Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09962/2019

THE IMMIGRATION ACTS

Heard at Field House via Skype for Business
On 10th May 2021

Decision & Reasons Promulgated
On 10th June 2021

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MR N R J C
(ANONYMITY DIRECTION MADE)
Respondent

Representation:
For the Appellant: Ms R Pettersen, Senior Home Office Presenting Officer
For the Respondent: Ms F Allen, Counsel instructed by AASK Solicitors

DECISION AND REASONS

1. The application for permission to appeal was made by the Home Office but for the purposes of this decision I shall refer to the parties as they were described before the First-tier Tribunal, that is Mr C as the appellant (Indian national born on 10th May 1990) and the Secretary of State for the Home Department as the respondent.

2. The respondent appeals against the decision of First-tier Tribunal Judge Coll promulgated on 21st January 2021 following a hearing on 13th January which allowed the appellant's appeal against the refusal of the Secretary of State, dated 30th

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September 2019, to grant asylum and humanitarian protection and human rights grounds (Article 3 European Convention on Human Rights). The appeal was refused on Article 8 human rights grounds. There was no cross appeal on the refusal.

3. The Secretary of State submitted that the sole issue was in relation to credibility and at paragraph 19 of the decision the judge stated:

> *"Mr Thompson relied on the reasons letter. The appellant had been unable to explain any of the inconsistencies in his evidence. In particular, why he had described his father as a councillor when he was a civil servant. Secondly, why he had given two accounts of what had happened on leaving the airport on return from Bolivia. Thirdly, why he had given two accounts of the authorities' involvement with him on his release into custody. Fourthly, how he had been able to be issued with a passport (on 21 March 2017) if he were of interest to the authorities. Finally, how he had been able to leave Mumbai airport for the UK without problems. In sum, he was not credible."*

4. At paragraph 20, however, the judge stated she had carefully considered the oral testimony of the appellant and his brother-in-law and the written evidence and documents and found the evidence of the appellant and the brother-in-law consistent, credible and reliable. The grounds for permission to appeal added that having heard the appellant, the judge stated that the appellant failed to explain most of the inconsistencies put to him and he seemed to be struggling during much of the hearing and that he was somewhat vague. Nonetheless, the judge found that his failure to explain the inconsistencies should not damage his credibility.

5. It was submitted that the judge erred in finding that the appellant was consistent, credible and reliable as the judge had contradicted herself having already stated that he had failed to explain most of the inconsistencies which went to the core of the claim. The vulnerability of the appellant was not sufficient to override the unexplained inconsistencies of his evidence and the judge had misdirected herself in accordance with **SB (vulnerable adult: credibility) Ghana [2019] UKUT 398**. There was no assessment of the extent of the vulnerability and its effect on the quality of the evidence.

6. The judge at paragraph 28 refers to the medical report of Dr Grande which briefly refers to inconsistencies at (v) but this related to the account of ill-treatment, not inconsistencies. The judge failed to provide reasons as to why this related to issues outside the account of mistreatment.

7. Further, in relation to the brother-in-law's evidence, which the judge found to be supportive, the judge noted at paragraphs 32 to 33 that the absence of mention of the appellant in the brother-in-law's interview was an 'apparent major weakness' in the appeal. The judge explained this at 34 but it was wholly unclear why the judge accepted the explanation that the appellant was very young and required protection at the time of the brother-in-law's interview.

8. Further at paragraph 36 the judge set out that the brother-in-law verified that the appellant had been arrested on return from Bolivia but found in the alternative that

even if she was wrong this was of no significance. However, later in the same paragraph the judge relied on this as a corroborating factor. First, it was unclear and without a reason how the brother-in-law was able to corroborate such an event as it occurred at a time when he was not in contact with the appellant or his family. Secondly, in finding that the appellant was unable to explain inconsistencies it was unclear how the evidence of the brother-in-law was in fact corroborative.

9. Finally, the judge failed to take into account the matter of Section 8 as raised in the decision letter at paragraphs 31 to 33.

10. Overall, the judge had materially erred in her consideration of credibility.

11. In a Rule 24 response it was submitted that the grounds did not identify a material error of law and amounted to a mere disagreement with the findings and the conclusion that the appellant was credible.

12. The grounds did not challenge the medico-legal report of Dr Grande from Freedom from Torture, which found that his examination findings were congruent with the appellant's account of his treatment during detention.

13. It was submitted that the judge had provided sufficient reasoning for finding the respondent's account credible and did not simply rely on the respondent's vulnerability to override unexplained inconsistencies but considered evidence which provided explanations as to inconsistencies and evidence which assisted her to reach her findings. The judge, having considered all the evidence and submissions, accepted the appellant's account. In addition, contrary to the grounds, not all the inconsistencies went to the core of the account, for example the father's job description. The judge considered the guidance on vulnerable witnesses giving evidence and noted he had mental health problems of such severity that he warranted a full psychological assessment.

14. In the case of **KB & AH (credibility - structured approach) Pakistan [2017] UKUT 00491** paragraph 34 confirms that if an individual is a vulnerable person whose account is strongly supported by expert medical evidence it is immaterial that the account contains inconsistencies and lack of detail. In the instant case the appellant's account was strongly supported by a medico-legal report from Freedom from Torture.

15. Given the limitations of the respondent's evidence, the judge looked to and considered other evidence to assist in assessing credibility, namely Dr Grande's expert report and the brother-in-law's statement and oral evidence. Dr Grande's undisputed report upon which the judge placed great weight, specifically dealt with inconsistencies in the respondent's account and was referred to at paragraph 28(v) and referred to the possible neuropsychiatric memory impairment from beatings to the head. What happened to the appellant on return from Bolivia when detained and ill-treated and his interaction with authorities after release from detention clearly related to the issue of detention and ill-treatment.

16. The judge also considered the brother-in-law's evidence and found him wholly credible. In fact, the brother-in-law gave two reasons for the failure to refer to him in his claim and no issue was taken with the second ground as to why he did not mention the appellant, namely that the purpose of providing names was to substantiate his claim and he took the view that he could do this by offering the names of many individuals, all of them senior in the venture (paragraph 34). In relation to **SB** and the assertion that there was no assessment of the effect of the appellant's vulnerability on the quality of the evidence, that assertion was simply wrong when considering paragraphs 22 to 29. The judge took care to consider the extent of the mental health and physical issues as set out in the reports of Dr Grande and Ms Yoca when considering the quality of the evidence given and the impact on her assessment.

17. **SB** is clear that it is for the judicial fact finder to determine the relationship between the vulnerability and the evidence that is adduced.

18. Section 8 was clearly raised at paragraph 22 of the skeleton argument. It was accepted that this had not been dealt with by the judge but this would not in any even be a sufficient basis for setting aside the decision when reading the decision as a whole.

19. At the hearing before me Ms Pettersen advanced that the judge should have made a proper assessment and given proper explanations for her reasoning. Ms Allen relied on her Rule 24 response and expanded on that to submit that the judge was exactly right in her approach and noted that the judge stated that he had failed to explain "most" of his inconsistencies rather than *all* and he was "somewhat" vague about the evidence, not wholly vague. The judge noted that the appellant struggled with his oral evidence because he was in pain and the judge did not just stop at the appellant's oral evidence but proceeded to assess the evidence holistically, which is what was required of her.

20. The Dr Grande report established that the appellant was a victim of torture and nothing in the grounds challenged that report. It would appear that the author of the grounds for application for permission to appeal thought that paragraphs 28(i) to (vii) was a cut and paste from Dr Grande's report, which it was not. It was the judge's résumé of the evidence by the judge, which showed she had addressed it in detail.

21. In relation to the corroborative point at paragraph 36, the judge had looked at all of the evidence in the round, which is what she should do.

Analysis

22. The Court of Appeal in **Lowe v The Secretary of State for the Home Department [2021] EWCA Civ 62** referred to and repeated the judgment of Lewison LJ in **Fage UK Ltd v Chobani UK Ltd [2014] EWCA Civ 5** at paragraph 114 as follows:

> *"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do*

so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski [1999] 1 WLR 1360; Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23 [2007] 1 WLR 1325; Re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33 [2013] 1 WLR 1911 and most recently and comprehensively McGraddie v McGraddie [2013] UKSC 58 [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include.

i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.

ii) The trial is not a dress rehearsal. It is the first and last night of the show.

iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court and will seldom lead to a different outcome in an individual case.

iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.

v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).

vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done".

23. When considering the approach to credibility the Upper Tribunal in **KB and AH** at paragraph 34 observed

'Third, it must never be forgotten that credibility assessment is a highly fact-sensitive affair. Whilst having regard to a set of "Credibility Indicators" assists in making sure that, where relevant, the evidence is considered in a number of well-recognised ("familiar") respects, it does not prevent a decision-maker reaching a decision without going through such indicators step-by-step. For example, their use may be otiose if an individual's account rests wholly on a physical impossibility (e.g. that he jumped a 6 metre wall unaided) or is riddled with major inconsistencies. Conversely, if for example the individual is a vulnerable person whose account is strongly supported by expert medical evidence, it may not always matter that it contains inconsistency and lack of detail'.

24. In this case the judge had the benefit of hearing live evidence from the appellant and his brother-in-law and being able to clarify issues as they arose. She heard oral submissions on the evidence and weighed the evidence. She also had the assistance of an expert medical report.

25. At the outset at paragraph 22 the judge was aware that the particular issue was the appellant's credibility and she reminded herself to take into account the guidance appropriate to vulnerable witnesses within the meaning of the guidance in the Joint

Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance. The judge accepted that the appellant was suffering from mental health problems but, in particular, accepted the report and psychological assessment of Dr Grande from Freedom from Torture, who had had undertaken a series of psychological assessments with the appellant. The judge noted at paragraph 18 that the respondent had previously commented in the reasons letter on the absence of a report assessing the appellant's injuries under the Istanbul Protocol but that such a report now existed.

26. The judge set out the inconsistencies at paragraph 19 and at 20 but also set out that she had carefully and anxiously considered the oral testimony of the appellant, the brother-in-law and the written evidence and reports.

27. It is important to note that the judge set out the oral evidence in detail. The Secretary of State did not challenge the report of Dr Grande. At paragraph 26, the judge referenced the fact that the appellant failed to explain most of the inconsistencies but proceeded to find that his failure to explain these inconsistencies should not damage his credibility and the judge at paragraph 27 confirmed that she was assisted in assessing his credibility by Dr Grande's expert report and by the brother-in-law's witness statement.

28. The report from Dr Grande highlighted the fourteen scars, of which six were highly consistent with being beaten or poked with a stick and which supported the account given by the appellant of his treatment. At paragraph 28(iv) the judge assessed Dr Grande's report as finding that a substantial cause for the depression was his ill-treatment based on various points and was a characteristic feeling of torture survivors. That goes to the issue of inconsistency not merely ill treatment.

29. The judge accepted at paragraph 28(v) (and this was not an extract from Dr Grande's report but a finding by the judge on that report) that:

> *"As regards his inconsistencies, there are many reasons that torture survivors find it difficult to recount specific details about their ill-treatment (Istanbul Protocol paragraph 142). The following features of the appellant's situation are relevant reasons: the psychological impact of the traumatic events including a very serious injury and subsequent surgical operation on his neck, the possible neuropsychiatric memory impairment from beatings to the head and loss of consciousness and the effects of PTSD and depression on memory and recall."*

30. Having noted therefore that there were inconsistencies, the judge stated the possible neuropsychiatric memory impairment from beatings to the back of the head and loss of consciousness and the effects of PTSD and depression on memory and recall and that there was no evidence of fabrication.

31. The judge gave sound reasons for accepting Dr Grande's report in full and noted that the respondent had not produced her own medical report.

32. Thus, the judge noted the inconsistencies and gave sound reasoning for explaining them.

33. The weight to be given to the evidence is a matter for the judge as established in **Herrera v SSHD** [2018] EWCA Civ 412. **SB** confirms that by applying the Joint Presidential Guidance Note No 2 of 2010 the vulnerability will also be taken into account when assessing the credibility of that evidence. That is what the judge did.

34. Not only did the judge consider the appellant's evidence and that of Dr Grande but she also considered the brother-in-law's evidence, which she found was presented in a measured and clear manner and answered without hesitation and addressed the points in all the questions. The judge gave sound reasoning for finding the brother-in-law credible and noted that he had succeeded in his own refugee claim and his fear arose from his support of the LTTE members in India by providing medical supplies. One of the inconsistencies was that the brother-in-law had not identified the appellant in his own asylum interview. The judge flagged up that the brother-in-law had not referred to the appellant in his asylum interview but the reasoning which was given was twofold. As Ms Allen pointed out, the Secretary of State only challenged the reasoning in relation to the minority of the appellant. There was no challenge to the second reason given by the brother-in-law that his purpose in providing the names was to substantiate the claim and he took the view that he could do this by offering the names of many other individuals, all of them senior in the venture, in order to verify his account. Thus, the judge accepted the brother-in-law's explanation. The judge also accepted that the brother-in-law explained that the word in Tamil for someone senior involved in helping village residents was the same as that for councillor and thus something might have "got lost in translation". Again, that the brother-in-law verified that the appellant had been arrested at home on return from Bolivia was accepted, first, because Dr Grande had explained that the appellant might remember more than one version and not be able to distinguish between the two and secondly, that the appellant had never wavered from the assertion that he was arrested by the authorities. I find that the brother-in-law's corroboration of that at paragraph 36 is merely a peripheral addition to the reasoning and not undermining of the overall reasoning. Although not in fact dealt with in the reasoning of the judge the judge did note at paragraph 4 that the appellant was helped by a different agent to obtain a visa who oversaw his safe exodus from India and thus this would explain his ability to obtain a passport and exit India without issue. That criticism of an inconsistency takes the matter no further forward.

35. Lastly, the criticism of Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 requires decision-makers to take into account the claimant's conduct and applying the benefit of the doubt in unsubstantiated material facts. In particular, Section 8(1) states:

> *"In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this Section applies.*
>
> *…*

> *(4) This Section also applies to failure by the claimant to take advantage of a reasonable opportunity to make an asylum claim or human rights claim while in a safe country."*

36. I find that the judge did err in failing to consider Section 8 but in the particular circumstances and overall evidence of this claim, particularly the ill health of the appellant, which the judge did address holistically, I find that in this particular instance it is not a material error of law that would induce this decision to be set aside.

Notice of Decision

The decision of the First-tier Tribunal shows no material error of law and will stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Helen Rimington* Date 26th May 2021

Upper Tribunal Judge Rimington