Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13610/2016

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)	**Decision & Reasons Promulgated**
On 29th August 2017	**On 28th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE E M DAVIDGE

Between

A O
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Vinita Templeton of Duncan Lewis
For the Respondent: Geoffrey Harrison, Home Office Presenting Officer

DECISION AND REASONS

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

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

© CROWN COPYRIGHT 2017

Appellant and Appeal

2. The Appellant is a Palestinian national from Gaza. He asserts risk on return from Al Qassam who he describes as a military faction of Hamas. He explains that in 2014 there was a 50-day war and in the last days of the war he went to give blood in the area of conflict and helped first aid workers move the injured and dead. As a result of that involvement two armed Al Qassam militiamen came to his house days before the war ended, with their faces covered, calling him by name and accusing him of betraying them by reporting their position so that they got hit by the Israelis. His mother intervened and in the stress of the moment had a heart incident. Local people came to his and his mother's aid and the Al Qassam members left. His mother had to go to hospital. He fled for fear of the militiamen. The Appellant asserts that he initially travelled to Egypt where he found out that his mother had died. He then spent time in Turkey and Greece and arrived, via France, in the United Kingdom in May 2016 and claimed asylum on the same day.

3. There was a screening interview in May 2016 and the Appellant was interviewed on 17th and 24th November 2016, and the claim was refused on 25th November 2016.

4. The Respondent rejected the Appellant's claim because of inconsistencies in his account, the vagueness of his explanation as to why he had come to the attention of Al Qassam and his ability to escape them, the lateness of the account as he did not say at screening that he had any fear of Al Qassam, failure to claim asylum having travelled through Italy and France, and the contradictory travel history when he said at screening in May 2016 that he had left Palestine in January 2016. Following that interview he wrote via Crowley Company Solicitors to say that in fact he had left Palestine in early 2014. At his first substantive asylum interview of 17th November 2016 he said that he had left Palestine in September 2016.

5. The Appellant lodged a Notice of Appeal through Albany Solicitors on 8th December 2016, filed his reply in person on 22nd December 2016, and appeared in person before the First-tier Tribunal at the hearing on 17th January 2017.

The First-tier Tribunal

6. The First-tier Tribunal Judge heard the Appellant's evidence but found that he had not established his claim to the lower standard. The judge agreed with the Respondent that the background evidence shows that had Al Qassam been sufficiently motivated to punish the Appellant as an Israeli spy who had enabled Israel to pinpoint their positions so as to successfully target them it would have been unlikely that, having located him at home, they would be deflected from taking him, but even if that were true they would have then pursued him with active enquiries which would have become known to him through his uncle who facilitated his flight, and whom the judge found the Appellant would have maintained contact with,

and yet there was no evidence of any interest in him. The judge did not hold it against the Appellant that he had failed to claim asylum in Italy or France. The judge found it significant that the Appellant had failed to disclose any fear of Al Qassam as the basis for his asylum claim when he first made it, and rejected the Appellant's explanation, namely that he feared being returned to one of the countries through which he had travelled, concluding that that made no sense in the context of failing to describe accurately the basis of the claim.

7. The Appellant appealed to the Upper Tribunal in person asserting that errors had been made by the judge because:

(a) the general humanitarian situation in the occupied Palestinian territory had been recognised as being so severe to make removal a breach of Article 3 of the ECHR.

(b) the Appellant could not be returned to the Palestinian authorities as he had lost his papers

(c) the crossing through Egypt is in any event only open irregularly.

(d) The assessment of credibility was flawed because:

(i) when the judge says, the Appellant had failed to mention a fear of Al Qassam at the first interview he was wrong:

(1) "but I did. I did mention them in my substantive interview."

(ii) In terms of the discrepant evidence of his travel he says that when the judge mentions that the Appellant had corrected his interview via his then solicitors on 17th June 2016 he failed to appreciate

(1) "I only saw my solicitor briefly and was only asked vaguely if I wanted to change anything, it was not the detailed examination of my evidence that the judge assumes, and this has affected his view of my credibility."

(iii) the judge had held it against the Appellant that he had failed to claim asylum in the safe third country.

8. Permission was granted on the basis that the First-tier Tribunal relied on inconsistencies said to arise from the Appellant's substantive interview which had not been rebutted. The record of the interview indicates that he was unrepresented and the record of the proceedings does not show that all of the alleged discrepancies were put to him. Further that the judge may have erred in concluding that because the Appellant was not executed by Al Qassam he was not of interest to them and would remain so.

The Upper Tribunal Proceedings

9. Ms Templeton did not rely on the Grounds of Appeal relating to the route to return or country conditions, neither of which, in the context of the country guidance case are points which could assist the Appellant. The Appellant's application, submitted when acting in person, relies on partial and incomplete quotes from the Respondent's country information and guidance, and incorrectly asserts that the Respondent accepts that an Article 15(c) position based on country conditions exists in the Palestinian authority, and further incorrectly asserts that the Respondent concedes the country guidance case is no longer applicable. Whilst it is apparent that the judge inexplicably refers to the operational guidance note of March 2013, inexplicable because the Respondent points out in the reasons for refusal letter that there is June 2015 country information and guidance, in the event nothing turns on the mistaken reference, as the conclusions on the updated evidence is not significantly different.

10. Ms Templeton argued that the challenge was to the assessment of credibility.

11. Ms Templeton said that contrary to the grant of permission the Appellant's case was not that the discrepancies were not fully explained or put to him in the hearing but rather it was as a result of the thoroughness of the judge's process that the Appellant came to understand, for the first time, his difficulties, and to appreciate that there must have been significant interpretation problems at the substantive interviews. This was why he said for the first time that difficulties must have arisen through interpretation. There was no criticism of the conduct of the hearing.

12. Ms Templeton submitted the Appellant's reliance, for the first time, on significant interpretation difficulties before the judge should not have counted adversely because the Appellant had not had any earlier opportunity to appreciate that there must be interpreter errors. Her instructions are that initially represented by Crowley and Co solicitors at the time of the screening interview, there had been a change in representation by the time of the substantive interviews, to Albany Solicitors and those solicitors withdrew their representation following the refusal letter, before they had taken instructions or given advice on the interviews, the last of which had only been the day before the reasons for refusal. On that evidence the Appellant had not had the opportunity to understand the difficulties or to give instructions about them. On that chronology, the solicitors would not have had the opportunity to make written representations as to the interpretation at the interview, and so the fact that nothing had been mentioned prior should not have counted against the Appellant.

13. Departing from the grounds upon which permission had been granted Ms Templeton sought to argue there was unfairness of process in that the Respondent's decision and the judge's hearing had proceeded on an incorrect factual basis namely that the interpretation of the interview was correct, when it was defective. Ms Templeton made a late application under Rule 15(2A) to submit new evidence to show that the Asylum

Interview Records relied upon by the Respondent in their bundle were not accurate, in that the Home Office interpreter had made errors of interpretation in the first substantive asylum interview on 17th November 2016.

14. Ms Templeton sought forbearance for the late addition of the ground and production of the evidence, the day of the hearing. She explained the ground only became available following the receipt of the transcripts. The Appellant had previously been represented by others and it had taken time to obtain the file and then apply for the transcripts. The processes of having to arrange funding for an interpreter to listen to the audio tapes, obtaining his services including his endorsement of the home office transcripts, the typing up of that evidence and the preparation of the witness statements, all within the confines of a busy office, with people away on leave over the summer, and the obvious necessity of delegating tasks, meant that the position had only recently become clear.

15. Mr Harrison for the Respondent objected to the late application, permission had been granted in June, and the documents were only now being submitted. Mr Harrison argued that I should refuse to permit an amendment to the grounds or admit the evidence of the new interpretation, and it was right for me to do so without looking at it simply because it was submitted so late, and in any event, there would be no proper basis to me to choose one over the other.

16. Ms Templeton clarified the Appellant had a screening interview in May 2016 and two substantive interviews, the first on the 17th November 2016 and the second on the 24th November 2016. The Appellant did not rely on any significant error in the second substantive interview of the 24th November. The interpreter had listened to a complete recording, endorsed handwritten notes on the Respondent's transcript, and those were in the supplemental bundle, but they did not reveal any significant discrepancy. Accordingly, the representative had not undertaken the expense of typing up the Appellant's interpreter's version of the audio tape.

17. Ms Templeton submitted it was the new transcript of the audio recording of 17th November 2016 which showed the Appellant had been misinterpreted. The tape was incomplete because it stopped at question 44. The interview ran to 58. I checked, but Ms Templeton explained there was no application to adjourn because the differences apparent in the interpretation of the first 44 questions were sufficient to establish the error.

18. I decided that it was necessary for me to have regard to the evidence to decide whether to permit the change in the grounds and to admit the evidence. The skeleton did not particularise the point but relied only on the fact of the interpreter finding significance difference with the version of the first substantive interview of 17 November 2016, upon which the respondent and the Judge had placed reliance.

19. I indicated that given the scant skeleton and the import of the point, I required Ms Templeton to take me through it in detail, to ensure I understood the interpreter errors relied upon, and in that process, afford the Respondent's representative a fair chance of seeing how the evidence was relied upon and providing him an opportunity to address the application.

20. Time was then devoted to the comparison of the Appellant's interpreter's version of the interview and that in the Home Office bundle. I took a discursive approach and taking every question went through each in turn analysing what if any difference there were and their import for the discrepancies relied upon by the Respondent in the reasons for refusal and those held significant by the judge.

21. What it came down to was this:

    (a) When the Respondent said that the Appellant had been inconsistent, saying that the militia men had come to him two days before the war ended but subsequently in the second interview on the 24th November (about which there is no issue) had been emphatic that it was exactly eight days before the end of the war, the Appellant's interpreter interpreted that he had said four days and then eight days.

    (b) Either way the evidence was discrepant, and that was the force of the respondent's point.

    (c) Similarly adjusting the chronology to the Appellant's interpretation leaves intact the Respondent's point that on either chronology offered by the Appellant his evidence as to when he left Palestine is not consistent with any version.

    (d) Nor does the Appellant's interpretation alter the evidence of the Appellant that his mother had the heart attack when the Al Qassam militia men tried to abduct him when he was 18 years old, and yet his chronology would have made him 19.

22. In submissions Mr Harrison relied on the rule 24 response to the point that the judge was right to conclude that the account of interest by Al Qassam ran contrary to the country information and that the Appellant had failed to provide adequate explanations for the adverse points relied upon in the reasons for refusal, and even now the late evidence, which in his view I should not admit, did not provide such. As revealed by my detailed examination in open court of each question and answer, and the asserted differences in interpretation, the differences asserted did not address the significant discrepancies identified by the judge. Reading the judge's decision in the round taking into account all of the reasons, and the evidence of the second interpretation, it was clear that the judge's decision would have been the same. This is not a case like MM (Unfairness: E and R) Sudan [2014] UKUT 00105 (IAC) where unknown to the judge the Appellant had in fact submitted evidence to the Respondent

asserting that the interview record was wrong. In that case the Respondent had failed to put that information before the judge, that was unfair. It had led to the judge concluding that when the Appellant said that she had submitted such evidence she was in fact lying. The new evidence brought forward in that case quite clearly showed that she was not. Here there was a second interpretation which took the Appellant's position no further.

23. In reply Miss Templeton pointed out that whilst the discrepancy in respect of the Appellant's age relied upon by the reasons for refusal remained, that was a peripheral matter, and whilst it was right that even with the new interpretation the discrepancy as to when the incident occurred remained, it was simply unfair for a case to be determined without an accurate interpretation. The most important point is that the judge did not accept that had the Appellant been of interest to Al Qassam he would have been able to get away and the new interpretation gave a much better flavour of the chaos that the Appellant claimed was the explanation for the two armed gunmen losing control of the situation and having to leave.

24. So far as the complaints about the delay of providing the evidence it was simply a matter of practicalities but in any event even had the interpretation been provided earlier the reality is that the Respondent did not in any event have the power to withdraw the decision.

25. Both representatives agreed that in the event that I decided to admit the evidence, I would be in a position to decide the error of law without further hearing.

Discussion

26. Mr Harrison repeated his objection to the late production of the evidence but did not seek to persuade me that I should not consider the merits of the ground raising issues of fairness in light of the two interpretations available to me. This is an Asylum case, the duty is of anxious scrutiny, the error asserted is one concerning fairness of process and in particular whether or not the Judge had the correct factual matrix before him in terms of what the Appellant's account, as he had set it out to the Respondent. I am satisfied that could come within the principle of an error of fact capable of constituting an error of law. I am satisfied that it is right for me to permit the enlargement of the grounds and to admit the evidence of the corrections made to the interview transcripts by the Appellant's interpreter. In considering questions of unfairness my approach must be to look at the substance, and not to be overly concerned with matters of technicalities. It is in this context that I ensured during the hearing, and, with the agreement of the representatives adopting a somewhat informal discursive approach and bearing in mind that the evidence was only served on the day, that I went through the alternative interpretations provided by the parties in detail, and I have read every question and answer.

27. The audio recording for 44 to 58 was not made available. Miss Templeton did not seek an adjournment. The Appellant has raised nothing specific to those parts of the interview in his grounds and Ms Templeton did not take me to anything in the reasons for refusal or judge's decision which significantly relied upon any matters arising from those sections. Taking account of the overriding objective to determine the appeal fairly and justly I saw no reason to adjourn. Of the 44 questions the first 39 are unremarkable. Accordingly, the focus at the hearing was on questions 40 to 44.

28. The judge restricted himself to inconsistencies identified by the Respondent as being significant in the reasons for refusal and reminded himself that because the Appellant was unrepresented and had suggested that there may have been errors of interpretation during his interview he needed to be careful about giving weight to the Respondent's concerns.

29. The Appellant asserts the judge was wrong to hold it against him that he had not mentioned his fear of Al Qassam when first interviewed because he had mentioned it at the first substantive interview. Ms Templeton did not pursue the point.

30. Judge Travaskis noted that in respect of the screening interview the Appellant, at a time when he had been legally represented by Crowley and Co, had written to clarify matters. Accordingly, the corrections made at that time could be presumed to be complete and in accordance with the Appellant's instructions. Corrections which did not arise from interpreter error but from, as the Appellant admits, the fact that he had lied.

31. The judge found it adverse that the Appellant, through Crowley and Co Solicitors wrote to the Respondent after the May 2016 screening interview to correct his evidence, but did not take the opportunity to amend his claim to include a fear of Al Qassam.

32. In his grounds the Appellant said that this was a rushed interview and he did not have the chance to fully explain to Crowley and Co what else he had said wrong or to elaborate on the reasons for his being frightened to return to Palestine. There is no merit in that.

    (a) The information provided about the travel itinerary is detailed and specific. He changed his evidence of when he left Palestine, from early 2016 to January 2015, when caught out by finger print evidence in the interview. Then through Crowley and Co he amended it to early 2014, and revealed that he had tried to get to Macedonia but being unsuccessful had returned to Turkey, and lived there for a year before embarking on the journey again. He said that he had left Palestine in early 2014. Subsequently he said in his asylum interview he had left in September 2014. The Respondent notes that even that date is inconsistent with the chronological account that he gives. It remains so even with the new interpretation. The argument that he did not get it right because he was rushed does not add up.

(b) In Crowley and Co's representations the Appellant having admitted that he had not told the truth when he said he had not been finger-printed because, as was pointed out to him, he had been, in Greece, offered the explanation that it was because he was frightened of being returned there. The grounds assertion of a rushed job has no traction here, his explanation has remained that he did not do so because he did not want to be sent back to Greece.

(c) I am satisfied that he had the opportunity to tell his solicitors he had a fear of Al Qassam, and, again contrary to his grounds, it is clear that they specifically canvassed with him the reasons he had given for claiming asylum in order to be able to add to it. Further, and contrary to the assertion of the grounds, the Appellant did take the opportunity of adding to his reasons for his claim.

(i) *"The applicant wishes to add that he has seen friends and neighbours killed and did not want to suffer the same fate."*

(d) Significantly he did not mention the claimed incident with Al Qassam, or even his mother.

33. As Judge Trevaskis noted no difficulties in interpretation were raised by the Appellant in respect of the screening interview so that the points about the failure to refer to any fear of Al Qassam when first making his claim remained. I find that his blaming the solicitors in this application appears expedient.

34. Judge Trevaskis noted that corrections had not been given to the record of the substantive interview.

35. Ms Templeton made much of the fact that the Appellant was unrepresented and so did not have the opportunity of correcting the interview and in particular it was only at the hearing that he realised it need correcting. The simple fact of the Appellant being unrepresented, and unable to obtain representation for the hearing, is not determinative of his assertion that he had no idea what was said in the reasons for refusal letter, and the discrepancies relied upon therein. Even allowing that it might be established that he could only access understanding through solicitors, the Appellant's position relies on a failure solicitors to take instructions and advise on the reasons for refusal, so denying him the opportunity of appreciating earlier, and mentioning it in his notice of appeal for example, that the Respondent's consideration of the interview in those reasons for refusal "must" have been marred by interpreter error. Ms Templeton tells me that according to her instructions solicitors withdrew representation following receipt of the notice of refusal, and did so without advising the Appellant on its contents, and without affording him an opportunity to give instructions on the reasons for refusal, or on the merits of appealing. There has been no complaint made against the company. They are expert immigration advisors. This assertion of Solicitor error does not bear scrutiny.

36. Ms Templeton places too much weight on this aspect. Judge Trevaskis does not place significant weight on the absence of any correction to the interview, but notes that there has been none. He assesses the likelihood of interpreter error proving an explanation of the Appellant's difficulties in the round, taking into account that much of his credibility difficulties arose before he ever had the substantive interview and is not amenable to interpreter error as an explanation in any event, and the difficulties brought to his account by the country information. On the evidence on the day he was entitled to his conclusion that interpreter error did not afford adequate explanation.

37. In the context of the arguments put forward now I have considered whether the evidence now provided shows that in fact interpreter error could account for his difficulties. The evidence now submitted results in the position of my being faced with two alternative interpretations for part of the substantive interviews.

38. There was no evidential basis put before me which could lead me to prefer one interpreter's ability over the other, or to prefer one interpretation over the other. I note that the Appellant's interpreter is employed by an agency described as "24/7" and has worked in that capacity since 2014. Although I do not have any indication of his qualifications he was instructed by Duncan Lewis Solicitors, an expert firm of immigration solicitors, and Mr Harrison took no issue with his ability to provide interpretation, I am satisfied that he is qualified, but I am unable to compare the qualifications. For similar reasons, I can only assume that the interpreter used by the Respondent has been assessed as being suitably and appropriately qualified. I take into account that the Home Office interpreter is providing a hands-on immediate interpretation, involving potential mishearing and having to ask for repetition, which will inevitably mean that words are not exactly repeated, and may but lead to omissions, additions and clarifications. His contemporaneous position is more difficult because he must make sense of it there and then, seeking clarification at the time. The Home Office interpreter does not have the added ability to pause or replay the interview in a calm and quiet environment. I note that the Respondent used the same interpreter for the two substantive interviews and that in respect of the interview of 24th November the Appellant's interpreter said that he found nothing of any significant difference. There is no evidential basis for me to conclude anything other than that they are both independent and professional.

39. In broad terms the two interpretations reveal that the Appellant's interpreter in some instances would have said more, and in some less, than the Home Office interpreter. There is a clear difference between them when at question 40 the Respondent has recorded the Appellant as having said that the incident took place two days before the war finished, the alternative version says he said that the incident took place four days before the war finished. However, in the second substantive interview, the interpretation of which is in effect agreed, the Appellant says that it was

eight days prior to the war finishing. The inconsistency of the Appellant's account of the timing of that incident therefore remains.

40. The Respondent was also concerned that the Appellant is internally inconsistent when he says both that he himself took his mother to the hospital, and that he did not take his mother to hospital but that others did. Whilst the Home Office interpreter provides a more succinct interpretation than the alternative provided by the Appellant's translator, both confirm the inconsistency of the account of who took the mother to the hospital.

41. Additionally, both interpretations confirm that the Appellant said that he was 18 at the time of the incident so that the identified inconsistency between that position and the Appellant's stated date of birth which would make him 19 in September 2014 remains.

42. The discrepant evidence as to when the Appellant left Palestine is also plainly established.

43. In short, the new evidence does not establish any significantly misunderstood factual matrix.

44. Ms Templetons' point that merely the fact that the interpretation now provided shows a difference with the version before the judge is sufficient to establish unfairness or an error of fact is misconceived. Contrary to Miss Templeton's submission there is no evidence before me which can satisfactorily establish that the alternative version now submitted is to be preferred, but even if it were, careful scrutiny, with full input from both representatives has resulted in showing that the outcome would have been no different in terms of the assessment of the Appellant's credibility in the light of those inconsistencies.

45. Miss Templeton's point that the judge found that the Appellant had failed to establish that members of the military wing of Hamas would not have lost control in circumstances where they had come to arrest the Appellant is not taken any further by consideration of the longer and more incoherent version of events provided by the Appellant as described by the recently produced alternative interpretation. It adds nothing to the Appellant's explanation that having arrived with the purpose of arresting and removing him for execution they were deflected from that purpose by the response of the Appellant's mother and those who came to the Appellant and his mother's aid. The ground fails to appreciate the significance of the judge's point that the claim that Al Qassam were so concerned about the Appellant's actions in Khamyounif, some hour's journey from his place of residence, so as to have identified him and tracked him to his local area, is undermined by the lack of evidence of any subsequent effort to apprehend him. The judge notes the assistance provided to the Appellant by his family following the claimed incident with Al Qassam and rejects the explanation offered in oral evidence to him that

he did not know whether Al Qassam had made efforts to find him because he had not maintained contact with his family.

Decision

46. The decision of the First-tier Tribunal dismissing the Appellant's international protection claim reveals no error of law and stands.

Signed Date 26 September 2017

Deputy Upper Tribunal Judge Davidge