Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12105/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 January 2022	**On 01 February 2022**

Before

THE HON. MRS JUSTICE HEATHER WILLIAMS
(sitting as a Judge of the Upper Tribunal)
UPPER TRIBUNAL JUDGE BLUM

Between

S T (INDIA)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Martin, Counsel, instructed by Lova Solicitors Limited
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of India born on 21 June 1977, appeals against a decision of Judges of the First-tier Tribunal Chinweze and Dyer ("the Panel") promulgated on 14 April 2021, following a hearing on 23 March 2021, dismissing his appeal against the Respondent's decision of 18 November 2019, refusing his claims.

2. As the Panel noted in para 13 of its decision, the appeal before them was advanced on the basis that removal of the Appellant from the United Kingdom ("UK") would:

(a) Breach the UK's obligations under the Refugee Convention;

(b) Breach the UK's obligations in relation to persons eligible for a grant of humanitarian protection; and/or

(c) Be unlawful under section 6 of the Human Rights Act 1998 in that it would breach his rights under Articles 3 and 8 of the European Convention on Human Rights ("ECHR").

3. In summary, the Panel found that there was no basis for them to depart from an earlier decision of 25 June 2018 made by Judge of the First-tier Tribunal Moore rejecting the Appellant's appeal against an earlier refusal of his asylum claim. The Panel also decided that the Appellant had not shown that there were substantial grounds to fear he would be subject to treatment in breach of Article 3 ECHR by reason of his medical conditions; and that his removal would not entail a breach of Article 8 ECHR.

4. The Appellant's grounds of appeal are focused upon the rejections of his asylum appeal and his Article 3 ECHR claim. As we set out in more detail below, the Appellant contends that the Panel failed to substantively analyse his new evidence concerning his *sur place* activities; and in respect of the Article 3 claim he submits that the Panel erred in law in rejecting the opinion of his medical expert, in failing to apply relevant case-law and in failing to engage with his subjective fears.

Immigration history

5. The Appellant arrived in the UK on 26 January 2006 and claimed asylum on the same day. He failed to attend the asylum interview scheduled on 4 July 2006 and his claim was refused on 4 July 2006.

6. On 31 October 2011 the Appellant submitted a Legacy Questionnaire. By letter dated 23 March 2014 he was informed that his case had been reviewed and he was not entitled to stay in the UK. On 27 February 2017 further submissions were received from the Appellant's legal representatives, which were treated as a fresh claim. This was refused on 16 October 2017. It was this decision that the Appellant appealed unsuccessfully to Judge Moore. The Appellant was subsequently refused permission to appeal on 31 July and on 15 November 2018. His appeal rights were exhausted on 15 November 2018.

7. Further submissions were lodged on behalf of the Appellant on 18 March 2019, which were refused on 16 August 2019. The Secretary of State agreed to reconsider her decision but maintained her refusal in the decision of 18 November 2019 (the decision under appeal).

The Appellant's claim

8. The Appellant's claims for asylum / humanitarian protection were based on a claimed fear of persecution or serious harm from the Indian authorities as a result of his involvement with a proscribed group, the Liberation Tigers of Tamil Eelam ("LTTE"). He said that when working as a sales assistant in his local pharmacy in his hometown of Trichy in the state of Tamil Nadu, he provided medical supplies to Sri Lankan Tamils who were subsequently identified as involved with the LTTE.

9. The Appellant said that he was arrested, detained and questioned by police about these activities and that during the questioning he was beaten and tortured, leaving physical scars on his body. He said he was released after two days, following the intervention of a lawyer hired by his mother. He subsequently left Trichy and went into hiding for several months after he learnt that other employees at the pharmacy had told police that he was solely responsible for providing supplies to LTTE supporters.

10. The Appellant said that he left India in October 2005, eventually arriving in the UK by lorry in January 2006. He claimed that the Tamil Nadu police were still interested in him and had attended his parents' address on several occasions looking for him, including as recently as February 2021. He said that in recent years he had become involved with the Transnational Government of Tamil Eelam ("TGTE"), an organisation that supports a separate state for Sri Lankan Tamils, attending demonstrations and fund-raising events in London. The Appellant's case was that the Indian police had told his mother that they were aware of this activity. He also contended that in light of this activity he was unable to relocate to another part of India to avoid adverse interest.

11. The Appellant said he was suffering from poor mental and physical health as a result of his detention and ill-treatment by police in India. He contended that he could not be adequately treated in India and that his suicidal ideation would increase as a result of his fear of being removed to India.

12. The Appellant relied on a report prepared by Dr Saleh Dhumad, Consultant Psychiatrist, dated 12 January 2021. Dr Dhumad interviewed the Appellant on 12 January 2021. He also reviewed some earlier medical reports and letters. It is apparent from sections 6, 7 and 9 of the report, that the Appellant gave Dr Dhumad the history of arrest and torture in India which we have already summarised. The medical documentation that Dr Dhumad reviewed included: a letter from his GP, Dr Jukaku, dated 7 February 2019 referring to the Appellant suffering from depression and severe post-traumatic stress disorder ("PTSD"); a letter dated 19 February 2019 from Mental Health Liaison Services indicating he had presented at A & E that day after taking an overdose and had also reported two previous suicide attempts around three years earlier; a psychological report dated 16 February 2019 prepared by Georgia Costa, a psychologist, confirming a

diagnosis of PTSD and depression. Dr Dhumad noted that the Appellant was prescribed anti-depressant medication and had been referred for psychological therapy. Dr Dhumad concluded that the Appellant was suffering from a severe depressive episode and PTSD (paras 15.1 – 15.2) and expressed the following opinion:

> "15.5 The risk of suicide in my opinion is significant in the context of removal to India where he feels he will face torture and death. The main risk factors in his condition are Depression, PTSD and hopelessness, and previous suicidal attempts. His main protective factor is his friends in the UK. He told me; he has attempted suicide 3 times in the UK. Hopelessness has a serious and significant association with suicide risk. The risk will be greater when he feels that the deportation is close. Threat of removal, in my opinion will trigger a significant deterioration in his mental suffering and subsequently increases his risk of suicide.
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> 15.6 … I recommend further referral for psychological therapies. In my opinion his condition is very unlikely to progress further without a safe resolution of his fear. Therefore in my view, he is very likely to suffer a serious deterioration in his mental health if he were to be returned to India and this is not a course that I would recommend."

13. The Appellant also relied upon a scarring report dated 31 December 2018 prepared by Dr Izquierdo-Martin; and a report of Dr Chris Smith, an expert on Sri Lanka, dated 25 February 2019, as to the risks to the Appellant if he was returned to India.

14. These three reports post-dated Judge Moore's decision. As the Panel listed at paras 27 – 28, the other new evidence served by the Appellant comprised:

(a) An affidavit sworn by the Appellant's mother, bearing a date stamp of 12 January 2021;

(b) A statement from Mr A Mannivannan, an auto-rickshaw driver, dated 11 February 2021;

(c) A medical report from his GP, along with copies of his prescriptions and a print-out of the medical records held by his GP;

(d) Photographs of him attending TGTE demonstrations, with handwritten annotations explaining the occasions. The events depicted occurred in February 2018 and between November 2018 to March 2019; and

(e) A letter purporting to be from the leader of the TGTE dated 11 January 2018 referring to the Appellant's activities, which included "responsible roles such as organising events of the TGTE and fund raising". The author said that the Appellant's involvement "goes far beyond mere attendance at these events".

Judge Moore's decision

15. As the Panel placed considerable reliance on Judge Moore's decision, it is convenient to refer to it at this stage. Judge Moore indicated that he had found the Appellant's evidence to be "vague and inconsistent" (para 23). He identified several examples of these inconsistencies in paras 24 and 25. At para 28 he commented that it was surprising that there was no witness statement from either of the Appellant's parents. He said he took into account the Appellant's immigration history and his failure to attend for interview in 2006:

> "29. … His explanation for this, that he travelled to London with somebody (unnamed) to visit a Temple, then lost the other person and couldn't get back because the other person had his train ticket, I do not find at all credible. On 28 November 2006 he was apprehended by the Home Office officers in a KFC and required to attend Electric House on 29 November 2006, however he again failed to attend for interview. The reason he gave was that he could not afford to pay for a lawyer, however this would not have prevented him from attending for interview as required…A letter from the Home Office dated March 2014 informed that Appellant that his case had been fully reviewed and the outcome was that he had no basis of stay in the UK, however the Appellant did not make the asylum claim that is the subject of this appeal until February 2017. When the Appellant was questioned about what he had been doing in the UK since his arrival in January 2006, his evidence was vague in the extreme."

16. Judge Moore's conclusion was:

> "31. In light of the above, and looking at all the evidence in the round, I am not satisfied, even to the lower standard of proof that the Appellant's account of his detention and torture by Q branch of the Indian police is true. I am not satisfied that he is wanted by the Indian authorities or that his parents have been continually harassed by the police during the last 12 years".

17. Judge Moore added that:

> "32 As regards the Appellant's sur place activities, very little was made of this in the hearing. The Appellant asserted in his asylum claim that he had attended around 10 demonstrations in the UK in front of Westminster and in front of 10 Downing Street in support of the TGTE, but said that he was not a member of the organisation, just a 'looker'. Further he did not know the leader of the group and did not have any photographs…As the ECO noted, the Appellant had not provided any evidence that his low level presence at these events has come to the attention of the authorities or that they have taken an interest in him as a result…Mr Muquit submitted that the significance of these activities was that they enhanced the risk of further evidence being put in the hands of the Indian authorities to show that the Appellant, as suspected, has LTTE sympathies. However since I have rejected the Appellant's assertion that he is of interest to the Indian authorities, that submission falls away."

The Panel's decision

18. The Panel noted that their starting point was the earlier determination of Judge Moore (para 23). They then set out passages from that earlier decision, including paras 29, 30 and 31 (see above). At para 26, the Panel summarised the applicable principles identified in **Devaseelan (Second Appeals – ECHR – Extra Territorial Effect)** [2002] UKIAT 00702 as follows:

> "(1) The first Adjudicator's determination should always be the starting point.
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> (2) Factors happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator.
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> (3) Fact happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator.
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> (4) Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection;
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> (5) Evidence of other facts – for example country evidence – may not suffer from the same concerns as to credibility but should be treated with caution.
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> (6) If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator…the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and makes his findings in line with that determination;
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> (7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him."

19. The Panel then turned to the new evidence provided in support of the asylum claim. As regards the affidavit from the Appellant's mother, the Panel noted that it would have been relevant at the time of Judge Moore's decision and that no explanation had been offered for the failure to provide a statement from her at that stage (paras 29 and 32). The Panel also observed that the contents of the affidavit were vague, containing few details about the alleged ongoing harassment by the police. They commented that: "this lack of detail is a matter of serious concern when considering the weight to be attached to this evidence" (para 32). In their next paragraph, the Panel highlighted an inconsistency between the account in his mother's affidavit and the Appellant's oral evidence. Finally on this topic, the Panel rejected the plausibility of the mother's statement in her affidavit that she feared the police would torture her and her husband too. The Panel noted that there had been no arrest or detention of any family member since the Appellant's departure to the UK.

20. The auto-rickshaw driver referred to an occasion when he had transported two men in plain clothes, who claimed to be police officers and who had asked him if he knew the Appellant. He said he had dropped them off at the end of the road where the Appellant's mother lived. The Panel noted that the statement was untested and considered that even taken at its highest did not support the Appellant's claim to be a person of interest to the Tamil Nadu authorities (para 36).

21. The Panel next considered the scarring report, deciding that, at its highest, it was evidence that the Appellant had been kicked and beaten by a third party; and that it was therefore evidence of an intentional assault, but not of torture or of who carried out the assault (para 38).

22. The Panel concluded that the report of Dr Smith could not be relied upon because of a significant inconsistency between the Appellant's account of his release from police detention in India and the apparent understanding of Dr Smith as to whether a bribe was paid (paras 40 – 43).

23. As regards the photos relating to *sur place* activities and the TGTE letter, the Panel said:

> "44. … Some of this evidence would have related to facts arising before the first tribunal hearing and there was no explanation provided to us as to why it was not before the tribunal given that the Appellant sought to rely on his *sur place* activities.
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> 45. In those circumstances we are not convinced about the reliability of this evidence which has come into existence only after the comments made in the first determination by Judge Moore."

24. The Panel's conclusion in respect of the asylum claim was expressed as follows:

> "47. Considering all our observations above we do not find there is any basis for us to depart from the determination of Judge Moore with regards to the Appellant's credibility in his claim for asylum and that decision remains unchallenged by the new evidence submitted as part of this hearing."

25. The Panel agreed that the medical material was new evidence that was relevant to the Article 3 ECHR claim and that there was an explanation as to why it was not put before Judge Moore, given the subsequent deterioration in the Appellant's condition (para 46). The Panel accepted that the evidence was probative of the Appellant's mental health (para 49) and summarised the contents (paras 49 – 53). In relation to the reports of Dr Dhumad and G Costa, the Panel said:

> "53. … It is a concern for us in assessing the weight that can be placed on this medical evidence that neither medical expert appears to have been made aware of the Appellant's engagement with the TGTE or to have been given the opportunity to give their opinion on the effect, if any of such involvement on their diagnosis and/or the Appellant generally."

26. The Panel noted that the Appellant's case was that if he was required to return to India he would commit suicide as that would be preferable to being returned and subject to torture at the hands of the Tamil Nadu police; and that this risk and the associated deterioration in his mental health was said to be tantamount to treatment that would breach Article 3 ECHR (para 55).

27. The Panel's articulation of the applicable legal test was as follows:

> "54. In order to rely on a breach of Article 3 ECHR arising from circumstances of ill health, the Appellant must '*raise a "prima facie case" of potential infringement of article 3. This means a case which, if not challenged or countered, would establish the infringement*…' He may be considered to have done so if the Appellant is able to '*demonstrate "substantial" grounds for*

believing that it is a "very exceptional" case because of a "real risk" of subjection to "inhuman" treatment'. Para 32 AM (Zimbabwe [2002] UKSC 17."

28. The Panel concluded that the Appellant had not shown that there were substantial grounds to fear that he would be subject to treatment in breach of Article 3 ECHR for reasons arising from his medical conditions (para 59). Their stated reasoning was as follows:

> "56. Whilst it is self-evident that a successful suicide attempt would amount to death, this risk is not absolute or certain. The Appellant has experienced the desire to end his life here in the UK and was, through his own actions, diverted from any permanent or fatal consequences. As a result of the event, the Appellant was provided with more formal support and we are of the opinion that the risk posed by the Appellant to himself, despite having previously attempted suicide on at least one occasion, will be managed here in the UK through his existing support structure. The same risk on transportation, will in our opinion also be adequately managed by the UK authorities to ensure that the Appellant does not harm himself.
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> 57. There is no evidence before us that the Appellant could not be prescribed the same medication on return to India, the County Policy Information Note India: Medical and healthcare provision Version 1.0 October 2020 lists the anti-depressant medication that the Appellant has been taking since diagnosis as being available. There is no evidence to suggest that his mother would be unable or unwilling to provide the protective care that his friends have been doing.
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> 58. In our opinion, once the Appellant returns to India and realises that any subjective fears which he had on return were not objectively justified; (ii) has the benefit of his family support from his mother; and (iii) accesses the medical treatment in India which has not been shown on any evidence to be inadequate, the risk of harm to himself will be greatly reduced if not removed."

29. The Panel went on to say that because they believed there would be adequate treatment and medical facilities and protective support from his mother available to the Appellant in India, they did not find that he had proved there would be an interference with his physical and moral integrity such as to amount to a breach of his Article 8 rights (para 61).

30. The Panel found that as the Appellants had no dependents or partner, there was no evidence of family life (para 63). In terms of his private life, they rejected the applicability of para 276ADE (vi) of the Immigration Rules, as they did not consider that there would be very significant obstacles to the Appellant's return to India. He had parents and siblings who had homes there; he spoke the language and was culturally familiar with life in India, having lived there for the majority of his life (para 66).

31. Lastly, the Panel considered and rejected the proposition that the Appellant should be given leave to remain outside of the Rules on the basis that removal would involve a disproportionate interference with his private life. The Panel noted that the Appellant had entered the country unlawfully; had failed to attend the scheduled asylum interview; had remained in the UK unlawfully for 16 years and had not been found to be a credible applicant; and that these matters weighed in support of

immigration control (para 69). The Panel noted his relationship with a friend and his limited involvement with the TGTE, observing that his limited private life could not be given much weight as it was established when he was unlawfully in the UK (para 70). The Appellant had spent the greater part of his life in India, still had family there and was in regular contact with his mother (para 73). The Panel concluded that the balance came down in favour of the public interest, given his long history of non-compliance with immigration control, his age and cultural and family ties in India and his limited private life in the UK (para 74).

Grounds of appeal

32. The Appellant's grounds of appeal are rather diffuse. However, we distil the essence of his grounds as follows:

(a) As set out in para 2 of the grounds, the Panel erred in failing to consider the evidence from his mother. (We will refer to this as "Ground 1".)

(b) The Panel erred in law in how they assessed the fresh claim relating to his *sur place* activities. The Panel failed to give substantive consideration to this evidence, simply rejecting it on the basis that some of it would have been available for the earlier appeal (paras 4 – 5 and 7). Furthermore, the Panel applied the wrong standard of proof in saying they were "not convinced" by the new evidence (para 6); and in particular failed to address the evidence of activities that post-dated Judge Moore's decision (para 6). (We refer to this as "Ground 2")

(c) As set out in para 9 of the grounds, the Panel erred in law in rejecting the clinical findings of Dr Dhumad as unsustainable ("Ground 3")

(d) The Panel failed to mention or apply the case-law relating to suicide risk relied upon by the Appellant, specifically **J v SSHD** [2005] EWCA Civ 629; **AJ (Liberia) v SSHD** [2006] EWCA 1736; and **Y & Z (Sri Lanka)** [2009] EWCA Civ 362 (paras 11 and 12). ("Ground 4")

(e) The Panel erred in law in finding that the Appellant's mental health situation did not meet the **AM (Zimbabwe)** test (para 10). In particular, the Panel erred in failing to engage with the Appellant's subjective fear of persecution from the authorities upon his return to India; their reasoning was largely speculative and failed to take account of the fact that there would be a break in his care at the point of removal (paras 11 and 12). ("Ground 5").

33. Mr Martin elaborated upon these grounds in his oral submissions to us. He said that the photographs provided clear evidence that the Appellant had been involved in *sur place* activities and that this underscored the need for the Panel to grapple directly with this evidence. Much of the new evidence post-dated Judge Moore's decision as so was not subject to guideline (4) in **Devaseelan**. He said that the new evidence from the

Appellant's mother and the auto-rickshaw driver needed to be placed in the full context of the Appellant's activities with the TGTE in the UK.

34. Mr Martin emphasised Dr Dhumad's view that the Appellant's mental health would deteriorate prior to removal. He also submitted that on any view there would be a period of time after the Appellant's return to India before he came to realise that his subjective fears were unfounded, and the Panel's reasoning had failed to appreciate or address this.

35. Mr Lindsay took issue with each of the grounds of appeal. He said that there was no evidence before the Panel that the Appellant's sur place activities were known to and/or viewed adversely by the Indian authorities. Accordingly, there was no evidence that he was at any real risk of mistreatment or serious harm from the Indian authorities, if removed. He said that Mr Smith's report provided no direct support for the Appellant's case in that regard. In the circumstances, the Panel was entitled to find that no reason had been shown to depart from Judge Moore's decision.

36. As regards the Article 3 claim, Mr Lindsay said that the medical experts based their opinions, including on the risk of suicide, on the Appellant's rejected account of detention and mistreatment in India and that, in turn, this inevitably affected the weight to be attached to them. In terms of the case put forward regarding the Appellant's subjective fears, he said there was no supporting basis identified, as there was no suggestion that the Appellant was delusional and therefore he must know that his account was untrue. He submitted that the Panel had applied the correct legal test and he emphasised that it was a high threshold to meet.

Conclusions

Grounds 1 and 2

37. The contentions we have termed Grounds 1 and 2 both relate to the new evidence regarding the asylum claim.

38. Ground 1 is hopeless. The Panel did consider the affidavit from the Appellant's mother and identified legitimate reasons for rejecting the cogency of this evidence, as they set out in paras 29 and 32 – 34 (our para 19 above).

39. As regards Ground 2, we reject the proposition that the Panel applied the wrong test in para 45 of its decision. The Panel had already listed the issues that it had to resolve in para 15, setting out the burden and standard of proof in each instance. In relation to the asylum claim the Panel correctly recognised that the question was "whether or not the Appellant can prove that there is a real risk or a reasonable degree of likelihood of him suffering persecution in India for one of the reasons cited in the Refugee Convention". We do not consider that the subsequent reference in para 45 to not being "convinced about the reliability of this evidence" indicates that the Panel was departing from the applicable test,

which it had already set out, as opposed to describing their particular concern about this material. Of course, in so far as the new evidence related to events that pre-dated Judge Moore's decision, **Devaseelan** required that it be treated "with the greatest circumspection" and the phraseology used by the Panel is consistent with this.

40. Part of the evidence relating to *sur place* activities did pre-date Judge Moore's decision. A number of the photographs were from a demonstration in February 2018 and the letter from the leader of the TGTE was dated 11 January 2018. As we have set out in our para 23 above, the Panel noted at para 44 of the decision that no explanation had been provided for the failure to rely on this material in the previous appeal. In the circumstances the Panel was entitled to treat it with "the greatest circumspection". We also observe that there were significant inconsistencies between the role that the Appellant described to Judge Moore (that he was a "looker" at TGTE demonstrations) and the account of his involvement contained in the January 2018 letter (our paras 14(e) and 17 above).

41. However, we accept that there is force in the point that the Panel should have engaged in a fuller analysis of the material, particularly that which post-dated Judge Moore's decision. This was only dealt with briefly in paras 44 - 55, as our earlier references to the Panel's decision indicate.

42. That said, we do not consider that this error was material. In his oral submissions, Mr Martin rightly accepted that to succeed on this part of the appeal he would also have to show that if the Appellant was removed to India it was reasonably likely that he would be the subject of adverse interest from the Indian authorities and at risk of treatment that would cross the Article 3 threshold. We do not consider that there was any or any sufficient evidence to that effect. In para 29 of his decision, Judge Moore had rejected the Appellant's case that he was wanted by the Indian authorities and that his parents had been repeatedly harassed by them. The evidence from the Appellant's mother was legitimately rejected. The evidence of the auto-rickshaw driver, even when taken at its highest by the Panel, did not take the matter very far in itself, even if coupled with the Appellant's activities in the UK. The Appellant does not challenge the Panel's rejection of Dr Smith's report (which, in any event, was of limited assistance on this point, as Mr Lindsay highlighted). In short, there was no credible evidence that the Indian authorities were aware of the Appellant's *sur place* activities, or that they took an adverse view of this.

43. In the circumstances, it is clear that the Appellant was not able to show that there was a real risk or a reasonable degree of likelihood of him suffering persecution in India for a Refugee Convention reason or of him suffering serious harm if returned there.

44. We mention for completeness that although the grant of permission referred to the guidance given by the Upper Tribunal in **KK and RS (Sur place activities, risk) Sri Lanka (CG)** [2021] UKUT 130 (IAC), Mr Martin

did not place reliance on this, accepting that the guidance related to the situation in Sri Lanka and that it did not address the position in India.

45. Accordingly, we reject these grounds of appeal.

Grounds 3 - 5

46. The remaining grounds of appeal concern the Panel's rejection of the Article 3 ECHR claimed based on the Appellant's mental health and risk of suicide.

47. We begin with the legal test (an issued we have termed "Ground 4"). One of the complaints made in para 11 of the Appellant's grounds is that the case cited by the Panel, **AM (Zimbabwe)**, concerned physical health rather than mental health and suicide risk. Whilst this is factually correct, the point has no merit. It is plain from the terms of Lord Wilson JSC's judgment, including his discussion of the Grand Chamber's decision in **Paposhvili v Belgium** [2016] ECHR 113, that the test expressed was intended to be of general application in Article 3 health care cases. If additional confirmation be needed, the reasoning in **AM (Zimbabwe)** (at that stage, the Court of Appeal's decision, prior to the case going to the Supreme Court) was relied upon by the Upper Tribunal in relation to mental health cases in **AXB (Art 3 health: obligations; suicide) Jamaica** [2019] UKUT 397.

48. The Panel correctly cited a passage from para 32 of Lord Wilson's judgment in **AM (Zimbabwe)** (our para 27 above) setting out what an applicant was required to show in order to rely on a breach of Article 3. It may have been helpful if the Panel had also set out the Supreme Court's identification of the inhuman treatment capable of reaching the Article 3 threshold in this context, namely where the applicant would face a real risk on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in their life expectancy (as discussed in paras 29 – 30 of Lord Wilson's judgment). However, as the Panel in this case focused upon the risk of suicide, which would constitute a significant reduction in life expectancy, they clearly adopted an approach consistent with this test.

49. As we have indicated, the other aspect of the Ground 4 complaint is that the Panel failed to refer to a number of earlier Article 3 cases specifically concerning suicide risk consequent upon removal. These cases do not impact upon the over-arching **AM (Zimbabwe)** test, as opposed to providing some additional assistance as to the application of the Article 3 test in the specific context of suicide risk. However, as we explain below, it does not appear to us that the Panel failed to follow this case-law in any material way.

50. In **J v SSHD** [2005] EWCA Civ 629 Lord Dyson, giving the judgment of the court, identified five principles. The fourth was that an Article 3 claim could succeed in principle in a suicide case. The next principle he identified was:

> "30. Fifthly, in deciding whether there is a real risk of a breach of article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against there being a real risk that the removal will be in breach of article 3.
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> 31. Sixthly, a further question of considerable relevance is whether the removing and/or the receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that too will weigh heavily against an applicant's claim that removal will violate his or her article 3 rights."

51. In the present case, the Appellant was unable to rely on objectively well-founded fears, as the credibility of his account was rejected. The question of subjective fears was considered by Sedley LJ in **Y (Sri Lanka) v SSHD** [2009] EWCA Civ 362. He said:

> "15. … The corollary of the final sentence [of para 30 in **J**] is that in the absence of an objective foundation for the fear some independent basis for it must be established if weight is to be given to it. Such an independent basis may lie in trauma inflicted in the past on the appellant in (or, as here, by) the receiving state: someone who has been tortured and raped by his or her captors may be terrified of returning to the place where it happened…
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> 16. One can accordingly add to the fifth principle in **J** that what may nevertheless be of equal importance is whether any genuine fear which the appellant may establish, albeit without an objective foundation, is such as to create a risk of suicide if there is an enforced return."

52. As regards the alleged rejection of Dr Dhumad's clinical findings and expert opinion (the contention we have termed "Ground 3"), we do not consider that this is a fair characterisation of the Panel's approach. The Panel's reasoning does not indicate a wholesale rejection of Dr Dhumad's report. However, there were factors which went to its weight. In para 53 of the decision, the Panel quite properly noted that their reports indicated that neither Dr Dhumad nor G Costa had been made aware of the Appellant's *sur place* activities. This was significant because both had referred to the Appellant avoiding reminders of the torture he had undergone and isolating himself and not going out; and neither had referred to his involvement with the TGTE. The Panel was entitled to take this into account. Furthermore, it is clear that both Dr Dhumad and G Costa had based their opinions on the Appellant's account of detention and mistreatment by the Indian authorities and the fears that this had given rise to; yet the credibility of that account had been rejected now by two First-tier Tribunals. Again, the Panel was perfectly entitled to take this into account in deciding the weight it attached to the Appellant's medical evidence.

53. In terms of the contentions that we have referred to as "Ground 5", we note that no issue is taken with:

(i) The Panel's finding at para 56 that the risk of the Appellant harming himself on transportation to India would be adequately managed by the UK authorities;

(ii) The Panel's finding at para 57 that the Appellant could be prescribed the same anti-depressant medication in India as he was currently receiving;

(iii) The Panel's finding at para 58 that he would have the benefit of family support from his mother in India; and

(iv) The Panel's finding at para 58 that he would be able to access medical treatment in India that has not been shown to be inadequate.

54. In so far as the Appellant challenges the conclusion at para 56 that whilst he was still in the UK, but aware of his pending removal, the risks would be managed by his existing support structure, we consider this was a conclusion that the Panel was entitled to draw from its assessment of the evidence. As we have already explained, the Panel was entitled to assess the weight that they placed on Dr Dhumad's opinion (of a significant deterioration in the Appellant's mental health) in light of the factors we have referred to. Furthermore, the Panel was entitled to take into account the support structure which the Appellant had in the UK, and which had managed his risk thus far. Beyond that, the ground of appeal is no more than the expression of disagreement with the Panel's conclusion in this regard and we can detect no error of law.

55. Furthermore, we consider that the Panel's reasoning in para 58 shows that subjective fears were taken into account. Whether or not the Appellant had established an independent basis for that fear (in line with Sedley LJ's approach in **Y (Sri Lanka)**), rather than rejecting that proposition, the Panel proceeded to address the appeal on the assumed basis that subjective fears existed ("once the Appellant returns to India and realises that any subjective fears which he had on return…"). The Panel then identified the three reasons why they did not consider that the requisite risk of harm had been shown. As we have already noted, there is no challenge to two of those reasons. Whilst the reasoning could have been fuller, the Panel were plainly aware that the Appellant would not realise immediately after his return to India that his (assumed) fears were not borne out and we consider that there is nothing to indicate that they did not take this into account. No error of law is disclosed by para 58. Again, the Appellant's objection is really no more than the expression of disagreement with the conclusions that were reached.

56. For these reasons, we consider that all of the grounds of appeal relating to the Panel's rejection of the Article 3 claim are unfounded.

57. Accordingly, for all the reasons given above, we are satisfied that the Panel did not materially err in law.

58. We therefore dismiss the appeal.

Decision

The decision of the First-tier Tribunal did not involve the making of any error of law sufficient to require it to be set aside. We dismiss the appellant's appeal to the Upper Tribunal.

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

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

Signed:
Mrs Justice Heather Williams Date 17 January 2022
The Hon. Mrs Justice Heather Williams
sitting as an Upper Tribunal Judge

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**