IAC-AH-DN-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/02027/2013

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice	**Decision & Reasons Promulgated**
On 1 June 2015	**On 18 June 2015**

Before

UPPER TRIBUNAL JUDGE COKER
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M M (IRAQ)
(ANONYMITY DIRECTION MADE)

Respondent/Claimant

Representation:
For the Appellant: Mr E Tufan, Specialist Appeals Team
For the Respondent/Claimant: Mr Collins, Counsel instructed by Caulker & Co Solicitors

DECISION AND REASONS

1. Permission to appeal was granted by First-tier Tribunal Judge Fisher on 27 March 2015 for the following reasons:

(1) Permission is sought, in time, to appeal against the decision of First-tier Tribunal Judge McWilliam, promulgated on 3 March 2015, in which she allowed the [claimant's] appeal against a decision to make a deportation order against him, following his conviction for an offence of rape, for which he was sentenced to six years' imprisonment.

(2) The grounds seeking permission assert the judge erred in law by stating that the [claimant] had previously been given leave to remain under Article 3 of the ECHR when, in fact, he had been granted discretionary leave due to the prevailing conditions in Iraq. Furthermore, it is said that the judge failed to adequately resolve the conflict in his evidence concerning the role he played in the Ba'ath Party.

(3) There is a tension in the decision concerning the [claimant's] previous leave. In paragraph 4, the judge observed that claimant had been granted periods of discretionary leave due to the country's situation. However, at paragraph 33, she stated that the [claimant] had been granted leave under Articles 2 and 3 of the ECHR because of his claimed involvement in the Ba'ath Party and risk on return from the Mahdi Army. Although she found the [claimant] an unimpressive witness because of the change in his account to distance himself from the Ba'ath Party, it is argued the judge failed to adequately resolve the conflict in his evidence. His role as set out in paragraph 35 of the decision is vastly different from his oral evidence as recorded at paragraph 24; that he was merely a cook.

(4) In these circumstances, it is argued the judge erred in law, so I grant permission to appeal. All of the grounds raised are arguable.

Background

2. The claimant, born 25 December 1958, entered the UK on 13 December 2004 after being granted a visit visa. On 26 May 2005 he applied for leave to remain in order to access private medical treatment, and the application was refused on 17 June 2005. He appealed this decision, and his appeal was allowed on 25 August 2005. Leave to remain was issued on 19 September 2005 until 31 December 2005. On 24 February 2006 he was granted further leave to access medical treatment until 13 June 2006. And leave was granted again on the same basis until 23 March 2007. On 21 March 2007 he applied for an EEA residence card as the dependant of his brother, who was a national of Denmark. His application was refused on 15 October 2007.

3. On 16 January 2008, the claimant was issued with a notice to a person liable for removal. On 3 March 2008 the claimant applied for asylum. His core claim, as summarised in paragraphs 8 to 9 of Judge McWilliams' decision, was that he was a well-known member of the Ba'ath Party in the Al-Doora area of Baghdad. He had been a member of the Ba'ath Party since 1989. He was trained and had to attend seminars in relation to the use of firearms and the capture and detention of those wanted by the party. He was responsible to Dr Iyad Al-Mesh Hadni who was in charge of the whole area. His rank was Moayed-Nassseer and his main task was to control events on the streets and to capture and bring those who were wanted by the party for prosecution. Between 1995 and 1996 he had been given a list of names and was responsible for apprehending the individuals named on the list. In that period he captured a group from the Mahdi Army. One of those captured was an Ameer, which is a prince or someone who is responsible for a certain area. This person's name was Abu (Hadeed), and his followers knew the claimant by name and could identify him. He frequently received threats (and made some telephone

calls) from the Mahdi Army and the Salafi Al-Jihad Al-Rafidayn Group ("SAR Group") had said that one day they would take revenge.

4. The claimant said he fled to Syria in 2003, and that he returned to Iraq at least once in 2004. On 15 March 2004 a warrant was issued by the Ministry of Justice Iraq for his arrest. He decided to come to the UK and he entered on a valid visit visa in December 2003. He had returned to Syria in 2007 in order to relocate his family to a secure location because he had received threats in relation to them. Since the fall of the regime members of the Mahdi Army had taken over the judiciary. Colleagues that he had worked with were being killed. In 2006 he had received a note from the Mahdi Army threatening his life. The note was delivered to his house in Iraq, and subsequently sent to his wife in Syria by an uncle. As a Ba'ath Party member he had certain privileges and he had done well for himself in Iraq, owning three houses. These three houses had now been destroyed.

5. The claimant's asylum claim was considered by a specialist group. The decision-maker who responded to his claim for asylum in a decision of 9 September 2011 indicated that his account was considered to be generally credible, save for his claim that he was forcibly recruited into the Ba'ath Party. It was accepted that he had received threats from the Mahdi Army since he had left Iraq in 2003, and that he remained of ongoing adverse interest to the Mahdi Army.

6. On the basis of his account of his activities for the Ba'ath Party, the Secretary of State decided that he had committed crimes against humanity, thereby excluding him from protection under the Refugee Convention. So his claim was certified under Section 55 of the Immigration, Asylum and Nationality Act 2006. It followed that he was also excluded from the grant of humanitarian protection pursuant to paragraph 339D of the Rules. The claimant challenged this decision by judicial review, but the application was refused on 9 May 2012, the judge having found that his case was totally without merit.

7. On account of the Article 3 risk he faced from the Mahdi Army, the claimant was granted discretionary leave until 8 March 2012. He made a further application for discretionary leave on 22 February 2012, and this was granted until 8 September 2012.

8. The claimant applied for an extension of discretionary leave on 20 August 2012. While this application was pending, on 10 September 2012 the claimant was convicted of rape and sentenced to six years' imprisonment. Following this, he was served with a notice of liability to deportation on 19th October 2012. The Secretary of State considered representations, but went on to make a deportation order pursuant to Section 32(5) of the UK Borders Act 2007 on 11 September 2013. At the same time, the claimant's application for further discretionary leave to remain was refused. The Secretary of State asserted that his previous links to the Ba'ath Party would not put the claimant at a continued threat should he return. The Secretary of State relied on background evidence to the effect that being targeted solely with reference to former Ba'athist

association was unlikely, and that such risks were minimal due to the extensive de-Ba'athification process; and that former membership of the Ba'ath Party was not a determining factor when it came to the question of whether or not the person would be targeted. The influence of the Mahdi Army had waned significantly since 2007/2008, and they had become more splendid and more political; they rarely used violence openly. The threats that the claimant had received were made when the Mahdi Army was at the height of its power, and with its decline, the threat level to the claimant had decreased to the point where he was not at a real risk of serious harm on return to Baghdad. It was this decision that was the basis of the appeal before the First-tier Tribunal.

The Hearing Before, and the Decision of, the First-tier Tribunal

9. At the hearing in the First-tier Tribunal, which took place on 3 February 2015, the claimant adopted as his evidence-in-chief a witness statement dated 25 October 2014 in which he said at paragraph 24 that the interpreter used in his case "gave wrong interpretation", as he was from Yemen. The SAJR Group (about which the 2013 decision-maker had not been able to find any evidence as to existence) had become DASH–Isis, and he was wanted by these people to kill him. These people believed that he was an informant against them to the Ba'ath Party.

10. In his oral evidence, he said that he was just a cook for the Ba'ath Party, and his duties were making meals. There was a problem with the interpretation during his asylum interview. The interpreter was from Yemen and not Iraq. He denied saying in interview that he was part of a militia which went out and arrested people. His role was minimal.

11. In her subsequent decision, the judge addressed the claimant's change of case at paragraph [33].

> "I find that the [claimant] is an unimpressive witness because he has changed his account today in order to distance himself from the Ba'ath Party. I do not accept the [claimant's] account that there was a problem during the interview with the interpreter. He has not raised this concern before. I prefer the detailed and clearer account that he gave an accurate account of his activities during his interview for asylum. On 9 September 2011 the Secretary of State granted leave to the [claimant] pursuant to Articles 2 and 3 of the 1950 Convention on Human Rights on the basis of his claim. The Secretary of State last granted leave to the claimant under Article 3 on 22 February 2012 and therefore she was of the view that he was, at that date, at risk on return from the Mahdi Army."

12. The judge went on to observe that the Secretary of State now took a different position in the decision of 2013 from that taken in 2011. Issues were raised in the 2013 letter about the credibility of his account which were not raised in 2011. The Secretary of State's position in the 2013 letter was now that the claimant was a low level member of the Ba'ath Party, but this was not consistent with her view in 2011 which was that he had committed crimes against humanity. In 2011 and again in 2013 the Secretary of State accepted the documentation produced by the claimant. The judge's own view of the claimant's evidence was that which was accepted by the Secretary of State in 2011. She found that he was

involved in the detention of members of the Mahdi Army prior to the fall of the regime; and before and after the fall of the regime he received threats. She considered the arrest warrant in the context of the evidence on the whole, and she found that it was reliable.

13. The judge continued in paragraph [37]:

> "The issue is whether or not the [claimant] is still at risk on the basis of the account as accepted by the Secretary of State in 2011 and which is the account that I prefer for the reasons given above. The background evidence cited in the RFL is out of date considering the ever changing and evolving circumstances in Iraq. While it is the case that the Mahdi Army has waned, I have considered the relatively up-to-date background evidence produced by the [claimant] which establishes that there has been resurgence since Muktada Al-Sadrs' withdrawal from politics. Of course I have taken into account the fact that the reports predate the stepping down of Al-Maliki on 14 August 2014, but there is no evidence that the Mahdi Army has again waned since then. The evidence is that it is now involved in opposition to ISIS operations in Iraq and has been re-named the Peace Brigades. The [claimant] has established that he would be at risk on return to Iraq."

14. There was no Article 8 claim and the judge dismissed the claimant's appeal against deportation under the Rules. She allowed his appeal under Articles 2 and 3 of the 1950 European Convention on Human Rights.

Discussion

15. Ground 1 is that the judge was wrong to find at paragraph [33] that the claimant was previously granted leave under Article 3 ECHR in 2012 as the Secretary of State considered that he was at risk on return. Earlier, at paragraph [4] the judge noted that the claimant was granted discretionary leave in 2012 due to the country situation in Iraq.

16. While there is a discrepancy between what the judge said at paragraph [4] and what she said at paragraph [33], Mr Tufan rightly abandoned this ground of appeal. In the decision letter of 9 September 2011, the Secretary of State explained at paragraph 32 that the claimant was being granted limited leave to enter the UK in accordance with the published Home Office policy instruction on discretionary leave because, although he had been excluded from benefiting from the 1951 Convention relating to the Status of Refugees and Humanitarian Protection, there was a real risk that he would suffer treatment contrary to Article 3 of the European Convention of Human Rights, and would otherwise have been given humanitarian protection. This statement immediately follows the acceptance in paragraph 31 of the letter that his actions in Iraq had created a real risk upon return that he would face treatment contrary to Articles 2 and 3 of the ECHR as he was being sought out by the Mahdi Army.

17. Ground 2 was that the Tribunal gave scant regard to the fact the claimant had now changed his asylum claim to something that was completely different to what he had raised previously; that no reasonable explanation for the vast discrepancy had been provided by the claimant; and the

Tribunal failed to provide adequate reasons why this discrepancy did not cast serious doubts upon the credibility of his previous claim.

18. As we informed the parties at the hearing, we find that ground 2 is made out. The judge's error was to treat the new claim and the old claim as being on an equal footing when deciding which claim to believe. This was the wrong approach, as the new claim supplanted the old one. The judge failed to engage with the implications of this, and with the probative force of what was objectively a confession that he had previously lied about his level of involvement with the Ba'ath Party. As the judge indicated in her reasoning, the level of detail that the claimant had given in his asylum interview was totally inconsistent with the proposition that the Yemen interpreter had wrongly attributed to him all the activities for the Ba'ath Party which had led to the Section 55 certification, when in fact what the claimant had been trying to say in his asylum interview was that his role was minimal and he was just a cook. Since misunderstanding and mistranslation is not a credible explanation, the only other explanation for the discrepancy is that if the present account is the correct account then the claimant had presented a dishonest and fabricated account when initially claiming asylum.

19. Not only was the credibility of the initial account thus severely undermined for this reason, but it was additionally undermined by the fact that the new account severely weakened the asylum claim both by reference to alleged past persecution (threats from the Mahdi Army) and by reference to future risk. Confessions or admissions against interest have a high evidential status in this jurisdiction no less than in other jurisdictions as in the normal course of events an asylum seeker is unlikely to tell a lie to his disadvantage; or, put another way, if a claimant admits in effect that a previous account is invented, there would ordinarily have to be cogent reasons and/or compelling evidence to justify the Tribunal adhering to an acceptance of the claimant's "retracted" version of events.

20. We acknowledge that the claimant did not retract his earlier claims to have been threatened by the Mahdi Army, and that, through his Counsel, he continued to place reliance on documents such as the arrest warrant. But in accordance with **Tanveer Ahmed**, the burden continued to rest with the claimant to show that such documents could be relied upon, having regard to his new account of his "true" level of involvement with the Ba'ath Party.

21. As submitted by Mr Tufan, there is no suggestion that the claimant is suffering from mental health problems, such that his new version of events could be disregarded on that account. Judge McWilliams was not assisted by the line taken by the Presenting Officer, who may have been surprised by the content of the claimant's oral evidence, and who had not had an opportunity to reflect upon its full implications. The thrust of his submissions, as recorded in paragraph [26] of the judge's decision, is that it was open to the judge to accept or not the account given by the claimant in his oral evidence.

22. In fact, for the reasons given above, the scales were heavily weighted in favour of the acceptance of the appellant's new account, or at least heavily weighted against a continued acceptance of his original account.

23. In short, not only has the judge not given adequate reasons for adhering to the original account, but for procedural reasons (the new account being the *only* account now being relied on in support of the claim under Articles 2 and 3 ECHR) the new account should have been the judge's starting point.

24. Ground 3 is that in paragraph [37] the Tribunal has found that the situation in Iraq has changed since the decision letter, but it is unclear from the Tribunal's findings what evidence this finding is based upon other than it is based on background evidence submitted by the claimant. It is argued that this fails to show sufficiently how the situation in Iraq has changed or why it results in the claimant being at risk.

25. We find that ground 3 is made out as the judge has not identified the specific background evidence submitted by the claimant which supports the finding in paragraph [37] that the claimant would be at risk on return to Iraq.

26. Accordingly, we find that the decision of the First-tier Tribunal contained an error of law, such that it should be set aside and remade.

Future Disposal

27. As we canvassed with the parties at the hearing, we consider that this is an appropriate case where the appeal should be remitted to the First-tier Tribunal for a de novo hearing. None of the findings of fact will be preserved.

Conclusion

28. The decision of the First-Tier Tribunal contained an error of law, such that it should be set aside and remade.

Directions

29. The appeal against deportation is remitted to the First-tier Tribunal at Taylor House for a *de novo* hearing on the international protection claim, with a time estimate of three hours.

30. None of the findings of fact made by the previous Tribunal on the international protection claim (Articles 2 and 3 ECHR) will be preserved.

31. An Iraqi interpreter will be required.

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

Unless and until a Tribunal or court directs otherwise, the claimant 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 claimant

and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge Monson