IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005832
First-tier Tribunal No:
IA/09084/2021
PA/52541/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 April 2023

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE BLACK

Between

S F H S
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Gilbert, Counsel instructed by Duncan Lewis
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 28 March 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant and/or any member of his family 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. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge J G Raymond ("the Judge") dated 1 August 2022 ("the Decision") dismissing the Appellant's appeal on all grounds against the Respondent's decision dated 30 June 2020. By her decision, the Respondent refused the Appellant's protection and human rights claims. This was the Appellant's second appeal on protection and human rights grounds, the first having been dismissed by First-tier Tribunal Judge Bowler by a decision promulgated on 31 May 2019 and upheld by this Tribunal. The Appellant made further submissions on 24 February 2020 refused by the decision under appeal but treated by the Respondent as a fresh claim.

2. The Appellant is a national of Pakistan. He came to the UK in 2012. He first claimed asylum in 2018. The core of his claim is that he would be at risk on return to Pakistan as a Shia Muslim. He claims that, in 2008, his father was murdered by terrorists on account of being a Shia Muslim. It is accepted that his father was killed in 2008. The killers of the Appellant's father were prosecuted but later acquitted. That too was accepted by Judge Bowler. However, Judge Bowler found that the Appellant would not be at risk on return to Pakistan. He did not accept the Appellant's claim to have a well-founded fear of persecution not least because he found that the Appellant's other family members continued to live in Pakistan without incident and that the Appellant had himself remained in Pakistan for some time after his father was killed. Judge Bowler also pointed out that since the Appellant's father's killers had been acquitted, the killers would no longer be interested in the Appellant. One of the killers had since died. The Appellant says that he will now be at risk on return as he has petitioned the Supreme Court in Pakistan to reopen the case.

3. The Appellant also claims to suffer from serious mental health issues. He therefore claims that he cannot return to Pakistan as to do so would expose him to a real risk of a breach of Article 3 ECHR.

4. The Judge took as a starting point the findings made by Judge Bowler as he was bound to do following the guidance in Devaseelan. However, based on the same evidence as was before Judge Bowler, he concluded that the prosecution of the killers of the Appellant's father had never taken place. It had been discontinued. He therefore found that the petition to the Supreme Court was not a genuine document and that the Appellant could not be at risk from his father's killers. The Judge also rejected the claim based on the Appellant's mental health.

5. The Appellant appeals on seven grounds as follows:

Ground one: the Judge made a mistake of fact in his finding that the trial of the killers of the Appellant's father had never taken place. That had led to an error of law on the basis that the Judge had misunderstood the evidence and therefore either took into account irrelevant considerations or had failed to take into account relevant ones.

Ground two: linked to the first ground, there was evidence that the trial had taken place which the Appellant produced with the grounds of appeal to this Tribunal but had not been provided earlier as the Appellant was not alerted to the Judge's intention to disagree with the previous Judge's finding. The Appellant sought to produce that evidence by way of an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Ground three: also linked with the first and second grounds the Appellant submits that the Judge misdirected himself in relation to the extent to which he could revisit earlier findings applying the Devaseelan guidance.

Ground four: also linked to the first to third grounds, the Appellant asserts that it was procedurally unfair for the Judge "to adjudicate on a new argument developed by itself …which had never been advanced by the unrepresented Respondent and was not raised by [the Judge]".

Ground five: separately from grounds one to four, the Appellant submits that the Judge's findings about the petition to the Supreme Court were unsupported by the evidence in various respects.

Ground six: the Appellant says that if the genuineness of the Supreme Court petition were at issue, the Respondent could and should have sought to verify that document.

Ground seven: the Appellant says that, when considering his credibility, the Judge failed to have regard to the medical evidence concerning his mental health and the impact of his vulnerability on the evidence he could give.

6. Permission to appeal was refused by First-tier Tribunal Judge Cruthers on 17 November 2022 on the basis that the grounds did not identify any arguable error of law and amounted to a mere disagreement with the Decision.

7. Following renewal of the application for permission to appeal to this Tribunal, permission was granted by Upper Tribunal Judge Pickup on 16 January 2023 in the following terms so far as relevant:

> "… 2. The renewed grounds seek to rely on evidence that was not placed before the First-tier Tribunal as to whether there was a murder trial in Pakistan (in which the accused were acquitted).

It is argued that the judge was wrong to depart from the finding of a previous Tribunal in 2019 that there was such a trial in 2009, when that departure was not based on new evidence. Overlapping arguments are that the First-tier Tribunal was procedurally unfair in that the judge developed a new issue and concluding that there was no criminal trial.

3. The remaining grounds take minor points of marginal relevance and which amount, in essence, to a disagreement with the findings and the Judge's approach.

4. Given the centrality of the issue as to the 2009 murder trial and the conclusion that the trial was a fantasy and never took place, [80] & [148], it is arguable that the judge may have confused the documentation and the DVR as to which FIR proceeded to trial (FIR 425/21 was dropped but FIR 423/08 was prosecuted to trial), and thereby made a material error of fact undermining the other credibility findings and the outcome of the appeal. Whilst it is not usually a valid ground that there was evidence to confirm the matter but which was not adduced, it is arguable that there was procedural unfairness in raising and addressing an issue not challenged by the respondent and which had been the subject of a previous finding of fact. Whether there was sufficient to depart from that 2019 finding is a matter that may need further consideration, but if the judge raised an issue that the appellant was entitled to consider as settled, it may also be appropriate to permit the appellant to adduce further evidence.

5. Whilst permission is granted, the appellant would be best advised to simplify his grounds and pursue only that which is determinative of the outcome of the appeal and not merely criticism of approach.

6. For the reasons explained above, an arguable material error of law is disclosed by the grounds."

8. The Respondent filed a Rule 24 Reply dated 21 February 2023 seeking to uphold the Decision. She submitted that, even if there were an error made out by the Appellant's first ground, that error was not material, and the Judge was entitled to reach the findings he had on the evidence.

9. The matter comes before us to determine whether the Decision contains an error of law. If we conclude that it does, we may set aside the Decision in whole or in part. If we set aside the Decision, we must either re-make the decision ourselves or remit the appeal to the First-tier Tribunal to do so.

10. We had before us several bundles provided by the Appellant as well as a core bundle of documents relating to the appeal to this Tribunal. We refer below to certain documents in the first bundle before the First-tier Tribunal ([AB/xx]), the third bundle also before the First-tier

Tribunal ([AB3/xx]), the Respondent's bundle before the First-tier Tribunal ([RB/xx]) and the bundle of documents submitted with the rule 15(2A) application ([ABS]).

11. Having heard submissions from Mr Gilbert and Mr Tufan (who accepted that there was an error established by the Appellant's first ground), we found that grounds one to four were made out and that the error disclosed was material for those reasons. We did not need to reach any view on the remaining grounds.

12. We agreed that it was appropriate to set aside the Decision as a whole in consequence of our conclusion on the first four grounds. Since one of those involved procedural unfairness, we also agreed that it was appropriate to remit the appeal to the First-tier Tribunal. We indicated that we would provide our reasons in writing which we now turn to do.

DISCUSSION AND CONCLUSIONS

Ground one

13. The focus of the first ground is on [74], [79] and [148] of the Decision as follows:

> "74. The FIR concerning the killing of the appellant's father, No 423/11 of 08.08.08, has been verified by the respondent in a DVR dated 31.07.18 (SB/188-190), with the police official spoken to indicating that the three arrested persons were [KA, MR] and [KQ], the matter having been referred, (referral letter to the relevant court being the *'Challan'* and the Petition refers to local police having referred complete '*challan'* against the accused to the trial court), but this is clearly wrong as the evidence of the appellant is to the contrary, and the FIR itself only declares an intention (for reasons that are unsaid as regards [KQ]) is to lodge a report against all three of the preceding, including [KQ] – *'I want to lodge report for injuring thereby killing…'.*
>
> …
>
> 79.More perplexing however, is that the Document Verification Report (DVR) submitted by the respondent, which accepted the FIR of 08.08.08 as regards the killing of the father of the appellant as genuine, quotes the police source for this information as observing that – *'The second Challan was sent to the court on 26/10/2008 under reference number 425/21 and an out of court settlement and reconciliation was reached between both parties and the charges were dropped and the case was filed away'.*
>
> …
>
> 148. I am confirmed in that conclusion, of treating the petition as a gross and cynical fabrication, because of the signal fact, which the previous Judge was somehow, and incomprehensibly, not led

> to appreciate, of the FIR concerning the killing of the father of the appellant in 2008, and verified by the respondent in a DVR, informing that there was never a criminal trial, (which must follow upon the charges being '*dropped and the case filed away',)* and that the matter was settled out of court and by reconciliation [§79; B3/189)]."

14. The Appellant submits that the Judge has confused the two FIRs and has therefore wrongly concluded that there never was a criminal trial. The first FIR is numbered 423/08 ("the First FIR") ([AB/238-241]). The second is numbered 425/01 ("the Second FIR").

15. The previous Judge, Judge Bowler, made findings about the First FIR and the Second FIR in the previous decision which appears at [RB/97-116]. At [53] and [54] of that decision, Judge Bowler said this:

> "53. There are two documents at D48 and D53 which state that they are FIR No 423 from [xx] Police Station [xx]. The wording is different. This has not been explained. I recognise that the Respondent has verified that the FIR provided to them is genuine, but neither party has identified which one was verified.
>
> 54. However, both versions of the FIR state that the witnesses to the Appellant's father's shooting alleged that those accused of his shooting belong to the SSP. This therefore supports the contention, consistent with the background evidence that the SSP were blamed for the Appellant's father's murder at the time."

16. The Respondent's position at that time is recorded at [23(e)] of the previous decision. That accepts that the Appellant's father was killed but did not accept that the document which was accepted as genuine showed that the SSP was responsible. Her position has not changed. Notwithstanding the confusion regarding the differing FIRs, Judge Bowler accepted at [43(d)] of the previous decision that those accused of killing the Appellant's father were tried but acquitted.

17. Mr Gilbert took us to the underlying documents which were before the Judge and which were relied upon in this regard. In particular, we were shown the Respondent's document verification report (DVR) which appears at [AB3/185-187] and reads as follows so far as relevant:

> "I called the record keeper of [xx] Police Station and provided him the FIR number and date. The record keeper after checking the record confirmed that provided date & details of FIR number 243/08 does match to the details in the records of [xx] Police Station and the dates of filing and the crimes committed are same in police record, he confirmed that the copy of FIR No 243/08 dated 08/08/2008 of [xx] provided by the applicant is **genuine**.

> He stated that the Challan *(referral letter to the relevant court)* was initially sent on 13/08/2008 and three persons were the main accused who were arrested in this case
>
> 1. KA
> 2. MR
> 3. KQ
>
> The second Challan was sent to the court on 26/10/2008 under reference number 425/21 and an out of court settlement and reconciliation was reached between both parties and the charges were dropped and the case was filed away. In light of above information the copy of FIR No 243/08 dated 08/08/2008 of [xx] provided by the applicant is verified as **genuine**."

18. As Mr Tufan pointed out, there has been a transposition of numbers in the DVR. The First FIR is numbered "423" and not "243". As Judge Bowler pointed out, there appear to be two FIRs numbered "423" which are different in content. However, none of that makes any difference to the substance of the Appellant's case. As Judge Bowler found, both are consistent with the Appellant's case that his father was shot, and that those accused of his killing were tried.

19. Even the Judge's findings regarding the First FIR and the Second FIR are inconsistent with his later finding that no trial took place. As he says at [74] of the Decision, the FIR which refers to the killing of the Appellant's father is the First FIR and is numbered "423". As he says at [79] of the Decision, the FIR which is referred to as dropped is that numbered "425" and is therefore the Second FIR. We could not find that in the bundles, but nothing turns on that as the charges therein were dropped. As it is, though, it is evident even on the face of the Decision itself, that the Judge has made a mistake when assessing the evidence and when reaching the conclusion at [80] of the Decision that "there was never any trial".

20. As we have already noted, the error of fact is said to have led to an error of law on the basis either that the Judge took into account irrelevant considerations, failed to take into account relevant considerations or reached a finding which was inconsistent with the evidence. On whatever basis the Appellant puts this ground, we are satisfied that an error has been disclosed. Mr Tufan accepted as much.

21. The issue then becomes one of materiality. Before turning to that issue, we deal briefly with grounds two to four which are linked to the first ground.

Grounds 2 to 4

22. The second ground is really an alternative way of pleading the first ground. The Appellant has produced by way of a Rule 15(2A) application the trial judgment relating to the First FIR. That is at [ABS/34] onwards (digital numbering). The Appellant has explained that he did not produce this earlier as he did not realise that he needed to. Given the finding of Judge Bowler and that the Respondent had not changed her position, he did not consider the fact of the trial to be at issue. We accept that is the position.

23. That then leads us to the fourth ground that there has been procedural unfairness. The fact of the trial of those accused of the Appellant's father's killing was not at issue between the two parties. The Appellant had a finding in his favour that his father had been killed and that those accused of the killing had been tried but acquitted. He submits that if the Judge intended to overturn that finding, he needed to alert the parties to this. As we agreed with Mr Gilbert, either the Judge needed to put the parties on notice of his concerns in the course of the hearing or if, as often happens, he did not appreciate the point he has raised until after the hearing, he ought to have sought written submissions on that point or reconvened a further hearing. As it is, in the circumstances of this case, if he had taken that step, he might have avoided the error of fact which has led to the error of law established by the first ground.

24. The fact of having reversed the earlier finding of Judge Bowler is the subject of the Appellant's third ground. He says that the Judge has wrongly applied the Devaseelan guidance as it is said that "an assessment of the matters that were before the first Adjudicator should simply be regarded as unquestioned". Up to a point, that is correct. However, as we understood Mr Gilbert to accept, if the Judge had in fact been right and it was Judge Bowler who had misunderstood the evidence, it would have been open to the Judge on this occasion to reach a contrary finding, so long as he put the parties on notice of his intention to do so.

25. As it is, and as we have already concluded, the error was that of the Judge and he was in error when he reached the finding contrary to that of the Judge Bowler. That arises not from any misapplication of the Devaseelan guidance but due to the Judge's misunderstanding of the evidence. The way in which he dealt with this issue was moreover procedurally unfair to the Appellant.

Materiality of the Error on Grounds 1 to 4 and Next Steps

26. In this regard, Mr Gilbert drew our attention to [80] and [150] of the Decision which read as follows:

> "80. Quite apart from the shoddy and uncertain qualities attaching to the Petition set out in the preceding and therefore calling into doubt any weight that could attach to it, it must further seem that

> it would be an empty exercise in any case as there never was any trial.
>
> …
>
> 150. While I have taken the findings of previous Judge as a starting point in the assessment of the present renewed asylum appeal upon fresh evidence. I find that this key piece of evidence, upon which the basis of the petition to the Supreme Court becomes a fantasy, and completely falls away, enables me to draw my own conclusions upon the totality of the evidence, without being unduly bound by the conclusions of the previous Judge, who did not have all the evidence that has come before me in this appeal, and not least of which is the petition itself."

27. What is said at [150] of the Decision is determinative of the materiality of the error which we have found to be made out. The petition is at the core of the Appellant's fresh claim. As the Judge himself pointed out, his finding that the trial to which that relates never took place completely undermines the petition. Whilst another Judge may still conclude that the Supreme Court petition is not genuine, that depends on a proper consideration of all the evidence in that regard. Moreover, the Judge's incorrect finding in relation to the trial which has led him at least in part to the conclusion that the Supreme Court petition is not genuine, impacts on the Judge's view of the Appellant's overall credibility.

28. Mr Tufan, having sought the Tribunal's initial views on materiality, did not seek to persuade us that the error was not material.

29. In light of our conclusion about the materiality and centrality of the error disclosed by the first four grounds, we do not need to deal with the other three grounds.

30. Both representatives agreed that the Decision should be set aside in its entirety. Both also agreed that the appeal should be remitted in consequence of the error. We have found that the error disclosed involves procedural unfairness and has impacted on all the findings made by the Judge. The appeal will therefore need to be reconsidered entirely afresh. It is therefore appropriate to remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Raymond (or Judge Bowler who dismissed the Appellant's previous appeal).

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge J G Raymond dated 1 August 2022 contains an error of law. We set aside the Decision and remit the appeal to the First-tier Tribunal for re-hearing before a Judge

other than Judge J G Raymond or Judge Bowler (who dismissed the Appellant's previous appeal).

L K Smith

Upper Tribunal Judge Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

30 March 2023