IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001346

First-tier Tribunal No: PA/00230/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 25 September 2023

Before

UPPER TRIBUNAL JUDGE PITT

Between

RG
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Hawkin, Counsel, instructed by Wimbledon Solicitors
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

Heard at Field House on 7 August 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or any other person. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal against the decision issued on 14 January 2022 of First-tier Tribunal Judge Hughes which refused the appellant's asylum and human rights claims.

Background

2. The appellant maintains that he is a national of Myanmar. The respondent maintains that he is a national of India. The appellant was born in 1966.

3. The appellant maintains that he came to the UK on 12 November 2004. He did not come to the attention of the immigration authorities until he was encountered working illegally on 18 October 2011. He initially gave a false name and claimed to be Indian. He made an asylum claim the same day and then in a screening interview stated that his correct name was RG and that he was born in Myanmar.

First Appeal

4. The respondent refused the appellant's asylum and human rights claims in a decision dated 19 March 2012. He appealed to the First-tier Tribunal.

5. In a decision issued on 16 May 2012, First-tier Tribunal Judge Lever refused the appeal. First-tier Tribunal Judge Lever found that the appellant was significantly lacking in credibility. He found that he was an Indian national. The appellant's account of being of adverse interest from powerful politicians in his home area was not accepted. Judge Lever stated: "I find absolutely no credibility attaching to that claim"; see paragraph 21. The judge reached this conclusion, in part, on the basis that the appellant was able to live in India for six months without being found by those who were interested in harming him. Also, the appellant's account was that his wife and child had remained in India for seven years after the appellant went abroad and experienced no adverse interests. This was not found to be at all compatible with the appellant's claim that within days of his return, the people he feared heard of his return and mistreated him.

6. The appellant became appeal rights exhausted on 13 February 2013.

Second Appeal

7. On 25 September 2019 the appellant made further submissions. The respondent did not find that these submissions showed that he was in need of international protection. However, in a decision dated 16 December 2019, the respondent accepted that the further submissions amounted to a fresh claim and a further right of appeal to the First-tier Tribunal arose.

8. The appeal was heard in the First-tier Tribunal on 27 May 2021 and 15 November 2021. After the hearing on 15 November 2021, written submissions were provided by both parties. The delay in finally determining the case in the First-tier Tribunal was, in part, because the respondent was trying to establish whether the appellant would be accepted by the Indian authorities as Indian and therefore could be documented for return. The First-tier Tribunal Judge recorded in paragraph 38 of the decision that some progress had been made in this regard as the appellant "had been positively verified within the pre-verification process as being eligible to apply for a travel document to India."

9. Judge Hughes found the appeal should be refused. In paragraphs 31 and 53 of the decision he identified the core new evidence on which the appellant relied in order to distinguish the findings of Judge Lever. These were a physical medical report dated 21 January 2021 prepared by Dr Creasy and a psychology report dated 30 June 2020 from Dr Stern. The appellant also relied on a country report from Dr Farhaan Wali dated 3 December 2019 and an addendum dated 31 January 2020 commenting on the situation in India and the appellant's claim to be a Myanmar national and not a national of India. In paragraphs 51 to 96 Judge Hughes did not find that any of the reports showed that the findings of Judge Lever should be distinguished. He found that the asylum, humanitarian protection, Article 3 ECHR and Article 8 ECHR appeals should be refused.

Grounds of Appeal

10. The appellant was refused permission to appeal the decision of Judge Hughes by the First-tier Tribunal on 4 March 2022. The Upper Tribunal granted permission on 16 August 2022 on renewed grounds dated 4 April 2022.

11. The renewed grounds of appeal run to 14 pages. They set out 8 grounds across 65 paragraphs. For the reasons set out below, I did not find that any of them had merit. On the contrary, the grounds here appeared to me to attract the criticisms made by the Court of Appeal in paragraph 65 of Volpi v Volpi [2022] EWCA Civ 464:

> "65. This appeal demonstrates many features of appeals against findings of fact:
>
> i) It seeks to retry the case afresh.
>
> ii) It rests on a selection of evidence rather than the whole of the evidence that the judge heard (what I have elsewhere called 'island hopping').
>
> iii) It seeks to persuade an appeal court to form its own evaluation of the reliability of witness evidence when that is the quintessential function of the trial judge who has seen and heard the witnesses.
>
> iv) It seeks to persuade the appeal court to reattribute weight to the different strands of evidence.

v) It concentrates on particular verbal expressions that the judge used rather than engaging with the substance of his findings."

Ground 1

12. In paragraph 52 the First-tier Tribunal applied the provisions of Section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Judge Hughes found that the appellant's delay in claiming asylum and the use of a false name when encountered and detained in 2011 weighed against him. He stated that these parts of the appellant's claim supported Judge Lever's findings that the appellant was not credible and was from India rather than showing that they should be distinguished.

13. Ground 1 maintains that the First-tier Tribunal "had no jurisdiction" to apply s.8 as the delay and use of a false name were matters that were "historical to the fresh claim" and not relied on by the respondent in the refusal letter. That submission is without merit. The First-tier Tribunal was obliged to apply the provisions of s.8 as the statute mandates this. It is not "very troubling", as suggested in paragraph 7 of the grounds, that the First-tier Tribunal made this finding first. The judge had to start somewhere. Paragraph 9 of the grounds asserts that the approach to s.8 (and the rest of the findings) showed that Judge Hughes did not consider the new evidence "fairly" and objects to "the way the Judge expresses himself". That submission is also without merit. As required by statute, the First-tier Tribunal made a wholly rational decision that features of the appellant's conduct undermined his credibility. It was uncontroversial to point out that this adverse finding supported the credibility findings of Judge Lever rather than distinguishing them.

Ground 2

14. Judge Hughes set out reasons for finding that little weight attracted to the medical reports in paragraphs 55 to 62 of the decision. The appellant maintained that he had mental health problems because of what had happened to him in India and that these problems would get worse if he had to return to India. Judge Hughes noted that in the appellant's medical records from 2013 onwards, he did not raise any mental health issues at all until 18 December 2019; see paragraph 57. Judge Hughes found it significant that the first mention of mental health problems arising from mistreatment in India was made 15 years after the appellant claimed that he came to the UK and 2 days after his asylum claim was refused. Judge Hughes found that both of the medical reports were undermined by not having had reference to the appellant's medical records. The psychology report did not take account of the significant delay in reporting any mental health issues or the timing of the appellant's first report of any mental health issues. Judge Hughes also found that the complex mental health issues identified in the psychology report was not consistent with the absence of any reference to any mental health problems at all until 2020 despite regular visits to the appellant's GP; see paragraph 58.

15. The appellant also maintained that he had physical markings that were consistent with his claimed mistreatment in India. Judge Hughes found that the physical medical report of Dr Creasy was undermined where it did not take into account that the appellant made no reference at all to having any physical marks of the ill-treatment he had experienced in India at the hearing before Judge Lever in 2012; see paragraph 59. Judge Hughes also found that the appellant's evidence as to his mistreatment was inconsistent across various accounts and that where this was not addressed in the physical medical report, the report attracted less weight; see paragraph 62.

16. Judge Hughes also found that the medical reports attracted less weight as they failed to engage at all with any of the adverse findings made by Judge Lever in 2012; see paragraph 58.

17. Judge Hughes also found that the appellant's claim to have needed in-patient medical treatment for a week in India as a result of the ill-treatment he experienced was undermined by the appellant not having made any attempt to obtain medical records of this event; see paragraph 60.

18. Ground 2 challenges the findings on the medical reports. This ground is set out in paragraphs 11 to 30 (20 paragraphs) of the renewed grounds. Over half of those paragraphs (paragraphs 16 to 26) only set out lengthy extracts from the medical reports or comment favourably on the medical reports, for example, paragraph 16 referring to the "extremely detailed and thoughtful" psychology report, paragraph 19 of the renewed grounds referring to the physical medical report being "very thorough and detailed" and paragraph 30 referring to a failure to give "proper weight" to the "conscientious, detailed and expert findings" in the reports.

19. Paragraph 13 of the grounds asserts that Dr Stern did have "some" medical reports before her and so the First-tier Tribunal was not entitled to draw adverse weight from her not having seen them. That assertion is wrong. The list of documents provided to Dr Stern does not include the appellant's medical reports. Dr Stern's comment that that the appellant's mental health had deteriorated in the year prior to the medical report being prepared is not capable of showing that Dr Stern was provided with the appellant's medical reports. The case of HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111 (IAC) supports the finding of Judge Hughes that the medical reports attracted less weight as they were not informed by the appellant's medical records.

20. Paragraph 14 of the grounds states that the findings on the medical evidence were in error as the appellant was not asked in cross-examination about why did not raise his mental health issues earlier. This challenge has no merit. The appellant had the burden of making out his case in adversarial proceedings. He had specialist legal representatives assisting him to present his case. The First-tier Tribunal was not required to ensure that any issues that undermined the appellant's account were put

to him in cross-examination. The refusal letter made clear that the respondent did not accept that the appellant's mental health prevented him from returning to India. The Respondent's Review stated that if a matter was not expressly challenged that did not mean that it was conceded. The appellant raises similar challenges in paragraphs 29 and 32 of the renewed grounds which have no merit for the same reasons.

21. Paragraph 15 of the grounds states that the findings on the medical evidence were in error as the respondent did not challenge the medical evidence in the refusal letter. This submission is misconceived as the medical reports were not before the respondent when she refused the appellant's renewed claim on 16 December 2019.

22. Paragraph 27 of the grounds maintains that the First-tier Tribunal erred in placing less weight on the medical reports where they merely accept the appellant's account and did not "challenge … its veracity." This challenge has no merit. The medical experts had the decision of Judge Lever before them which found the appellant's account to be significantly lacking in credibility and indicated that the appellant had not referred to having any scars or to having mental health problems in his appeal in 2012. The medical reports did not refer to those matters when giving their opinions on the appellant's physical and mental health. Judge Hughes was entitled to find that a failure to factor in the absence of evidence regarding the appellant's physical and mental health in the appeal before Judge Lever reduced the weight attracting to the medical reports. In my view, that is all that Judge Hughes was saying in paragraph 59. He was not requiring the medical experts to express a view on credibility but to factor in relevant evidence when reaching their opinions. Paragraphs 27 and 28 of the grounds misread paragraph 59 of the First-tier Tribunal decision where they seek to assert that Judge Hughes somehow offended the ratio of paragraph 25 of KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10.

Ground 3

23. In paragraph 62, Judge Hughes set out the appellant's evidence from his different account on how he incurred the scarring listed in the medical report. He found that the accounts showed "a significant inconsistency" that undermined the appellant's credibility and undermined the weight that could be placed on Dr Creasy's report where it did not take these inconsistencies into account. Judge Hughes had already indicated in paragraph 20 of the decision that he accepted that the appellant was a vulnerable witness and bore this in mind when making his findings. The differences identified in paragraph 62 entitled the First-tier Tribunal to find that the appellant's accounts were not consistent and undermined his credibility. That finding is rational. Paragraph 36 of the grounds is misconceived in stating that these inconsistencies did not entitle the First-tier Tribunal to "reject [the appellant's] entire account". Judge Hughes provided numerous reasons for finding that the evidence did not show the appellant to be a credible witness and that the decision of Judge Lever had

not been distinguished and did not merely rely on the differences in the appellant's account on how he incurred scars.

Ground 4

24. This ground is headed "Credibility" and challenges the findings made in paragraph 63 of the First-tier Tribunal decision.

25. Paragraph 37 of the grounds states:

> "The Judge states at para 63 that the Appellant "did little to improve upon the wholly adverse credibility findings made by Judge Lever", an expression which itself begs the question."

This appeared to me to be a clear example of the type of ground which was criticised by the Court of Appeal in paragraph 65(v) of Volpi. It cannot form the basis of an error of law challenge.

26. Paragraph 38 asserts that the First-tier Tribunal "has clearly not taken the reports and clear findings" of the medical experts into account when assessing credibility. The discussion above shows that the First-tier Tribunal clearly did take the medical evidence into account.

27. Paragraph 39 of the grounds objects to the rejection of the appellant's explanation of why he said that the was Indian when first encountered by the respondent in 2011. If the appellant thought he was from Myanmar and not from India, as he now claims, but told the respondent when first encountered that he was Indian this is clearly something the First-tier Tribunal Judge was entitled to rely on against him when assessing credibility. The judge was entitled to find the explanation for this, that the appellant had an Indian grandfather, to be "contrived and entirely implausible." The grounds, here, are really seeking to assert that the First-tier Tribunal was not entitled to reach the conclusion that it did on this evidence when that conclusion was rationally open to the Tribunal.

28. Paragraph 40 of the grounds is misconceived in suggesting that the First-tier Tribunal did not give reasons for finding that the appellant's evidence on his last contact with his family was "contrived and implausible". Detailed and rational reasons are give in paragraph 63 of the First-tier Tribunal decision.

29. Paragraph 41 of the grounds again asserts that the First-tier Tribunal failed to consider the appellant's evidence in the context of his being a vulnerable witness when, as above, this is not correct. Paragraph 42 of the grounds is misconceived. It "island hops" the findings of the First-tier Tribunal on the appellant's approach to family tracing s Judge Hughes gave a number of reasons for finding that the appellant's approach to family tracing was "indifferent", beyond the issue of not having followed up on his family tracing application made in March 2021. This ground also appeared to me to be misconceived as, by the time that the decision was written in January 2022, there was nothing further on the appellant having

followed up on the family tracing application, notwithstanding a further hearing and further written submissions from the parties. It was not a question of a 2 month period of no follow-up on the family tracing application but an extended period, identified correctly as such by the First-tier Tribunal.

Ground 5

30. This ground challenged the findings of the First-tier Tribunal on the country expert report, set out in paragraphs 68 to 82 of the decision. In paragraph 72, Judge Hughes identified that Dr Wali did not have expertise in the area of nationality law. As a result, he did not place weight on Dr Wali's opinion that the appellant was not Indian and was a citizen of Myanmar. That approach was lawful. As Judge Hughes identified in paragraph 71, nothing in the reports of Dr Wali indicated that he had the expertise or experience that enabled him to comment on India or Burmese nationality law. Dr Wali only set out that he was an expert on "the culture, politics and society of India". Dr Wali's comment in the second report that he was not an expert on Burmese law and was expressing an opinion "based on secondary research" also shows that to be so. The assertion in paragraph 45(iv) of the grounds that Dr Wali did have the expertise to give an opinion on nationality is unparticularised and unsupported by any evidence.

31. As Mr Lindsay submitted at the hearing, nothing in either of Dr Wali's reports suggested that he took into account the findings of Judge Lever or other credibility issues surrounding the appellant's account. Dr Wali only addressed the appellant's claim to be from Myanmar (and not from India) at its highest.

32. The First-tier Tribunal was equally entitled in paragraph 73 of the decision to find that the evidence concerning Indian and Burmese nationality relied on assertion and reference to statute rather than following the guidance in Hussain & another (status of passport; foreign law) UKUT 00250 (IAC) which requires a higher level of expertise and cogency when making submissions on nationality law in foreign jurisdictions.

33. These matters show that it was entirely open to the First-tier Tribunal to find that the reports of Dr Wali did not assist in assessing the appellant's credibility and that they did not show that the appellant was a citizen of Myanmar. Where these core reasons for rejecting Dr Wali's opinion were rational, it is not necessary to address the remaining grounds which are, at best, peripheral challenges to the conclusion of the First-tier Tribunal on the country expert evidence.

Ground 6

34. The challenges to the First-tier Tribunal's approach to the physical and mental health expert evidence have been found to have no merit for the reasons set out above. That being so also significantly undermines the challenge to the finding that the evidence did not show that there would

be a breach of Article 3 ECHR if the appellant returned to India. That must be so where the challenge to the Article 3 ECHR findings is based, largely, on a reassertion of the merits of the reports of Dr Stern and Dr Creasy.

35. In any event, Judge Hughes considered the expert evidence on the risk of a deterioration in the appellant's mental state and risk of suicide if he were returned to India at its highest in paragraphs 83 to 96. In paragraph 93, Judge Hughes identified that he was not provided with any evidence on the treatment available to the appellant to protect his mental health on return to India. Where that was so, he referred to the respondent's Country Policy and Information Note (CPIN). He concluded in paragraph 94 that the CPIN showed that the appellant would be able to access treatment that would provide material assistance such that no risk of an Article 3 ECHR would arise on medical grounds.

36. Paragraphs 53 and 54 of the grounds maintain that the First-tier Tribunal "did not specifically" consider three sections of the CPIN which referred to limited mental health provision in India, the references to those sections having been set out in the written submissions made in January 2022. That submission fails to take account of the indication in paragraph 47 of the decision that an absence of reference to parts of the evidence did not meant that they were not considered. It ignores the clear statement in paragraph 93 of the decision that the First-tier Tribunal did consider the CPIN. The grounds also do not argue that the First-tier Tribunal was wrong in finding that sufficient treatment would be available to the appellant, albeit not to the extent that it was available in the UK.

Grounds 7 and 8

37. These parts of the grounds, asserting that the First-tier Tribunal was wrong to find no breach of Article 8 ECHR, rely on there being merit in the previous grounds. It is therefore not necessary to address them further, having found no merit in grounds 1 to 6.

Conclusion

38. For these reasons, it was my conclusion that the decision of the First-tier Tribunal did not disclose an error on a point of law and it therefore stands.

Notice of Decision

39. The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

S Pitt
Upper Tribunal Judge Pitt

Judge of the Upper Tribunal
Immigration and Asylum Chamber
Dated: 31 August 2023