Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11614/2019 V

THE IMMIGRATION ACTS

Heard at Field House On 21st September 2021 via Teams	**Decision & Reasons Promulgated On the 19th October 2021**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

MFS
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Heybroek, of Counsel, instructed by Wimbledon Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Pakistan born in 1977. He arrived in the UK in January 2010 with entry clearance as a Tier 4 student migrant. His leave in that capacity expired on 8th March 2012 when he withdrew his application to extend his leave in this capacity, he then overstayed and

made a number of applications to remain as a student and for leave to remain outside of the Immigration Rules but these were all refused without a right of appeal. In 2017 he was identified as an absconder. In September 2019 he was detained, and subsequently he made an asylum claim. On 15th November 2019 the respondent refused this application. His appeal against the decision was dismissed on protection and human rights grounds by First-tier Tribunal Judge Fox in a determination promulgated on the 5th January 2021.

2. Permission to appeal was granted by Upper Tribunal Judge Sheridan on 20th April 2021 on the basis that it was arguable that the First-tier judge had erred in law in assessing the credibility of the claim. This is because it is found to be arguable from what is said at paragraph 46 of the decision that the judge had reached a decision that the claim was not credible without having regard to the objective evidence. It is also arguable that the First-tier Tribunal did not have regarding to all of the medical evidence, as it is arguable that there was a failure to consider the Rule 35 and scarring reports in addition to the evidence (which was considered) of Dr Stein.

3. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether any error was material and whether the decision and any findings should be set aside. The hearing was heard remotely via Teams, a format to which the parties raised no objection. Ms Heybroek's audio connection was not good but I was satisfied that the hearing was conducted fairly despite these issues, and there were no problems of connectivity.

4. It was established that the three appellant bundles were not in the Upper Tribunal file but as documents referred to in the grounds had been filed with the Upper Tribunal by Wimbledon Solicitors, and it was not contested that these were before the First-tier Tribunal, this did not pose a problem for the error of law hearing.

Submissions – Error of Law

5. In the grounds of appeal and in oral submissions from Ms Heybroek it is argued in summary for the appellant as follows. Firstly, it is argued that there was a failure to consider whether the appellant was a vulnerable witness in light of the information contained in medical evidence, and to record in the decision whether he was such and any affect that his vulnerability had on his evidence. Secondly, it is argued, that the First-tier Tribunal failed to make a holistic assessment of whether the appellant was credible taking into account all of the medical evidence including the Rule 35 report and the scarring report which is said not to exist in the decision but was in fact in the bundle before the Judge. Ms Heybroek added that the analysis of Dr Stein's report failed to engage with the conclusions that the appellant suffers from depression, hallucinations and is at suicide risk even if there were comprehensive reasons (although in her view not good reasons: she argued that what

was said in the second report was more nuanced than is portrayed in the decision) given as to why it was not accepted that the appellant lacked the ability to give oral evidence. Thirdly, it is argued, that the First-tier Tribunal failed to consider material evidence in support of the claim contained in the three FIR reports and the discharge note which were in the respondent's bundle. Fourthly it is argued that the background country of origin materials were not considered when considering the credibility of the appellant's claim when there was evidence in the CPIN that supported the appellant being at risk from extremists as a lawyer.

6. In the Rule 24 notice dated 13th May 2021, and in oral submissions from Mr Avery it is argued, in summary, for the respondent as follows. That First-tier Tribunal Judge noted that the appellant was a vulnerable witness at paragraph 9 and that he did not give evidence so nothing further was required. Secondly there was consideration of the Rule 35 report at paragraph 40, and at paragraph 41 it was said that the scarring report was not referred to in the hearing, not that it was not in bundle and indeed page C17, the scarring report, was referred to at paragraph 43 when considering whether the appellant had funds for studies. It is argued that there was consideration of the FIR evidence at paragraphs 41 and 45 of the decision. Mr Avery argued that the First-tier Tribunal did not therefore err in law, and drew to my attention that there were many matters against the appellant such as not calling potentially helpful witnesses in addition to his failing to engage with the asylum system with no proper reason, although he did accept that it might have been better if the First-tier Tribunal had engaged with the evidence in a more structured way.

Conclusions – Error of Law

7. The First-tier Tribunal reminds itself of the Presidential Guidance on vulnerable witnesses at paragraph 9 of the decision, I find no error in this respect given that the appellant was not actually a witness before the First-tier Tribunal. The First-tier Tribunal starts the decision making by conducting a detailed analysis of the evidence of Dr Stein and concluding, with reasons, that it is not adequate to support the contention that the appellant lacks capacity to give evidence in support of his asylum claim. These are conclusions that I find were lawfully and rationally open to the First-tier Tribunal. I therefore find that it was open to the First-tier Tribunal to give little weight to the appellant statement, although it is meaningless to call it self-serving as that could be said of any witness statement, at paragraph 44 of the decision.

8. Consideration is given to the FIR reports, which are noted as existing at paragraph 41 of the decision, and this evidence is said to have been considered in the round at paragraph 45 but is found not to support the claim as it is easy to obtain fraudulent documents in Pakistan. It would have been better if fuller reasons were given for not placing weight on this evidence. I find that the reasons given for rejecting the evidence in

the Rule 35 report are insufficient as this report documents scarring evidence which was potentially consistent with the appellant being a victim of ill-treatment. There is also a failure to consider the evidence in the scarring report, it being stated only at paragraph 41 of the decision that no reference was made to it in the substantive hearing. This is not accurate as the scarring report is referred to at paragraph 9 of the appellant's skeleton argument which was before the First-tier Tribunal for this hearing. It is the duty of the First-tier Tribunal to consider all evidence before it, and this evidence is not immaterial as it concludes that the appellant's history of ill-treatment is consistent with his scarring. There is also no reference to any country of origin evidence. Whilst the factors found against the appellant are weighty it cannot be said that it would be inevitable that the outcome of the appeal would have been the same if there had been properly consideration of the other evidence which might have been supportive of the credibility of his claim.

9. The approach to the credibility of the claim as recorded at paragraph 46 of decision is as follows: "As the appellant has failed to establish a subjective fear of harm it follows that the objective evidence is of limited probative value." I find that this is indicative of an erroneous legal approach. Instead of weighing each piece of evidence independently on its own merits and then considering it all in the round, and concluding on the totality of the evidence whether the appellant had shown his case to the lower civil standard of proof, the lack of any evidence of any weight from the appellant due to his lack of any proper reason for not giving oral evidence has been held to mean that the rest can be given little weight. I find that this errs in law: without weight being given to the appellant's own witness account it might be unlikely that he would succeed but it does not always follow that this will be the case, and due weight must still be given to other credible sources of evidence when concluding whether or not an appellant succeeds in his appeal.

10. In light of this legally flawed approach to credibility and the failure to properly consider potentially supportive evidence for the appellant, particularly with respect to scarring, I find that the decision must be set aside and remitted to the First-tier Tribunal for a full rehearing of the appeal. I remit the appeal to the First-tier Tribunal, to a judge other than Judge of the First-tier Tribunal Fox, due to the large extent of the remaking that will need to take place as I find that no findings can be preserved, as I accept Ms Heybroek's submission that the findings with respect to the appellant's other mental health conditions documented by Dr Stein are insufficiently clearly made so I cannot preserve the findings made on Dr Stein's evidence.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal and all of the findings.

3. I remit the appeal to be reheard de novo by the First-tier Tribunal by a judge other than Judge of the First-tier Tribunal Fox.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim.

Signed: Fiona Lindsley Date: 21st September 2021
Upper Tribunal Judge Lindsley