



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

Case Nos: UI-2024-003070  
UI-2024-003071

First-tier Tribunal Nos:  
PA/52115/2022  
IA/05593/2022  
PA/52223/2022  
IA/05843/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:  
On the 18 November 2024**

**Before**

**UPPER TRIBUNAL JUDGE MAHMOOD**

**Between**

**MK  
SA  
(ANONYMITY ORDER MADE)**

Appellants

**and**

**The Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Ms S Saifolahi of Counsel, instructed by David Benson  
Solicitors Ltd

For the Respondent: Mr E Tufan, a Senior Home Office Presenting Officer

**Heard at Field House on 28 October 2024**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules  
2008, the appellants are granted anonymity.**

**No-one shall publish or reveal any information, including the name or  
address of the appellants, likely to lead members of the public to**

**identify the appellants. Failure to comply with this order could amount to a contempt of court. The parties may apply on notice to vary this order.**

### **DECISION AND REASONS**

1. This is my oral decision which I delivered at the hearing today.

#### **Background**

2. The Appellants are citizens of India. This is an appeal with permission against the decision of First-tier Tribunal Judge Rodger (“the Judge”) dated 30 April 2024, which had followed an extensive hearing in relation to linked appeals relating to two brothers, their respective wives and dependants. The two brothers, MK and SA, are the Appellants. The appeals were dismissed by the Judge on protection and human rights grounds.

#### **The Grounds of Appeal and Grant of Permission**

3. Two grounds of appeal were raised by the Appellants. Ground 1 contended that there was a flawed approach in relation to the medical evidence and that thereby there was a consequent flawed conclusion in respect of paragraph 276ADE(1)(vi) of the Immigration Rules and in respect of Article 8 ECHR. Ground 2 contended that there was a fundamentally flawed approach in respect of assessing credibility. Namely that there was a mistake by the Judge in relation to whether or not one Appellant had mentioned the other in their respective asylum interviews.
4. The Appellants’ applications for permission to appeal were considered by Upper Judge Loughran on the papers. By way of a decision dated 9 August 2024 the learned Judge granted permission to appeal in relation to both grounds but observed in respect of ground 2 that there were many credibility issues highlighted by the Judge at paragraph 50 and in the other paragraphs. Thereby it was said that ground 2 was weak and that the Appellants ought to consider whether they wished to pursue that ground.
5. Ms Saifolahi said to me today that she was not going to say anything further in respect of ground 2 and would merely rely on the written grounds as set out within the documentation. It is right to observe from the outset therefore that because of the extensive nature of the hearing, the case having been listed for two days (although ultimately the case took one day to be heard), the Judge had set out very extensive detailed findings in respect of the protection aspect of the claim.
6. Ms Saifolahi submitted referred in her submissions to the grounds of appeal which she had drafted. She said her principal submission was the non-assessment by the Judge of other evidence. For example, the Freedom from Torture letters, which were at pages 121 to 125. She submitted that the Judge materially erred in concluding that this was evidence which could not or should not be taken into account because it

was not in the form of an expert report. I was taken through various medical records, such as the GP records and Multidisciplinary Reports within the bundle. It was specifically submitted that ‘this was not the sort of case in which a document or reports were buried amongst thousands of other pages’. It was submitted that the Judge had been specifically made aware of these reports and indeed she had referred to some of the documentation herself.

7. Mr Tufan on behalf of the Respondent in clear submissions said that paragraphs 26 to 31 of the judge’s decision made clear that the Judge did consider the medical evidence. Paragraph 23 referred to the deficiencies in the report of Dr Saleh Dhumad. Paragraphs 26, 27 and 28 of the Judge’s decision referred specifically to the Freedom from Torture documentation and the judge noted at paragraph 30 the medical diagnosis for each of the Appellants.

8. Mr Tufan took me to the case of *JL (China)* [2013] UKUT 145 and to various aspects of the headnote including headnote 2 which states that,

“They should also bear in mind that when an advocate wishes to rely on their medical report to support the credibility of an appellant’s account, they will be expected to identify what about it affords support to what the appellant has said and which is not dependent on what the appellant has said to the doctor (HE (DRC, credibility and psychiatric reports) Democratic Republic of Congo [2004] UKAIT 000321). The more a diagnosis is dependent on assuming that the account given by the appellant was to be believed, the less likely it is that significant weight will be attached to it (HH (Ethiopia) [2007] EWCA Civ 306 [23]).”

9. Mr Tufan said that in any event that the opinion section of Dr Dhumad’s psychiatric report showed that the current episodes were moderate and therefore that at their highest, these individuals have symptoms of PTSD. Thereby taking everything at its highest the question was whether the Appellants really could satisfy the *HA Sri Lanka* [2022] UKUT 00111 test. Mr Tufan said paragraphs 180 to 183 were particularly relevant of that case, which state as follows:

“180. At paragraph 146 and 147, in concluding that the applicant's case did not reach the threshold set by Article 3, the ECtHR reiterated that the threshold had ‘to remain high for this type of case’. Against that background, there was ‘no call to address the question of the returning state’s obligations under this Article in the circumstances of the present case.

181. In our view, Savran is a striking illustration of the fact that the Paposhvili threshold test is a demanding one. Cogent evidence is needed to demonstrate the requirements of the test are met, at each stage of the analysis. In this area, a strict evidence-based approach prevails, with the ECtHR being at pains to emphasise that recourse to speculation must be limited to what is essential for the ‘forward-looking’ assessment inherent in Article 3 cases. This emerges from paragraph 146:

146. Even assuming that a certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment (see *Paposhvili*, cited above, Â§ 186), the Court is not convinced that in the present case, the applicant has shown substantial grounds for believing that, in the absence of appropriate treatment in Turkey or the lack of access to such treatment, he would be exposed to a risk of bearing the consequences set out in paragraph 183 of the judgment in *Paposhvili* and paragraphs 129 and 134 above.
182. So far as concerns Article 8, the Court of Appeal has recently reiterated that Article 8 is not in this conte[x]t to be regarded merely as Article 3 with a lower threshold: SL (St Lucia) v SSHD [2018] EWCA Civ 1894. An appellant cannot succeed under Article 8 simply because of their mental ill-health and suicide risk, if those are insufficient and meet the high Article 3 test set by *Paposhvili* and (now) explained by *Savran*.
183. Mental ill-health and suicide risk may, however, be combined with other Article 8 factors, so as to create a cumulative case, which enables an appellant to succeed on Article 8(2) proportionality grounds.”
10. Mr Tufan also said that there is reference to a moderate suicide risk but a moderate risk does not show that Article 3 would be breached. Paragraph 276ADE is a qualification of Article 8 in the Immigration Rules. Mr Tufan took me back to *HA Sri Lanka* and paragraph 197, which states:
- “197. As we have said, a person’s mental health and risk of suicide, not being sufficient to reach the Article 3 threshold, cannot without more enable them to succeed by reference to Article 8.”
11. Mr Tufan said that therefore the Judge considered the documents and arrived at conclusions which were open to her but at their highest the Appellants could still not succeed under Article 3 or under Article 8.
12. In respect of ground 2 and in light of the observations of the permission Judge, Mr Tufan said he could only reiterate that the negative credibility findings which were made in reference to paragraph 50 and the non-reference to the brother in interview, in effect was correct. There was nothing more than that and nothing in substance to the three questions. He submitted that there was no error of law which arises from ground 2.
13. In reply, Ms Saifolahi said that it was not being submitted that the Judge did not highlight the wider medical evidence. What was being submitted was that the failure to attach weight to the wider evidence and the criticism of the psychiatric evidence was an error of law. The core challenge was in respect of paragraph 276ADE. Ms Saifolahi said that despite the Home Office submitting that the threshold test cannot be met, even if that had been taken into account, what needed to happen first was that the facts in relation to the Appellants’ mental health needed to be safely made first before the assessment could then be undertaken.

14. It was said that the entirety of the Freedom from Torture letter had not been considered in any event. I was taken to page 124 and the last paragraph which has a subheading of the clinical opinion, which says in part as follows:

“In my clinical opinion, the risk of [Mr K] harming himself including his suicide risk will significantly increase if he receives a negative outcome from his asylum claim. He has also spoken to me about this saying that it would be better to die than being sent back.”

15. I invited the parties make submissions if I was to find that there is a material error of law in relation to ground 1.

### **Analysis and Consideration**

16. I deal with ground 2 first and I shall call that the asylum ground. In my judgment, that ground must fail. It must fail because the Judge provided very extensive detailed reasons why the Appellants’ asylum claims were comprehensively disbelieved by the Judge. This included rejection of the expert country evidence report by Dr Maryyum Mehmood dated 20 June 2023. That is referred to at page 32 of the Judge’s decision.
17. The Judge provided very extensive detailed reasoning why the Appellants’ and their dependants’ evidence was rejected. Within that there was an acceptance that sadly the Appellants’ respective wives were seriously sexually assaulted in the way which has, albeit the conclusion of the Judge, rationally reached was that that was not connected to political motivation or for reasons which would enable the asylum claim to succeed. I make clear the sexual assaults were very serious and nothing I say detracts from the awful events that the Appellants’ wives experienced.
18. In my judgment, the Judge’s reasoning and conclusions from paragraphs 32 to paragraph 75, adequately and sufficiently reason why the Appellants’ protection claims were dismissed. I remind myself of the Court of Appeal’s decision in *Volpi v Volpi* [2022] EWCA Civ 464 and remind myself that an Upper Tribunal Judge should hesitate before interfering with the expert First-tier Tribunal Judge’s decision, particularly because the First-tier Tribunal Judge had the benefit of seeing and hearing from the witnesses and their legal representatives.
19. I conclude that there is no material error of law in relation to the Judge’s decision relating to either Appellant’s protection claim. Ground 2 thereby fails.
20. I turn to ground 1. This contends that there was a flawed approach in relation to the medical evidence and thereby a flawed approach in respect of paragraph 276ADE and Article 8. In my judgment, the Judge has materially erred in law in relation to this ground. My reasons for coming to this conclusion are as follows.

21. Whilst the judge was entitled to consider in detail the psychiatric report of Dr Dhumad and to make her own assessment of what the conclusions were, there was further additional medical evidence which the judge ought to have taken into account too. The Freedom from Torture letter dated 2 August 2023 along with the MTD reports and the GP's letters and records provided further evidence and assistance to the Judge in the wider assessment of the Appellants' medical and mental health conditions.
22. The Judge materially erred in law when concluding, in effect, that she was not going to take the Freedom from Torture and other documentation into account. It was a material error of law because those letters and GP reports and records was still evidence, even if it did not have the duties on experts attached to them. The Judge was entitled to give weight to this evidence too. In addition, the Freedom from Torture letters provided further evidence too.
23. By way of example, at paragraph 26 of her decision, the Judge concluded that the psychiatrist had not properly engaged with the medical records, whereas further consideration of the actual medical records was required by the Judge. Whilst Mr Tufan is correct that the Judge does refer at paragraphs 26, 27 and 29 to the Freedom from Torture letters, the error of law is the failure to take them into account in the round without those reports having to be expert reports. The Judge said specifically at paragraph 28 as follows:

“I take into account the observations and opinions set out in the medical records and letter of ZH. However, I note that these are not expert reports and have been prepared on a clinical basis and not by an expert whose duty is to the tribunal. For example, the letter of ZH is not a diagnosis letter and does not fully engage with the lack of engagement of A1 or with the issue of whether A1 or his wife may be feigning or exaggerating their mental illness or their account relied upon for the asylum claim. That is because that is not their role. The role of the expert, however, is to engage with the issue of whether an appellant may be feigning or exaggerating their mental illness and to engage with parts of the medical records that are relevant to such assessment. In view of the concern identified with SD's report, I attach low weight to his conclusions on A1 and SMA and consider the evidence in the round with the other evidence.”
24. Whilst the Judge is correct that an expert providing evidence to a Tribunal must ensure that the duties of experts are met, there was no similar requirement in relation a treating clinician who was providing a brief report and prognosis. Nor was there a similar requirement upon the drafters of the letters from Freedom from Torture. In my judgment, the full balanced consideration of the medical evidence is deficient in this case for that reason.
25. Thereby, a material error of law is shown in relation to this aspect of the case. I make clear that I am not saying that medical and other evidence without reference to the duties on experts can be determinative of a case. In this particular case though, the issue which arises is that no real weight

appears to have been given to those parts of the written evidence which did not have an expert's duty captioned to it. The non-expert evidence was still evidence and required some weight to be attached to it.

26. Having found there to be a material error of law in the decision of the First-tier Tribunal, I set it aside in respect of Paragraph 276 ADE of the Immigration Rules and Article 8 ECHR only.
27. I apply *AEB* [2022] EWCA Civ 1512 and *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 00046 (IAC). I carefully consider whether to retain the matter for remaking in the Upper Tribunal in line with the general principles set out in paragraph 7 of the Senior President's Practice Statement. I take into account the history of the case, the nature and extent of the findings to be made and in considering paragraphs 7.1 and 7.2 of the Senior President's Practice Statement and given the scope of the issues and findings to be made, I consider that it is appropriate that the First-tier Tribunal re-make the decision relating to Paragraph 276 ADE and Article 8 ECHR.
28. For the avoidance of doubt, it is only that aspect which is being remitted to the First-tier Tribunal. There are retained findings from paragraphs 32 to paragraph 75 inclusive of the Judge's decision. The First-tier Tribunal will not be considering the protection claim because that remains dismissed.
29. Whilst the First-tier Tribunal will deal with further directions, in my judgment, it appears appropriate for these two cases to remain linked and for them to be heard together but it is imperative that one consolidated bundle is provided for the First-tier Tribunal's consideration rather than having to flick between two different bundles. I also note that vulnerability has been raised in this case and so the Appellants' solicitors must ensure to assist to ensure that the First-tier Tribunal is made aware of what measures are required.

## **Notice of Decision**

The decision of the First-tier Tribunal contains a material error of law in respect of Paragraph 276 ADE of the Immigration Rules and Article 8 ECHR. That part of the decision is set aside relating to each Appellant and will be reheard at the First-tier Tribunal.

The decision of the First-tier Tribunal does not contain a material error of law in respect of the protection claim. Each of the Appellant's protection claim therefore remains dismissed.

The Judge's findings at paragraphs 32 to 75 are retained findings.

**Abid Mahmood**

Appeal Numbers: UI-2024-003070  
UI-2024-003071

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**28 October 2024**