UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER) **APPEAL NUMBER: PA/02083/2016**

THE IMMIGRATION ACTS

Heard at: Field House
On: 19 April 2017

Decision and Reasons Promulgated
On: 10 May 2017

Before

Deputy Upper Tribunal Judge Mailer

Between

MASTER MOHAMMED KHALIFA OMER
NO ANONYMITY DIRECTION MADE

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Ms G Capel, counsel (instructed by BHT Immigration Legal Services ILS)
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. At issue before the First-tier tribunal was whether the appellant who gave his date of birth 21 November 1999, was a national of Syria, as claimed. He lived in Egypt between 2012 and 2015.

2. His appeal against the decision of the respondent dated 16 February 2016 refusing his application for asylum, was dismissed by the First-tier Tribunal Judge in a decision promulgated on 1 February 2017.

3. On 27 February 2017, First-tier Tribunal Judge Grant-Hutchison granted the appellant permission to appeal. She found it to be arguable that the Judge erred with

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regard to the application of the correct standard of proof where nationality was disputed.

4. She found that it was also arguable that in assessing the weight to be given to the LOID report, the Judge failed to consider that the language analysis was conducted by a linguist who does not speak Arabic and does not appear to have any academic specialities in Arabic. His two “analysts” speak Syrian Arabic but not “Cairo Arabic”. It was arguable that he did not fully engage with the criticisms of the LOID report put forward by Professor Matras in his language report which was supportive of the appellant's case. There were misdirections regarding the assessment of the psychological report by Mr Derek Gifford May who rejected the possibility of the appellant's feigning, finding that there were a number of possible contributing factors to his memory problems, and not just his head injury.

5. Moreover, it was arguable that the Judge failed to take into account the appellant's correct answers to “knowledge” questions relating to Syria in general and Aleppo in particular. Finally, he arguably misdirected himself by finding that simply because the Egyptian authorities came looking for the appellant's father, the appellant thought his life was in danger, whereas the appellant's account was that he would be arrested in place of his father if his father did not surrender himself. Nor did the Judge take into account that the appellant is a minor when considering paragraph 276ADE(vi) of the Immigration Rules.

6. Ms Capel, who represented the appellant at the hearing, developed the grounds of appeal. She relied on her detailed grounds for permission from page 175 of the consolidated bundle which she produced at the hearing. She also referred to the skeleton argument that was before the First-tier Tribunal.

7. She contended that the Judge failed to apply the correct standard of proof in this case. The appellant's claimed nationality was disputed. This was a central issue in the appeal. The appellant claimed to be Syrian. The respondent asserted that he is Egyptian.

8. She submitted that where the respondent positively asserts that the appellant is a national other than that claimed, she must prove it to the higher civil standard. She referred to the decision in Hamza (Disputed Nationality – Removal Directions – s.66(2) 1999 Act) Kenya [2002] UKIAT 05185 at [12]. Mr Justice Collins stated that where there are in reality only two possible contenders, either the country from which the appellant alleges he or she came, or some other country which is the obvious candidate, if an adjudicator feels able to decide the issue of nationality, he must bear in mind that if he is going to make a positive finding against the appellant, then he must do so not on the asylum standard, but on a higher standard which would be the balance of probabilities.

9. Ms Capel submitted that this is also reflected in the respondent's API on Doubtful, Disputed and Other Cases: at 3.1. There it is provided that if the Home Office considers the applicant to be a specific nationality other than that claimed, the burden of proof rests with the Home Office to prove that assertion. "He who asserts must prove." The Home Office will need to establish this according to the balance of probability standard. The test is met if it is more likely than not that the applicant is of the alternative nationality.

10. She accordingly submitted that the Judge in this case erred by failing to acknowledge or apply the correct standard of proof. She referred to [27] of the decision by way of example. There he stated that having considered the whole, and having applied the lower standard, he found that the appellant is not a Syrian but an Egyptian.

11. In addition, she submitted that in assessing the relative weight to be attached to the LOID report which was supportive of the respondent's case and the report of Professor Matras, supportive of the appellant's case, the Judge failed to take into account or engage with relevant material and failed to resolve the conflicts in the evidence presented. The appellant put forward specific arguments in respect of the LOID report which were set out in the skeleton argument at [54].

12. The Judge in considering the LOID report, stated at [25] that it would have been a better practice to have stated the qualifications of the persons involved in preparing the report. However, he did not engage with the point made that neither of the analysts speaks or has academic training in what the report refers to as "Cairo Arabic." Nor did the Judge engage with the remainder of the specific criticisms put forward in respect of the LOID language analysis report. He was required to do so having regard to the need to exercise anxious scrutiny in considering the appellant's claim and to ensure that every factor that could tell in the appellant's favour was taken into account.

13. The Judge took no issue with the expertise of Professor Matras, who stated that it is to be expected that both features of Syrian Arabic and Egyptian Arabic appeared in the appellant's speech. Prof Matras provided a detailed and thorough analysis of the appellant's speech and concluded that there had been a very short and inadequate sample provided. His conclusion was that the appellant's speech is fully consistent with his own narrative about his personal biography. It shows a form of speech that is reconcilable with Syrian Arabic and also shows influences from standard Arabic which is ubiquitous throughout the Arabic world, as well as individual features from Egyptian Arabic to which the appellant will have been exposed during his stay in Egypt.

14. Ms Capel submitted that the Judge accordingly failed to engage with the view that the features of Egyptian Arabic present in the appellant's speech are explicable by the time he spent in Egypt. That was highly relevant to the significance or otherwise of

the existence of elements of Egyptian Arabic in the appellant's speech. If Prof Matras's analysis on this point was to be rejected, sustainable reasons were required.

15. She further submitted that the Judge erred in his approach to the psychological report of Mr Derek Gifford May. He found that the appellant's performance on the cognitive assessment provided some evidence of memory problems. There were a number of possible contributing factors to those problems.

16. The Judge's reference to R (on the application of AM) v SSHD [2012] EWCA Civ 521 was inapposite. The Judge appeared to suggest that in the absence of physical scars to which "physical sciences" can be applied a report cannot constitute independent evidence in support of the appellant's account. That, she submitted, is an error and the key question in respect of any medical report is whether or not it merely repeats the appellant's account or adds to it by reaching an evaluative judgment. She referred to the decision in Detention Action v SSHD [2014] EWHC 2245 (123-124). She submitted that it cannot therefore be said that Mr Gifford May's report is based solely upon the oral evidence of the appellant and merely repeats the appellant's account.

17. Ms Capel submitted that the reference by the Judge to "Mrs Miyajar" at [12] is inexplicable. There the Judge stated that "these are all entirely based on the oral accounts given by Mrs Miyajar. The resulting letters and reports are not independent of Mrs Miyajar but entirely dependent upon her." She submitted that this is most likely a reference to an appellant in another case.

18. She submitted that when considering either incorrect or inadequate answers by the appellant relating to Syria generally, and Aleppo specifically, the Judge failed to set those against the appellant's correct answers to various questions put to him at the substantive interview. During his interview he named the neighbourhood in which he lived – Bav -Al Haddad, which is an area in Aleppo. He identified the names of important buildings in his area. He referred to the Umayyad Mosque in Aleppo. He stated that it takes about 15 minutes to get to it. That is confirmed by country background evidence. He stated that the mosque is popularly referred to as "Halib". He also named a football team in Syria – Al Wadha. He identified the currency used. Some of the denominations found in coin form and their colours were identified by him. He also identified the denominations found in note form. He noted that both the note and coin form are called "Lira". He was also aware that the flag of Syria had been changed. He named the television station in Syria.

19. She submitted that in rejecting his account that he was at risk of persecution by the Egyptian authorities who had arrested his father, the Judge stated at [28] that in his view it is unrealistic that simply because the Egyptian authorities came looking for his father, the appellant thought his life was in danger.

20. However the appellant's account was that the Egyptian authorities told him that he would be arrested in place of his father if his father did not surrender himself. She

submitted that in that context, it is readily understandable why the appellant believed that he was at risk of persecution. The country background evidence was not referred to by the Judge, but it was also supportive of his claim to be at risk of persecution in Egypt.

21. She referred by way of example to the country background evidence cited in the skeleton argument at [76-78]. She referred to paragraph 14 of the appellant's witness statement where he stated that he was compelled to flee Egypt as the authorities came to his house for his father and told him he would be arrested and taken into detention in his place if they returned again and he was not present. He felt they believed he was involved in the same or similar way as his father. They would not have believed his protestations of innocence and would have mistreated or even tortured him if they had returned and taken him away. He knew he had to escape.

22. Finally she submitted that as the appellant is a minor, paragraph 276ADE(vi) of the Immigration Rules does not apply to him. The Judge erred in considering his case by reference to that provision.

23. In reply, Mr Clarke accepted that the findings at [28] of the decision was clearly wrong. He also accepted that there is a burden on the respondent to the civil standard regarding the positive findings of nationality in this case. However, it was the evidential burden that was on the respondent in this respect.

24. He submitted with regard to [27] that when everything is considered in the round, and having applied the lower standard, the appellant is not Syrian. That he submitted followed from a comprehensive analysis undertaken in relation to his nationality.

25. Further, Mr Gifford May did not subject the appellant to a physical examination. He did not engage with the appellant's evidence given to the Judge that his loss of memory is down to a head injury which he sustained as a boy. There was no reference to poor memory resulting from a head injury. The Judge noted that the appellant forgot the name of a street near his home. He claimed to have lived at an address in Aleppo until he left for Egypt, on his account, for 13 years. In those circumstances the Judge's finding that he would have forgotten the name of the street where he lived is sustainable.

26. The Judge had regard to the linguistic reports setting out the assessment in some detail from [20] onwards. He noted that the appellant challenged the report relied on by the respondent. Professor Matras relied on the audio recording which he said was poor. The appellant's voice was not clear. He did not get his own evidence of the appellant's speech. This amounts in effect to a disagreement with the finding by the Judge.

27. Moreover, the Judge noted Professor Matras's criticisms that there was no indication that the principal author of the report had any knowledge of Arabic, nor that the language analysts had had any formal training in linguistics analysis. The interviewing was identified by code reference and the verifiers are identified by code reference as well. The Judge found that it would have been a better practice to have stated the qualifications of the persons involved in preparing the report but considering the totality of the report, he found the contents were cogent. He therefore attached weight to the contents of the report - [25].

28. The Judge had the benefit of all the evidence, and was not bound to accept the appellant's account on the basis of the author's observations. He took the report into account, having regard to the totality of the evidence.

29. Finally, with regard to the mistake in respect of the appellant's father, there had been bare assertions regarding the father. This is a small point and would not change the outcome of his appeal.

30. In reply, Ms Capel submitted that if you get evidence relating to his father "wrong" that is a material misdirection. She referred to her grounds of appeal before the First-tier Tribunal at [77] and [78]. Since 2013 when former President Morsi was ousted, Egyptian authorities have adopted a "zero tolerance" approach to Muslim Brotherhood activities of any kind. Amnesty International's report of 2016 with regard to Egypt noted the crackdown on members and perceived supporters of the Muslim Brotherhood. Further, Human Rights Watch noted the existence of a broad arrest campaign targeting the Muslim Brotherhood. Crucially, the country background evidence indicated that even perceived membership of the Muslim Brotherhood is sufficient to attract a risk of persecution.

31. She submitted that contrary to the Judge's assessment, the expert did address the causes of the appellant's memory problems that he claimed. Mr Derek Gifford May stated that he believed that the appellant's performance on the cognitive assessment provides some evidence of memory problems at this time, although he outlined a number of caveats to this conclusion as well. It is not possible to conclude what has given rise to his memory problems in the first place, since there a number of possible contributing factors including neurological damage from brain injury.

32. He also stated that the results of psychological trauma and depression scales indicate that he does suffer emotional difficulties of depression and post traumatic stress. He was able to mask these by the protective mechanisms of defensive avoidance, deliberately avoiding memories and people who may trigger painfully traumatic memories. He perceived changes in his affect which marked internal distress at both memories of the war and separation from his parents.

33. Mr Gifford May asked him about his memory. The appellant indicated he was young when he fell down on a rock in a field. He stated that he was unconscious but could

not recall anything else. Mr Gifford May noted that there was no medical or corroborative evidence for this statement and it is possible that he was simply trying to explain his lack of memory, whether or not falling on a rock had any such impact. Mr Gifford May also noted that the appellant's account of the incident and the effect that it has had on him was consistent, coherent and congruent with his emotions observed by him in the assessment.

34. Accordingly, she submitted that the Judge has not considered the significance of all this evidence.

Assessment

35. I have considered the competing submissions. I find that the Judge has made errors of law.

36. In particular, he adopted an erroneous approach to the language reports. He was required to assess the relative weight to be attached to the reports supportive of the respondent's case as well as the report of Professor Matras in support of the appellant's. He failed in certain respects to take account or engage with relevant material or to resolve any conflicts in evidence.

37. In SSHD v MN and KY (Scotland) [2014] UKSC 30, the Court referred to the importance in any case of the Tribunal itself examining such a report critically in the light of all the evidence and of the reasoning supporting its conclusion (not necessarily limited by the scope of the criticisms or evidence that may be presented by the appellant).

38. In his appeal the appellant had put forward specific arguments in respect of the LOID report, which were comprehensively set out in the skeleton argument. This included the assertion that the sound recording is poor and did not provide sufficient linguistic material for an informed analysis. The report also incorrectly cited the appellant's speech. The report cited examples of the appellant's speech which are absent from the recording. The report also failed to identify important features of the appellant's speech. All these criticisms were set out in the report of Professor Matras. Moreover, it was contended that the LOID report incorrectly attributed weight to certain features of the appellant's speech and incorrectly assumed that the appellant's speech can be assigned unequivocally to a particular location and that a sample of the appellant's speech would coherently reflect a coherent, uniform local or regional dialect.

39. Further, the report failed to take into account the appellant's period of residence in Egypt, or to explain why this could not account for the features of "Cairo Arabic" present in his speech. Nor did the report explain the presence of aspects of Syrian Arabic which the report acknowledged appeared within his speech.

40. The Judge did not consider the point that neither of the analysts speak or have academic training in what the report referred to as "Cairo Arabic."

41. Nor did the Judge engage with the remainder of the specific criticisms put forward in respect of the LOID language analysis report. There is force in Ms Capel's submission that the reasons for preferring that report were in the circumstances inadequate. In particular, he does not appear to have considered Professor Matras's view that features of Egyptian Arabic present in his speech are explicable by the time he has spent in Egypt.

42. Mr Clarke has accepted that there was a mistake of fact made by the Judge relating to the appellant's account of his being at risk of persecution by the Egyptian authorities who had arrested his father: He had not simply stated that because the Egyptian authorities came looking for his father, he thought his life would be in danger, as suggested by the Judge. Relevant country background evidence which I have set out, was not considered by the Judge and may have supported the appellant's claim to be at risk of persecution in Egypt.

43. Further, the appellant's nationality was disputed. The appellant claimed to be Syrian, whereas the respondent positively asserted that he is Egyptian. I have referred to the decision in Hamza as reflected in the respondent's own Instructions at paragraph 3.1. It does not appear that the correct burden of proof was applied in this case.

44. It was moreover necessary for the Judge to consider that notwithstanding the absence of physical scars to which neurological science can be applied, Mr Gifford May's report nevertheless could, in the circumstances, constitute independent evidence supportive of his account. He had undertaken various cognitive tests and his findings were in the circumstances not based solely upon the appellant's account.

45. For these reasons I set aside the decision of the First-tier Tribunal. Ms Capel submitted, without opposition, that in the circumstances this is an appropriate matter to remit to the First-tier Tribunal for a fresh decision to be made.

46. Having regard to the extensive judicial fact finding that will be necessary, amounting to a complete re-hearing, I find that it would be just and fair to remit the case.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and the decision is set aside. The appeal is remitted to Hatton Cross for a fresh decision to be made before another Judge.

No anonymity direction is made.

Signed Date 5 May 2017

Deputy Upper Tribunal Judge C R Mailer