IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2023-004364
UI-2023-004363

First-Tier Tribunal Nos:
PA/54380/2021; IA/13099/2021
PA/54382/2021; IA/13089/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 12th March 2024

Before

UPPER TRIBUNAL JUDGE FRANCES
UPPER TRIBUNAL JUDGE KAMARA

Between

JM
HM
(ANONYMITY ORDER MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Ms L Giovannetti, KC and Mr D Seddon, KC instructed by Farani Taylor Solicitors
For the Respondent: Mr S Singh KC, instructed by Government Legal Department

Heard at Field House on 1 March 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.

DECISION AND REASONS

1. The appellants are nationals of India born in 1989 and 1956 respectively. They appeal against the decision of First-tier Tribunal Judge Bird and First-tier Tribunal Judge Beach dated 28 March 2023 dismissing their appeals against the refusal of their protection claims on asylum, humanitarian protection and human rights grounds.

2. We shall refer to the first appellant as the appellant in this decision. The second appellant is his mother and she is medically unfit to give evidence. It was accepted by the respondent that she was not fit to be interviewed and, therefore, any decision reached in relation to the first appellant would also stand in relation to the second appellant. The respondent accepted before the First-tier Tribunal ('FTT') that the second appellant's claim would stand or fall with the first appellant's.

3. This is a complex case and the documentary evidence is extensive. We will summarise the appellant's immigration history, the appellant's case and the respondent's case in so far as it is relevant to the context of this hearing in which we consider whether the FTT made a material error of law.

Appellant's immigration history

4. The appellant came to the UK as a student in 2007 and was subsequently granted leave to remain as a highly skilled entrepreneur in 2011. His wife joined him in 2013. Between 2014 and 2018 the appellant, his wife and child (born in 2015) lived in Dubai and made visits to the UK. The appellant's second child was born in Dubai in 2019. In September 2019, the appellant was granted a business visit visa and entered the UK on 12 September 2019. He was joined by his wife and children.

5. The appellant notified the respondent of his need for international protection by letter dated 12 November 2019 and by telephone on 7 January 2020. The appellant attended the asylum screening unit on 24 January 2024 and submitted a detailed statement and exhibits with further representations on 28 February 2020. The appellant was interviewed on 7 September 2020 and made detailed final representations on 12 October 2020. Following the appellant's application for judicial review, the appellant made updated representations and his protection claim was refused on 31 August 2021.

Appellant's case

6. It is the appellant's case that he is subject to a politically and religiously motivated campaign by the Indian authorities, presenting him and his mother as public enemies linked to terrorism and organised crime and/or the opposition political parties. The appellant submits the campaign is orchestrated by powerful actors in the ruling Bharatiya Janata Party ('BJP'), its allies and the nationalist media to serve the political objectives of stoking Hindu nationalist and Islamophobic sentiment for political capital and in order to attack the Congress Party and the Nationalist Congress Party ('NCP').

7. It is the appellant's case that his family is targeted by the authorities because his father IM, a prominent Muslim businessman from Maharashtra, was tarred with allegations of connections to Dawood Ibrahim and his criminal organisation D-Company who perpetrated the 1993 Mumbai bombings. In 1995, the Indian Government attempted to extradite IM from the UK on charges of murder and conspiracy to murder. An initial charge in relation to drug trafficking was discontinued by the prosecution. The extradition request was rejected on the basis there was no case to answer.

8. The appellant states it is alleged that IM belonged to D-company and, since IM's death in 2013, the appellant, his mother and brother, have replaced IM to direct the organised crime syndicate which is involved in drug trafficking, human trafficking and financing terrorism. The appellant denies these allegations. On 5 October 2019, the Indian Directorate of Enforcement ('ED') issued a summons against the appellant in relation to a criminal investigation under the Prevention of Money Laundering Act 2002 ('PMLA'). The appellant is accused of laundering the proceeds of IM's alleged organised criminal activity from the 1980s-1990s.

9. In October 2019, the Indian Government initiated criminal proceedings against the appellant, accompanied by high-profile public statements implicating the appellant in Islamic terrorism and organised crime. These statements emanated from the most senior leadership of the extreme Hindu nationalist ('Hindutva') BJP, including Prime Minister Narendra Modi. It is the appellant's case that this campaign, strongly supported by the Hindutva media and other BJP allies, was timed to meet the political imperatives thrown up by the Maharashtra State elections on 21 October 2019.

10. It is the appellant's case that he will face a real risk of serious harm, on account of being Muslim, a member of IM's family and an imputed political opinion, amounting to persecution. If returned to

India, the appellant will face a high profile politically motivated prosecution and unfair trial resulting in pro-longed detention and inhuman and/or degrading conditions of imprisonment. There is a real risk he will be ill-treated and tortured because of the alleged connection with D-Company and his personal characteristics. The appellant is an educated Muslim and first-time inmate who suffers from a speech disability and anxiety. He is at risk from the authorities and members of the public because of the public hostility generated against his family.

Respondent's case

11. The respondent accepted the appellant's account of the proceedings against IM and the appellant, but did not accept the appellant's account of the motivation for the criminal proceedings. The respondent did not accept the Indian authorities were behaving abusively as alleged by the appellant or that the appellant would be at risk of persecution or real risk of serious harm.

12. It is the respondent's case that the appellant had failed to show a religious or political motive for the Indian authorities' interest in him. The respondent submitted the Indian authorities' interest in IM was motivated by their concern that IM was involved in serious criminal activity and they were not the only national authorities who had that concern. The Office of Foreign Assets Control ('OFAC') of the US Treasury Department designated IM as "an international narcotics trafficking kingpin". The interest of the ED in the appellant had also been motivated by legitimate concerns that the appellant may have been involved in laundering the proceeds of IM's alleged crimes.

13. The respondent submits the appellant does not have a well-founded fear of being persecuted for reasons of religion, membership of a particular social group or political opinion. The motivation for the Indian authorities' interest in him was not because he is Muslim, a member of IM's family or for any actual or perceived political opinion on his part, but because the appellant is suspected to be involved in criminal activity. The appellant has failed to establish a Convention reason and he is not a refugee.

14. The respondent does not dispute that there is a real risk the appellant will be detained if returned to India. However, the respondent does not accept there is a real risk of ill treatment in detention. The respondent submits that, whilst prison conditions in India are very basic, the appellant has failed to show that they are so poor that exposure to them would expose him to a real risk of the very high level of suffering necessary to engage Article 3 of the European Convention of Human Rights ('ECHR').

15. Additionally, the appellant's pre-trial detention would not be over long. The appellant had not shown a flagrant breach of Articles 6 or 9 of the ECHR. The appellant would not be at real risk of serious harm or any breach of his human rights on return to India.

FTT's findings

16. In summary, the FTT found that the appellant's fear of returning to India was not because of any actions against him as a Muslim, or because of any imputed political opinion or because of his relationship with IM [177]. The FTT concluded that the Indian authorities had a legitimate interest in investigating the source of income of the appellant's business. The evidence did not support the appellant's allegation that these actions are abusive and arise out of improper motives [188].

17. The FTT found that there was no evidence to support the belief that the appellant was being investigated because it was believed the money from the business was being used to fund terrorism [192]. The FTT found the appellant would not be detained because there was every likelihood he would be released on bail. The appellant had failed to show there was a real risk of persecution, serious harm or treatment in breach of Article 3 ECHR [194-200].

Grounds of Appeal

18. The appellant appealed on 8 grounds with each ground sub-divided into several discrete errors. In summary, the appellant submitted the FTT erred in law in its findings on the following:
    (1) Risk of detention
    (2) Convention reason
    (3) Reliance on the substantive merits of the criminal allegations
    (4) Approach to risk of terrorism charges
    (5) Failure to assess the case against the country evidence
    (6) Expert evidence
    (7) Fair trial and role of the court
    (8) Delay

19. Permission to appeal was granted by Upper Tribunal Judge Gill on 28 November 2023 for the following reasons:

> "It is arguable that the First-tier Tribunal (FtTJJ Bird and Beach) may have erred in reaching its finding that the appellants would not be detained, for the reasons argued at grounds 1A and 1B. There is arguably sufficient in the panel's decision to indicate that they may

applied too high a standard of proof at least in considering certain aspects of the case, as contended at para 15 of the grounds. Arguably, the panel may have overlooked relevant evidence or misunderstood relevant evidence in stating that the appellants' co-accused were all granted bail, as argued at para 20 of the grounds.

Grounds 1D, 1E and 1F are also arguable as is Ground 3B (procedural fairness).

All the grounds may be argued."

20. There was no rule 24 response from the respondent. The appeal was originally listed for hearing before the Upper Tribunal on 24 January 2024. This hearing was adjourned for the reasons given in the decision of Mrs Justice Steyn and Upper Tribunal Judge Frances dated 1 February 2024 (promulgated on 6 February 2024). The appeal was relisted for hearing on 1 March 2024. The respondent served a skeleton argument on 29 February 2024 conceding an error of law in relation to the FTT's findings on risk of detention and Article 3 ECHR: Ground 1.

Ground 1: Risk of detention

21. The FTT made the following relevant findings in respect of Article 3 and the risk of detention:

"197. We were referred to various passages in the expert reports both of Professor Blom Hansen and AX. Ms Giovannetti very helpfully set out the core elements at paragraph 56 of her principle skeleton argument which we have considered. It is accepted that there is a real possibility of ill treatment in detention. However, whether either the first or the second appellant will be detained for questioning is not certain. There is every likelihood that if they are charged as is anticipated under the PMLA that they will be released on bail with conditions whilst the hearing is pending as appears to have been the case with the others charged.

198. There is nothing to substantiate the statements made by the experts that they will be detained and ill-treated. Those others being investigated have not given any evidence that they were ill-treated whilst being questioned. Although Professor Blom Hansen mentions unwarrantable bail no such documentary evidence was before us. We therefore must assume that the appellants will be entitled to apply for bail. The others questioned and charged appeared to have had the means and access to legal representation – as will be the case with the appellants.

199. They will only be detained if they are found guilty but that is not a foregone conclusion. The fact that, in the past, the appellants

who are known for their association with IM and despite the media interest in the family have been able to successfully challenge the actions of the Indian authorities before the courts in that country does not show that because of their association they were treated unfairly or not afforded a fair hearing. Otherwise the restrictions placed on their passports would not have been lifted or the Courts have found in their favour in relation to the actions brought by the ED in 2015 and 2017.

200. We find for the reasons we have given that there is no real risk of there being a breach of the appellants' rights under Articles 3 and 6 of the ECHR. It was further accepted that the appellants did not seek to advance an Article 3 claim purely on medical grounds but on the lack of adequate medical facilities in prison. For the reasons we have given above we find that the appellants have failed to show that there is a real risk of them being detained without having the right to bail. The evidence does not support their belief that they are likely to be found guilty and imprisoned without there being an opportunity to a proper trial with the ability to seek legal representation."

22. The appellant submitted the FTT made the following errors of law in finding the appellant would not be at risk of detention:

Ground 1A: application of the incorrect standard of proof.

Ground 1B: erroneous finding that the appellant's co-accused were all granted bail.

Ground 1C: failure to assess the risk of denial of bail based on the appellant's own circumstances.

Ground 1D: unfounded assumption that bail equates to never being detained.

Ground 1E: failure to apply the risk of ill-treatment finding to imprisonment

Ground 1F: error of law as to the existence of non-bailable warrants ('NBW')

Ground 1G: failing to allow the appeal on asylum or ECHR grounds.

Submissions on ground 1

23. The respondent conceded, in his skeleton argument, that the FTT applied too high a standard of proof to the risk of detention. Mr Singh submitted the respondent did not dispute there was a real risk of the appellant being detained if returned to India given that the respondent's case, accepted by the FTT, was that the Indian authorities' interest in him was motivated by suspicions that he was involved in large scale money laundering.

24. Mr Singh submitted the FTT had misunderstood the respondent's case and had made a material mistake in fact in stating "It is accepted there is a real possibility of ill-treatment in

detention." The respondent at no stage accepted there was a real possibility of the appellant being ill-treated in detention.

25. Mr Singh submitted the FTT used the phrase "it was accepted" when referring to matters accepted by the parties as in [68-79] and [117-200]. However, it was apparent from [121, 129, 130, 131, 180, 188, 194, 195 and 200] that the FTT referred to itself as "we" when making its own findings. In addition, at [198] the FTT stated there "is nothing to substantiate the statements made by the experts that they [the appellants] will be detained and ill-treated". Therefore, it was unlikely that the FTT found as a fact that there was a real possibility of ill-treatment in detention and the only way the FTT statements could be reconciled was that the FTT misunderstood the respondent's position.

26. Alternatively, Mr Singh submitted that if the FTT had accepted the appellant would be ill-treated in detention, this finding lacked reasons. Mr Singh relied on his written submissions before the FTT dated 8 June 2022 ('RWS') at [183-186] and submitted that, having found an error of law, we should remake the decision and dismiss the appellant's Article 3 claim.

27. Ms Giovanetti submitted that the FTT did not misunderstand the respondent's case or misinterpret the respondent's position to be that he accepted there was a real possibility of ill-treatment. Nor did the FTT proceed to determine the appeal on that basis for the following reasons.

28. The respondent's case on this issue was clearly stated at [183-186] of the RWS and the FTT specifically referred to these paragraphs at [76] of the decision. It was the respondent's case that the onus was on the appellant to show that conditions in detention were so poor that exposure to them would expose him to a real risk of the very high level of suffering necessary to engage Article 3 ECHR. The respondent's position was clearly stated at [186]: "The onus referred to has not been discharged by A [the appellant]". This was not a concession by the respondent and there was no misunderstanding by the FTT.

29. In addition, at [197] of the decision the FTT expressly adopted [56] of the appellant's skeleton argument dated 16 December 2021 ('ASA') in which the appellant relied on evidence of excessive pre-trial detention; ill-treatment and torture in detention; physical attack, harassment and ill-treatment outside detention; extortion while detained; inhumane and degrading conditions of imprisonment and flagrantly unfair trial evidence in the expert reports and country summary/comprehensive extracts of country material.

30. Ms Giovanetti submitted the respondent accepted that each case had to be decided on its facts and in essence put the appellant to proof. She submitted the second appellant could not withstand imprisonment and the respondent did not take issue with the risk factors identified by the appellant. There was nothing in the FTT decision to demonstrate that the FTT did not accept there was a real risk of ill-treatment in detention.

31. Further, Ms Giovanetti referred to the transcript of the hearing before the FTT and submitted that the respondent's closing submissions were consistent with the RWS and the respondent's position was clearly stated; prison conditions were basic, but did not breach Article 3. Ms Giovanetti referred to the appellant's closing submissions in which she submitted the appellant had a strong Article 3 claim and she referred the FTT to the US State Department Report March 2022, the country evidence in the supplementary bundle and the appellant's comprehensive extracts of country material. She submitted the respondent had no response to this evidence and the appellant would face a real risk of treatment in breach of Article 3 if returned.

32. In relation to the language used by the FTT, Ms Giovanetti submitted the passages had to be read in context. It was apparent the FTT was referring to the respondent's submissions at [68-77] and the appellant's submissions at [78] and [79]. Under the heading 'Breach of Article 3 ECHR' at [198] the FTT set out its reasons. The FTT accepted the country evidence relied on by the appellant and found there was a real possibility of ill-treatment in detention.

Conclusions and reasons on ground 1

33. The respondent accepts the FTT applied the wrong standard of proof in its assessment of Article 3 and therefore the appellant has established an error of law in relation to ground 1. The issue before us is whether the decision can be remade on the findings of fact found by the FTT.

34. The respondent accepts the appellant will be detained if returned to India, but disputes the FTT's finding at [197] that there is a real possibility of ill-treatment in detention on the grounds the FTT made a material mistake in fact and/or misunderstood the respondent's case. The appellant submits this challenge to the FTT finding came very late in the day and was not made out on a fair reading of the decision and the respondent's submissions.

35. At the hearing before the FTT on 25 May 2022 and at a remote hearing on 16 January 2023, the appellant relied on the ASA and the respondent relied on the RWS. We find the appellant's case and the

respondent's case are clearly set out in these documents. The respondent submitted the appellant had failed to discharge the burden and show the Article 3 threshold was met. The appellant submitted he had a strong Article 3 claim and set out references to background country evidence to show a real risk of ill-treatment in detention at [56] of the ASA which the FTT considered at [197].

36. It is apparent from the transcript that the same positions were taken by the parties in oral closing submissions. Mr Singh submitted:

> "…in general, prison conditions are not systematically inhumane and life threatening, but you [the FTT] have got to take into account all the individual factors and so on when deciding whether there's a breach of Article 3."

37. In her submission to the FTT, Ms Giovanetti stated:

> "In our summary of country material, we've got quite a big chunk dealing with prison conditions, and prison conditions can't be taken on their own they've got to be looked at cumulatively with the evidence on lengthy pre-trial detention and judicial delays, ill-treatment…and that's what the condition, what the conditions in prison in terms of overcrowding, it's positive ill-treatment both by the authorities and at the hand of other prisoners, and the poor medical care, discrimination and access to medical care section."
>
> …
>
> "So there's report after report about this and they really make pretty grim reading, local reporting so for example, the Hindu [inaudible] Times, International NGO like Human Rights Watch, I mean I've just marked up so much of it, it is really quite a chilling document. The Secretary of State doesn't really dispute any of this, they deal with it really shortly and say you know, prison conditions are basic but they don't systematically breach Article 3, that's really it. There's no response to this. I mean they do… these appellants do face a real risk of breaching of Article 3 if returned."

38. We find the respondent's position was clearly set out in the documentary evidence before the FTT and maintained at the remote hearing. The FTT referred to [183-186] of the RWS at [76] of the decision. We find there was no material mistake of fact or misunderstanding on the part of the FTT. On a fair reading of [197] the FTT accepted the appellant's case set out at [56] of the ASA. We are not persuaded by Mr Singh's argument that the language used by the FTT demonstrates otherwise.

39. Having reviewed the country evidence in the supplementary bundle and the appellant's comprehensive extracts of country material, we conclude the FTT found that there was a real possibility of ill-treatment in detention and this finding was open to the FTT on

the evidence before it. There was nothing in [198] to detract from this finding and the FTT's reasons were adequate.

40. Taking into account the appellant's background and specific circumstances, the likelihood of lengthy pre-trial detention and the conditions in prison, the appellant has shown there is a real risk of a breach of Article 3 if returned to India. Mr Singh, quite properly, accepted that if the appellant established a risk of ill-treatment in detention his Article 3 claim would succeed given the respondent accepted he would be detained on return.

41. It follows that, in establishing a breach of Article 3, the appellant has shown a real risk of serious harm on return. It was not the respondent's case that the appellant should be excluded from protection under the Refugee Convention, but that he had failed to establish a Convention reason. We allow the appellant's appeal on humanitarian protection grounds and human rights grounds.

Ground 2: Convention reason

42. The FTT accepted that an imputed political opinion could be attributed to the appellant because of his association with the NCP [121]. The FTT found that the Indian authorities had a legitimate reason to investigate the business activities of the appellant and the evidence did not support the appellant's claim that these actions were based on being Muslim, a member of IM's family or any association with a political party [130-131].

43. The FTT considered the appellant's evidence relating to events before 2019 at [145-160] and concluded at [161] that there was nothing to show that the actions of the Indian authorities have been driven by improper motives. The FTT found that no action had been taken against the appellant's father or his family under the Terrorism Acts [162].

44. The FTT considered the complaint registered under the Foreign Exchange Management Act 1999 ('FEMA') in which IM was described as an international drug dealer, smuggler and criminal and alleged that the funds accumulated from these activities were used to buy property in India and abroad. The document referred to the statements of several witnesses and alleged the appellant had been part of a deal to a acquire a hotel in Dubai [167-179].

45. At [180] the FTT concluded:

> "On the evidence to the lower standard, despite the media interest which we find likely because of the high profile nature of this investigation, we find that the interest of the Indian authorities is driven by legitimate investigation into alleged money laundering activities and supported by extensive evidence supplied by persons

involved in the activities of these businesses. We further find this evidence shows that the activities involved are in relation to the hotels owned and run by the appellant [his mother and brother] in Dubai. The interest of the authorities is driven by funds being transferred abroad after sale of properties in 2010 by IM. Persons to whom these properties were sold were interviewed and there is no evidence before us to show that they continue to remain detained or have been subject to ill-treatment during questioning.

46. At [186] the FTT found:

" The Complaint by the ED includes as we have said a large number of statements from people who have personal knowledge of the businesses owned by IM and now by his sons and his first wife following his death and during his lifetime. The investigation is into financial sources of the businesses and the need to establish these. Again, on the evidence, we conclude that any interest in this family has not been because they are Muslims or rich Muslims or any connection or otherwise with a political party but with the source of the money invested in the businesses and whether it is acquired legitimately or otherwise. Emphasis added."

47. At [188] the FTT concluded:

"At present the evidence to the lower standard points to the conclusion that the appellants' fear of returning to India is not because of any actions against them as Muslims, or because of any imputed political opinion or because of their relationship with IM but is to do with their relationship and involvement in the businesses that have been passed to them in their entirety after IM's death in 2013. These charges relate to businesses given to the second appellant in 1992 and which she has run with the help of her brother in law and her sons. On the evidence we find it is plausible that the Indian authorities have a legitimate interest in investigating the source of the income of these businesses. The evidence does not support the appellants allegation that these actions are abusive and arise out of improper motives."

48. The appellant submitted the FTT made the following errors of law in finding the prosecution of the appellant was not abusive or motivated by political, religious or any other Convention reason:

Ground 2A: application of the wrong standard of proof.

Ground 2B: failure to consider evidence of the Indian government's abuses of process in A's case.

Ground 2C: failure to consider key factors as to abusive motive and Convention reason and illogical approach.

Ground 2D: failure to consider mixed motives.

Submissions on ground 2

49. Ms Giovanetti submitted that ground 1 was also relevant to ground 2 in that the appellant is vulnerable in detention because he is Muslim and implicated in terrorism as the family of IM. She relied on [60-83] of the grounds of appeal and referred to [42-50] of the appellant's response to the RWS. Ms Giovanetti submitted the FTT

applied the wrong test and failed to consider mixed motives for the prosecution on charges of money laundering.

50. Ms Giovanetti relied on R (Ivlev) v Entry Clearance Officer [2013] EWHC 1162 and submitted that, when considering whether there was a Convention reason for the criminal prosecution, the test was not binary. The FTT erred in looking at whether the prosecution was legitimate or whether it was abusive, but the two were not mutually exclusive. Having accepted that an imputed political opinion could be attributed to the appellant, the FTT adopted a binary approach at [140-141]. The FTT found there was a legitimate basis for the prosecution and that was the end of the protection claim.

51. Ms Giovanetti submitted the FTT considered the case from 'the wrong end of the telescope' and this error had to be looked at in conjunction with the misapplication of the standard of proof, particularly since the FTT had applied the wrong standard of proof in respect of Article 3. At [180] the FTT appeared to apply the lower standard to the respondent's case and at [188] the FTT found that it was plausible the Indian authorities had a legitimate interest in investigating the appellant. It was not the appellant's case that the criminal investigation was not legitimate but that there was also a Convention reason for the Indian authorities' interest in him. There was some evidence of abuse in respect of a witness being forced to sign a witness statement and evidence that the media campaign was fuelled by the BJP which the FTT overlooked.

52. Ms Giovanetti submitted there were clear Convention reasons which were not considered by the FTT because it wrongly focussed on the merits of the criminal case which neither party was invited to do. She submitted that if the appellant succeeded under Article 3, his appeal should also be allowed under the Refugee Convention.

53. Mr Singh submitted there was no material error of law in the FTT's assessment of motive and there was no compelling evidence of abuses of process which were sufficient to impute a malign motive to the Indian authorities' investigation. The expert evidence was weak and there were one-sided accounts of pressure put on witnesses. There was compelling evidence of a legitimate motive and the appellant merely disagreed with the weight attached to the evidence. Any error is respect of applying the wrong standard of proof was not material because, applying the balance of probabilities, the evidence supported a finding that the authorities had a legitimate motive to investigate the appellant.

54. Mr Singh submitted it was the appellant's case before the FTT that there were only improper motives for the criminal investigation as evidenced in the appellant's second witness statement and his skeleton argument. The appellant claimed the proceedings against

him were entirely abusive and part of an orchestrated campaign. The FTT was entitled to find there was no improper motive at all. It was difficult to see how the FTT could have found there were mixed motives and it was hard to see on the evidence that the appellant could have said there was some element of a different motive.

55. Mr Singh submitted the appellant had failed to establish an error of law in the FTT's key finding that the interest of the Indian authorities was motivated by legitimate concerns that the appellant may have been involved in laundering the proceeds of IM's alleged crimes at [130, 131, 151, 154, 177, 180, 186, 188]. This key finding was one of fact not law and the appellant had failed to show that it was one which was not reasonably open to the FTT on the evidence before it.

56. There was evidence in the US State Department report that IM was a 'drugs kingpin' which was a strong indication to the FTT that the interest in the appellant was legitimate rather than religious or political animosity. There was a report in a British newspaper describing IM as a top global drug baron and senior figure in D-Company. There was ample evidence before the FTT that IM was involved in serious crimes which explained why the Indian authorities were interested in IM. The BJP were not in power at the time of the extradition request against IM. This supported the FTT finding of legitimate interest not motivated by politics or religion.

57. It was the appellant's evidence that, in 2015, IM's second wife handed a dossier to the Indian authorities of email exchanges between IM and the appellant concerning business investments and an investigation into money laundering was commenced by the ED under the FEMA. Mr Singh submitted that when the FTT decision was read as a whole it was impossible to say that the FTT's key finding of fact was not supported by the evidence or was Wednesbury unreasonable.

Conclusions and reasons on ground 2

58. It is well established that the question for the FTT was whether the reasons for the prosecution and ill-treatment feared by the appellant included a Refugee Convention reason. In R (Sivakumar) v SSHD (HL) [2003] 1 WLR, the Court held:

> "41. There is no rule that, if an applicant is to succeed, the decision-maker must be satisfied that the Convention reason was, or would be, the only reason for his persecution…. So long as the decision-maker is satisfied that one of the reasons why the persecutor ill-treated the applicant was a Convention reason and the applicant's reasonable fear relates to persecution for that reason, that will be sufficient."

59. In Karanakaran v SSHD [2000] 3 All E.R. 449, the Court of Appeal held that a reasonable degree of likelihood equated to 'a reasonable chance', 'substantial grounds for thinking' or 'a serious possibility'. Brooke LJ stated at p.469-470:

> "In the present public law context, where this country's compliance with an international convention is in issue, the decision-maker is, in my judgment, not constrained by the rules of evidence that have been adopted in civil litigation, and is bound to take into account all material considerations when making its assessment about the future.
>
> This approach does not entail the decision-maker (whether the Secretary of State or an adjudicator or the Immigration Appeal Tribunal itself) purporting to find 'proved' facts, whether past or present, about which it is not satisfied on the balance of probabilities. What it does mean, on the other hand, is that it must not exclude any matters from its consideration when it is assessing the future unless it feels that it can safely discard them because it has no real doubt that they did not in fact occur (or, indeed, that they are not occurring at present).
>
> For the reasons much more fully explained in the Australian cases, when considering whether there is a serious possibility of persecution for a Convention reason if an asylum seeker is returned, it would be quite wrong to exclude matters totally from consideration in the balancing process simply because the decision-maker believes, on what may sometimes be somewhat fragile evidence, that they probably did not occur."

60. Therefore, in the appellant's case, even if the reason for the prosecution of the appellant was that he was suspected of involvement in money laundering, it was necessary to consider whether there were substantial grounds for thinking that there was a Convention reason for the prosecution and/or ill-treatment on return.

61. The FTT found the appellant was prosecuted because he was suspected of money laundering and on that basis his protection claim was dismissed. We find the FTT erred in law in failing to consider whether there was a reasonable chance the appellant would be ill-treated on return by reason of being Muslim, a member of IM's family or an imputed political opinion. The FTT failed to assess the appellant's evidence and consider whether there was no real doubt that one of the reasons for ill-treatment on return was a Convention reason.

62. We find the FTT failed to properly apply Sivakumar and failed to consider mixed motives for the prosecution which was the appellant's case before the FTT clearly set out in the appellant's response to the RSW at [54] and [55]:

> "54. Thus, the Appellants are at risk because they are Muslims, with (business) links to Congress and the NCP, and over and above that, they are members of the [M] community and – in particular - family

> members of [IM], who has previously been accused of involvement in the Mumbai blasts.
> 55 In short, on the application of the principles summarised in Sivakumar and Karanakaran (see above) there is at the very least a serious possibility that one or more of the underlying reasons for the treatment the Appellants' fear is a Convention reason."

63. The FTT made a choice between the respondent's evidence and the appellant's evidence instead of taking all matters into account in the balancing process required by Karanakaran. The finding that the prosecution was not abusive did not rule out the serious possibility of ill-treatment on return because the appellant was Muslim and IM's son. The FTT accepted at [121] that an imputed political opinion could be attributed to the appellant because of his association with the NCP, but failed to consider whether there was a causative link.

64. We agree with Mr Singh that the evidence supported the FTT's finding that there were legitimate motives for the criminal investigation, but that finding did not preclude an assessment of whether there was a serious possibility one or more of the underlying reasons for the treatment the appellant fears is a Convention reason given there was no challenge to the appellant's factual account or his credibility.

65. We find the FTT applied a binary test in concluding there were legitimate motives for the prosecution and wrongly excluded and/or rejected the appellant's evidence on the basis of a choice between the respondent's case on the one hand and the appellant's case on the other.

66. We find the FTT erred in law in failing to take into account all material considerations in concluding there were no other reasons or motivation for the prosecution. Having accepted the appellant would be ill-treated in detention, the FTT failed to consider whether there was a Convention reason for it.

67. We conclude that the FTT materially erred in law in finding at [194]: "the appellants have failed to show to the lower standard that if returned to India there will be a breach of their protected rights under the Geneva Convention for reasons of their religion, membership of a particular social group or imputed political opinion. We set aside the FTT's decision to dismiss the appeal on asylum grounds.

Disposal

68. The above findings and conclusions are dispositive of the appeal. We are grateful to Mr Singh and Mr Seddon for their

submissions on grounds 3 to 8. We make the following observations in respect of these grounds.

69. The respondent at [16] of the refusal letter stated and emphasised, “No consideration can, or will be given to the validity of the allegations of criminal activity against you in India, by UKVI.” The respondent accepted the appellant’s account of the proceedings against him but did not accept the appellant’s detention in India would amount to persecution.

70. We are of the view the FTT went ‘off point’ in its extensive discussion of the evidence in the criminal investigation which was not in issue (see [70-72] RSW). The expert evidence, quite properly, did not engage with the merits of the criminal case.

71. There was evidence before the FTT that the criminal investigation into money laundering was merged with the investigation into Dawood Ibrahim and linked to funding terrorism, contrary to [192] of the decision.

72. The parties agreed that if an error of law was found in respect of ground 2, the appellant’s asylum appeal should be re-heard by the Upper Tribunal.

73. Accordingly, the FTT erred in law and its decision is set aside. The appellant’s appeal is allowed on humanitarian protection and human rights grounds. The appellant’s asylum appeal is adjourned to be re-heard by the Upper Tribunal. The FTT’s findings at [130-195] are set aside.

Notice of decision

Appeal allowed

J Frances

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 March 2024