Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/52296/2021**
IA/07271/2021; UI-2022-003509

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2nd November 2022	**On the 3rd January 2023**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY JUDGE OF THE UPPER TRIBUNAL JARVIS

Between

GHULAM HAIDER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J. Gajjar, Counsel instructed by Burney Legal Solicitors
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

INTRODUCTION

1. The Appellant, Mr Ghulam Haider (born on 1 January 1966) is a national of Pakistan who has challenged the decision of First-tier Tribunal Judge Khurram (promulgated on 27 June 2022 and hereafter "the Judge") dismissing his appeal against the decision of the Secretary of State (the Respondent) to refuse his human rights claim (dated 21 May 2021).

2. The Appellant was given permission to appeal by First-tier Tribunal Judge Landes in a decision dated 18 July 2022; the focus of that grant of permission rested predominantly upon Ground 1 of the Grounds of Appeal as drafted by Mr Stedman, Counsel (dated 30 June 2022).

THE FIRST-TIER TRIBUNAL DECISION

3. For the purposes of this error of law decision we note the following observations and findings by the Judge of the First-tier:

   (a) On 14 December 2020, the Appellant made further submissions to the Respondent on the basis of Article 8 ECHR - within those representations he claimed to have entered the United Kingdom as a visitor on 4 September 2002 and that he had continued to reside in the United Kingdom ever since[1].

   (b) At the beginning of the FtT remote hearing, Mr Stedman, on behalf of the Appellant, confirmed that he would not be advancing any submissions in respect of Article 3 ECHR despite it having been pleaded by Mr Gajjar (who drafted the skeleton argument to the First-tier Tribunal dated 18 October 2021 - see paragraphs 10 to 12 of that document), see §17.

   (c) At §30, the Judge concluded that the Appellant had established at the balance of probabilities that he had resided continuously in the United Kingdom since 4 September 2002. We formally record that this finding has not been cross-appealed by the Respondent in these proceedings.

   (d) In focusing on the test of whether or not there would be very significant obstacles to the Appellant's reintegration into Pakistan (applying 276ADE(1)(vi) of the Immigration Rules), the Judge made the following discrete findings:

      i. The Appellant had not established that he had been absent from Pakistan since 1996, §37.

      ii. Although the Appellant has lived in the United Kingdom for many years he has nonetheless managed to do so despite not having lawful status for the majority of his time here; he previously worked for the Pakistani Foreign Office and has worked for friends in the UK. The Judge concluded, in respect of this particular aspect of the consideration, that this indicated that the Appellant was able to find ways and means to support himself, see §38.

      iii. At §39, the Judge referred to the psychiatric report of Dr Bedi (dated 1 July 2021) - in doing so the Judge noted that the Appellant presented with symptoms consistent with a diagnosis of moderate to severe depression and would benefit from a

[1] We should note that it is plain to us that the date given of 4 September 2022 at §24 of the judgment is a typographical mistake.

referral to a specialist mental health service for assessment and treatment. The Judge also noted Dr Bedi's observation that the loss of support that the Appellant is receiving in the UK from his friends would likely lead to a deterioration in his mental state with an increased risk to his health, safety and self-neglect.

iv. The Judge also noted the Appellant's GP records which confirmed active problems with hyperlipidaemia, essential hypertension and prediabetes.

v. In the same paragraph the Judge concluded that there was no evidence before him that the medication and treatments needed by the Appellant were not available in Pakistan and found that the Appellant's medical needs did not amount to very significant obstacles to his reintegration.

(e) The Judge went on to conclude that the Appellant could not enjoy the benefit of the Immigration Rules and then conducted an Article 8(2) ECHR proportionality assessment assessing whether or not there were exceptional circumstances in the case and concluded that the Respondent's refusal did not lead to unjustifiably harsh consequences.

(f) The Judge therefore dismissed the Appellant's Article 8 ECHR appeal.

THE APPELLANT'S GROUNDS OF CHALLENGE

4. In respect of Ground 1, paragraph 8 of the Grounds of Appeal document adequately explains the Appellant's challenge, namely that it was asserted that the fact that the Appellant had managed to live in the United Kingdom for a lengthy period with the support of friends does not equate to the situation the Appellant would face upon return to Pakistan or mean that he would not face very significant difficulties there without that support (paragraph 8.1).

5. Secondly (at paragraph 8.2), Mr Stedman contended that the presence of medication to meet the Appellant's physical and psychiatric needs in Pakistan was not determinative of the question of whether or not the Appellant would be able to access the medication or treatment, especially where it had been said that the Appellant's mental health could deteriorate if he was removed.

6. In respect of Ground 2, it was contended that the Judge had failed to take into account that the Appellant has been residing in the United Kingdom for at least 20 years by the date of the hearing (albeit not taking the benefit of 276ADE(1) because the Appellant had not accrued 20 years residence by the time of the application as required) and had failed to lawfully factor into the assessment of proportionality under Article 8(2) that the Appellant had significant relationships with friends in the United Kingdom and had mental health problems. Somewhat boldly, at paragraph 16, Mr Stedman argued

that a finding that the Respondent's decision did not lead to unjustifiably harsh consequences was arguably irrational.

THE ERROR OF LAW HEARING

7. At the error of law hearing, which was conducted in person at Field House on 2 November 2022, Mr Gajjar appeared on behalf of the Appellant. We are grateful to him for his careful and fair submissions.

8. In short Mr Gajjar concentrated upon Ground 1 and asked the Upper Tribunal to note the apparent shift in the Appellant's mental state from that recorded in the GP medical records (which had been printed out on 30 June 2020 and had not been updated for the First-tier Tribunal hearing) and the report of Dr Bedi (1 July 2021) in which the expert concluded that the Appellant was, inter alia, displaying suicidal ideation.

9. Mr Gajjar emphasised that the central element of the Appellant's argument had been his ability/capacity to engage with the medical services available in Pakistan because of his mental health difficulties as outlined by Dr Bedi,. Mr Gajjar also suggested that the Judge's reference to the length of time the Appellant had resided in the United Kingdom was not relevant to the question of the Appellant's ability to reintegrate into Pakistan.

10. Having heard those submissions and the responses given by Mr Gajjar to a number of our questions (for which we are grateful), we decided that we did not need to hear from the Respondent in reply to those submissions.

11. We indicated that we considered that there was no material error in the Judge's assessment of very significant obstacles under 276ADE(1)(vi) of the Rules and therefore that the Appellant's appeal was dismissed.

FINDINGS AND REASONS

12. For completeness, we should make it clear that we consider that Mr Gajjar was entirely right to focus his attention upon Ground 1. We agree with Judge Landes that there is no merit to the arguments as raised in Ground 2.

13. In our view, it is entirely clear that the Judge properly directed him or herself to the relevant approach in law as explained by the Court of Appeal in TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109, see §44 of the First-tier judgment.

14. It is also abundantly clear that the Judge carried out a proper balancing exercise having identified both matters in favour of and against the Appellant as well as applying the mandatory statutory considerations in section 117B of the NIAA 2002.

15. We consider there to be no merit at all in Mr Stedman's written argument that on the facts of the Appellant's case there could only be one answer to the proportionality question, especially once the Judge had applied the statutory scheme under section 117B, albeit we recognise (as the Judge did)

that the answer to those particular statutory sub-sections is not determinative of the ultimate question of proportionality under Article 8(2).

16. In respect of Ground 1, Mr Gajjar accepted that the central thrust of the Appellant's case that there were very significant obstacles to his reintegration into Pakistan revolved around the psychiatric report of Dr Bedi (dated 1 July 2021).

17. There can be no suggestion that the Judge did not understand the report of Dr Bedi nor that the Judge failed to factor in Dr Bedi's conclusions - it is beyond plain that the Judge did this at §39.

18. We also reject the submission that the Appellant's ability to adapt to life in the United Kingdom over the past two decades as well as establish relationships with people here; work illegally and so on is irrelevant to an assessment of the Appellant's ability to adapt to life in Pakistan where he (on the findings made by this Judge) lived until 2002 and was therefore 36 years old when he came to the United Kingdom.

19. We consider that the Judge was perfectly entitled to consider the way that the Appellant had adapted to life in a country which he did not know (i.e. the UK) as part of his overall assessment of very significant obstacles. We consider that the Judge's approach was entirely in line with binding authority such as Sanambar v Secretary of State for the Home Department [2021] UKSC 30 at §55. The Judge was perfectly entitled to take into account the fact that the Appellant had managed to obtain and maintain work in the United Kingdom, despite not being lawfully able to do so for most of his time in the United Kingdom as well as his previous history of work in Pakistan. These were plainly relevant considerations in the holistic assessment.

20. Whilst it is true that the Judge does not expressly refer to the Appellant's ability to access medication and/or treatment on the basis of the possible deterioration in his mental health on return to Pakistan, we also note that Mr Stedman (counsel at the First-tier hearing) did not pursue the argument as developed by Mr Gajjar in the First-tier Tribunal skeleton argument, of a breach of Article 3 ECHR on the basis of a fundamental deterioration in the Appellant's mental health and/or a real risk of suicide.

21. We accept that the Article 3 ECHR medical test is not the same as the very significant obstacles test nonetheless there is plainly a correlation between the two and the Appellant's approach at the First-tier Tribunal hearing was to not pursue the argument that there was a real likelihood of him committing suicide on return as a consequence of the act of removal.

22. Whilst it is true that, in answer to Q7 in the report, Dr Bedi indicates that the loss of the support of the Appellant's friends is likely to impact on his mental state and functioning with increased risk to his health, safety and potential for self-neglect (see internal page 8 of 10 of the report), nonetheless we consider that this evidence was not strong enough on its face to support the contention that the Appellant would not be able to

access medicines or treatment which, in the Judge's findings, were available to him in Pakistan.

23. We therefore consider that the Judge's conclusions at §§38-40 are legally sufficient and that there is no material error in the Judge's conclusions under 276ADE(1)(vi).

24. In any event, we also feel it important to say a little more about the nature of the medical evidence in this case: that being the Appellant's GP medical records as printed out on 30 June 2020 and the report of Dr Bedi (dated 1 July 2021). In our view the report of Dr Bedi is not worthy of any material weight and it is our judgment that the medical evidence does not comply with the Upper Tribunal's guidance in HA (expert evidence, mental health) Sri Lanka [2022] UKUT 111 (IAC) ("HA").

25. In HA, the presidential panel said the following in the headnote:

> *(1) Where an expert report concerns the mental health of an individual, the Tribunal will be particularly reliant upon the author fully complying with their obligations as an expert, as well as upon their adherence to the standards and principles of the expert's professional regulator. When doctors are acting as witnesses in legal proceedings they should adhere to the relevant GMC Guidance.*
>
> *(2) Although the duties of an expert giving evidence about an individual's mental health will be the same as those of an expert giving evidence about any other matter, the former must at all times be aware of the particular position they hold, in giving evidence about a condition which cannot be seen by the naked eye, X-rayed, scanned or measured in a test tube; and which therefore relies particularly heavily on the individual clinician's opinion.*
>
> *(3) It is trite that a psychiatrist possesses expertise that a general practitioner may not have. A psychiatrist may well be in a position to diagnose a variety of mental illnesses, including PTSD, following face-to-face consultation with the individual concerned. In the case of human rights and protection appeals, however, it would be naïve to discount the possibility that an individual facing removal from the United Kingdom might wish to fabricate or exaggerate symptoms of mental illness, in order to defeat the Respondent's attempts at removal. A meeting between a psychiatrist, who is to be an expert witness, and the individual who is appealing an adverse decision of the Respondent in the immigration field will necessarily be directly concerned with the individual's attempt to remain in the United Kingdom on human rights grounds.*
>
> *(4) Notwithstanding their limitations, the GP records concerning the individual detail a specific record of presentation and may paint a broader picture of his or her mental health than is available to the expert psychiatrist, particularly where the individual and the GP (and any associated health care professionals) have interacted over*

a significant period of time, during some of which the individual may not have perceived themselves as being at risk of removal.

(5) Accordingly, as a general matter, GP records are likely to be regarded by the Tribunal as directly relevant to the assessment of the individual's mental health and should be engaged with by the expert in their report. Where the expert's opinion differs from (or might appear, to a layperson, to differ from) the GP records, the expert will be expected to say so in the report, as part of their obligations as an expert witness. The Tribunal is unlikely to be satisfied by a report which merely attempts to brush aside the GP records.

(6) In all cases in which expert evidence is adduced, the Tribunal should be scrupulous in ensuring that the expert has not merely recited their obligations, at the beginning or end of their report, but has actually complied with them in substance. Where there has been significant non-compliance, the Tribunal should say so in terms, in its decision. Furthermore, those giving expert evidence should be aware that the Tribunal is likely to pursue the matter with the relevant regulatory body, in the absence of a satisfactory explanation for the failure…"

26. Whilst we fully recognise that HA was not promulgated until 25 March 2022 and therefore postdates the report of Dr Bedi, nonetheless we consider that Dr Bedi's report does not properly conform with the Tribunal's Practice Direction and did not provide the Tribunal with the kind of expert assessment that was required in order to substantiate the level of mental illness being alleged.

27. We start by observing that, (as was properly pointed out in accordance with his duty to the Tribunal by Mr Gajjar), Dr Bedi has not indicated in his report that he was aware of his duty to the Court as laid out in the Ikarian Reefer test. It is manifestly obvious from numerous reported decisions of the Tribunal over many years that an expert is required to show that they understand the particular criteria as now described in the Senior President's Practice Direction (2010) when formulating their report to a Tribunal.

28. This was reiterated in detail by the Upper Tribunal in MOJ & Ors (Return to Mogadishu) (Rev 1) (CG) [2014] UKUT 442 (IAC) at §25:

"Thus in the contemporary era the subject of expert evidence and experts' reports is heavily regulated. The principles, rules and criteria highlighted above are of general application. They apply to experts giving evidence at every tier of the legal system. In the specific sphere of the Upper Tribunal (Immigration and Asylum Chamber), these standards apply fully, without any qualification. They are reflected in the Senior President's Practice Direction No 10 (2010) which, in paragraph 10, lays particular emphasis on a series of duties. We summarise these duties thus:

(i) to provide information and express opinions independently, uninfluenced by the litigation;

(ii) to consider all material facts, including those which might detract from the expert witness' opinion ;

(iii) to be objective and unbiased;

(iv) to avoid trespass into the prohibited territory of advocacy;

(v) to be fully informed;

(vi) to act within the confines of the witness's area of expertise; and

(vii) to modify, or abandon one's view, where appropriate."

29. These important duties have also been re-emphasised by the Supreme Court in Kennedy v Cordia (Services) LLP (Scotland) [2016] UKSC 6, at §§45-61.

30. We therefore express our considerable concern at the doctor's failure to indicate his awareness of the Senior President's Practice Direction or properly conform to the rigorous standards laid out therein.

31. Even without the benefit of the presidential decision in HA, we would have reached the same view that Dr Bedi has clearly failed to carry out his role of assisting the Tribunal with a clinical and properly objective understanding of the nature of the Appellant's mental health at the time the report was completed.

32. Mr Gajjar was compelled to accept during discussion that at no point in the report does Dr Bedi engage with the fact that there is no reference at all in the Appellant's GP medical records (which Dr Bedi was given, see paragraph 1.4.2 of the report) to the Appellant expressing suicidal ideation; in fact the entry at 2 March 2020 (D3 of the Home Office bundle) records that the Appellant did not have any suicidal thoughts and was to be reviewed in 3 to 4 weeks - there is no evidence in the records (up until they were printed off on 30 June 2020) that this review ever took place and there is no other reference to a risk of suicidal ideation in the records which were disclosed despite the Appellant being a patient with that practice since 2010 (see D1).

33. We entirely accept, as Mr Gajjar submitted, in principle, that a person may have deteriorated in respect of their mental health between the issuing of GP medical records and a psychiatric assessment approximately one year later but there is simply no engagement with this by Dr Bedi in his report. It is trite to say that the burden of proof remains upon the Appellant and, in our judgment, the report of Dr Bedi as well as the surrounding medical evidence simply did not establish why it was that the Appellant's mental health had apparently deteriorated so markedly.

34. We therefore consider that Dr Bedi's report is unhelpfully silent in this crucial aspect of the Appellant's mental health claim and this seriously undermines the value of his report.

35. We add to that that there is no apparent investigation by Dr Bedi into (or discussion about) the fact that the Appellant was only receiving the lowest dose of a first-line antidepressant, namely 10 mg per day of citalopram (see paragraph 2.2.21 of Dr Bedi's report). Equally concerningly, Dr Bedi was apparently not himself concerned with finding out why it is that the Appellant told him that he was no longer taking the citalopram (see page 5 of 10 of the report).

36. Again, we consider this to be a material deficiency in the utility of this report to the Tribunal and an indication that Dr Bedi has not carried out the kind of detailed and objective assessment that he is required to by reference to his own professional duties as well as the Practice Direction for experts.

37. There is also of course a duty upon the Appellant's solicitors to provide sufficient and adequate instruction to the expert witness (see §26 of MOJ & Ors (Return to Mogadishu) (Rev 1) (CG) [2014] UKUT 442 (IAC)) and yet there has been plainly no attempt by these solicitors to remedy any of the obvious defects in this report; nor have they sought to produce updated GP medical records postdating 30 June 2020 despite the clear guidance in HA.

38. We are therefore not prepared to accept that the report of Dr Bedi constitutes weighty expert evidence that the Appellant was genuinely suffering suicidal ideation or such a profound level of mental health difficulty at the time of the creation of the report.

39. We therefore conclude that, at its highest, the report of Dr Bedi (read with the relatively limited GP medical records dating up until 30 June 2020) was just about sufficient to establish that the Appellant was suffering with low mood and had been receiving the lowest dose of a first line antidepressant. We would also add that it is hardly surprising that a person who has been residing in the United Kingdom without lawful status for as long as the Appellant has might be suffering with some mental health difficulties, but we do not accept that Dr Bedi's report is sufficient to establish that the Appellant would suffer the kind of marked mental deterioration as claimed in these proceedings.

DECISION

40. We therefore conclude that the making of the decision by the First-tier Tribunal did not involve any error on a point of law by reference to s. 12(1) of the Tribunal, Courts and Enforcement Act 2007 and the appeal is therefore dismissed.

Signed  Date 15 November 2022

Deputy Judge of the Upper Tribunal Jarvis

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email