



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/06783/2017

THE IMMIGRATION ACTS

Heard at Field House
On 23 August 2018

Decision & Reasons Promulgated
On 17 September 2018

Before

LORD BECKETT SITTING AS AN UPPER TRIBUNAL JUDGE
UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

RS
(ANONYMITY DIRECTION MADE)

Respondent

Appellant

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves a claim for asylum. We find that it is appropriate to continue the order. 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 his family. This direction applies both to the claimant and to the Secretary of State.

Representation:

For the Claimant: Mr Sellwood, Counsel instructed by Wilsons, Solicitors
For the Secretary of State: Mr Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is the Secretary of State for the Home Department and the respondent in this appeal, hereinafter “the claimant” is RS, a citizen of Iran, born in 1972. The appeal is taken against the decision of the First-tier Tribunal of 8 February 2018 to allow the claimant’s appeal against the Secretary of State’s decision of 6 July 2017 to refuse his protection claim. He entered the UK on 22 December 2016 and claimed asylum.
2. The issue for us is a narrow one relating to the F-tT Judge’s decisions at the appeal hearing on the form and scope of cross-examination of the claimant who had a number of vulnerabilities.
3. The claimant maintains that he was at risk of persecution or serious harm on account of having been a member and activist in Jebhe Melli (Iranian National Front, “INF”) since 2012.
4. The claimant’s account is that he was introduced to the group when a student in Iran in 2011. He became a member, but later became the head of a small group and was involved in attending meetings and delivering leaflets. He was arrested in September 2013 during a raid and held in solitary confinement and tortured by members of the security services over the course of a month before spending four months in another prison. The Revolutionary Court imposed a five year suspended sentence, a year’s probation and a life-time ban on political activities. Once the year was up, he distributed leaflets and persuaded others to become involved with the organisation. He attended a TNF conference in Paris 2016 at the request of its leadership. Whilst in Paris he learned by telephone that his home had been searched, his father had been arrested and the claimant’s laptop, printer and books had been seized. He was told not to return to Iran or else he would be executed.
5. The Secretary of State rejected the claim on the basis that the account provided lacked credibility. It was not accepted that he was a member of TNF given what was said to be areas of vagueness in his account, internal inconsistencies and a reluctance to give names of other members of his group. His account of his post-detention activities was not considered credible having regard to the Secretary of State’s interpretation of objective evidence of oppression in Iran. His account of arrest and ill-treatment was not accepted as he could not say what he had been charged with, the five year sentence was not credible and he was inconsistent about the judicial procedure. His ability twice to leave Iran was not consistent with being under surveillance which undermined his account. It was not credible that he would have left incriminating documents at home. His failure to claim asylum in France undermined his general credibility. He had not demonstrated that he was at risk of ill-treatment breaching articles 2, 3 or 8. Medicine and medical care was available in Iran to treat the claimant’s PTSD and depression.
6. The issues before the F-tT were threefold:
 - whether the claimant was a refugee;

- if not, whether he was entitled to subsidiary protection under para 339C of the Immigration Rules and the Qualification Directive;
- whether the decision breached his protected rights under ECHR articles 2, 3 and 8.

Appeal hearing

7. On the day of the hearing, the Secretary of State sought an adjournment for two to three months to allow the claim to be reconsidered in light of information in two expert reports from a Mr Mason on the subject of scarring to the claimant's arm and an injury to his nose and a psychiatric report by a Professor Katona, in effect diagnosing PTSD which was consistent with his account of being tortured, and major depression. The suggestion of PTSD was not entirely new. A similar conclusion had been reached in February 2017 by Dr Sous of Barnet, Enfield and Haringey Mental Health NHS Trust. The claimant had described his mental state in his statement of 11 April 2017 which was sent to the Secretary of State, but not referred to in the decision letter of 6 July 2017.
8. The Secretary of State had had the reports since at least 11 January and time was not being sought to instruct counter experts, merely to reconsider the whole claim; a fair hearing was possible; there had already been delay and the claimant was in poor mental health which delay may exacerbate.
9. The F-tT's offer of more time to prepare for the hearing that day was declined by the Secretary of State's representative as unnecessary.
10. In the light of medical evidence, the F-tT was satisfied that the claimant was a vulnerable witness such that compliance with Joint Presidential Guidance Note No 2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance (JPGN) was necessary. The F-tT was persuaded to hold the hearing in private to protect the claimant's identity.
11. The issue of cross-examination was discussed. For the claimant it was contended that since he had already been questioned by the Secretary of State's official and he had provided a detailed statement, it was unnecessary for him to give evidence. His recollection was impaired by his PTSD and it would be inappropriate to cross-examine him about his experiences in detention.
12. Despite resistance from the claimant's counsel, the F-tT considered that the claimant should give evidence, noting some vagueness and inconsistencies in the account which had not all been explained adequately in earlier statements. There was evidence in Professor Katona's supplementary report that questioning of the claimant's experiences of torture was likely to be distressing for the claimant. The judge noted that this part of the history was not of central importance to the Secretary of State's challenge to credibility.

13. The Secretary of State's representative wished to ask closed questions in cross-examination and had been instructed by a senior colleague that if this was not allowed there should be no cross-examination at all.
14. The judge decided that cross-examination would be permitted but that it should comprise open questions, it should not be aggressive and the claimant was not to be asked about his mistreatment in detention as it was likely to prejudice the claimant's welfare.
15. What Professor Katona reported in his supplementary report was that the claimant has PTSD and a major depression which made it difficult for him to give a detailed account of his torture.

"9.4 I would respectfully point out that people with PTSD experience particular difficulty with direct interviewing, especially in contexts which seem to them adversarial. The research evidence however suggests that such PTSD-related difficulties should not be seen as evidence of reduced credibility (Cohen 2001, Herlihy and Turner 2007.) PTSD can result in particular difficulties in recalling contextual details of traumatic experiences (Flor and Nees 2014.) [The claimant's] major depression (and in particular his psychomotor retardation and poor concentration) are likely to be compounding these difficulties.

[The claimant's] ability to give evidence

10.1 As is clear from the above, even in the clinical and relatively relaxed context of his interview with me, [The claimant] had difficulty in giving a clear account of his traumatic experiences. He was in particular unable to describe his torture experiences in as much detail as in his statement. In my clinical opinion this is unsurprising in the light of his complex PTSD and his major depression, and of the factors identified in section 9 above. In the formal and potentially adversarial context of a Tribunal hearing, [the claimant's] difficulty would be considerably greater. He would be likely to struggle to give a full account and also likely to become significantly distressed while trying to do so - particularly if he were cross-examined in an adversarial manner. The quality of the content of such evidence would also be reduced.

10.2 In my view [the claimant] would be able to give evidence but should be regarded as a vulnerable witness. Additional measures should be in place to safeguard his wellbeing as outlined in the Joint Presidential Guidance Note No. 2 of 2010: Child, vulnerable adult and sensitive appellant guidance. Particular consideration should be given to (10 iv) controlling the manner of questioning; and (10.2vi) ensure adequate breaks. I would also recommend particular caution in questioning him about his torture experiences and that he should be monitored closely for evidence of escalating distress throughout the process of giving evidence."

16. The claimant was questioned by his own lawyer. He adopted two statements and was asked about his brother. The Secretary of State's representative declined to cross-examine in light of the ruling that the permitted form of questions would be open.
17. A witness MK, the leader of the INF in the UK, gave evidence for the claimant, describing the claimant's involvement with the INF in the UK and thus corroborating parts of his account.
18. The Secretary of State's representative accepted that the claimant has PTSD and did not challenge the scarring report, but noted that the scars need not have been caused by torture and ill treatment in custody. He submitted that the claimant's account was vague in certain respects and there were discrepancies within and between his witness statements. It was surprising that the claimant's passport had not been revoked before, or that he had not been put on a stop list before he left Iran. That he had not applied for asylum in France undermined his credibility. It was not credible that he would have gone on to recruit new members having been detained.

The F-tT's reasons for allowing the appeal

19. The judge correctly noted that the onus of proof lay on the claimant but also noted that the standard of proof in protection claims was the lower standard of "reasonable degree of likelihood" or "a real risk." The judge considered a detailed 31 page witness statement dated 11 April 2017 to which the Secretary of State had not had regard in making her decision, for which no explanation was forthcoming. The judge noted that Professor Katona considered that the claimant fulfilled the criteria for PTSD and major depression, most likely on account of the imprisonment and torture which he had described as having occurred in Iran. He noted the professor's explanation of the impact which PTSD has on a person's ability to testify coherently.
20. The judge was more cautious about the evidence of Mr Mason about the scarring, noting that it was non-specific.
21. The judge considered country information, some of which weakened certain of the criticisms of the claimant's credibility advanced by the Secretary of State
22. The judge found the claimant's account to be credible which was substantiated by expert evidence and other personal and objective information. The judge found MK's evidence, which was subjected to rigorous cross-examination, to be credible.
23. Extensive and careful reasoning was offered for accepting evidence from the claimant and evidence which was led in support of his account in the light of the Secretary of State's challenge. The F-tT's reasoning on the evidence is not challenged in the appeal before us.
24. On the facts found, which are assembled in para 62 in six sub-paragraphs, the judge found that the claimant had demonstrated a well-founded fear of persecution on return to Iran. For the same reasons his appeal was found to succeed on articles 2 and 3. The legal reasoning is not challenged in the grounds of appeal.

Grounds of appeal

25. The grounds of appeal comprise 10 enumerated paragraphs. They are preceded by a summary which is to the effect that by ruling that cross-examination could only proceed by way of open questions, and by prohibiting questioning on the subject of torture and ill-treatment, the impact may have made a material difference to the outcome of the appeal. In essence, it is argued that the hearing was unfair, at common law, to the Secretary of State. Para 5 of the grounds asserts that JPGN in para 10 did not prohibit closed questions. In a conclusion to the grounds, it is suggested that the judge permitted a procedural impropriety by prohibiting cross-examination on the subject of torture and ill-treatment.

Submissions in the appeal

Secretary of State

26. Mr Tufan began his concise and candid submissions by acknowledging that the standard of proof on the claimant had been low and that there had been some strong supportive evidence available to him. The medical findings were not challenged.
27. When we put to parties that what the F-tT judge had said about the evidence of Professor Katona on the subject on the welfare of the claimant should he be questioned about torture was something of a gloss by which distress was represented as detriment or prejudice to welfare (paras 23 and 24), Mr Tufan did not seek to press the complaint about the ruling that there would be no cross-examination on torture and ill-treatment. He explained that in the particular circumstances of this case it was not particularly important. It was a red herring because the real attack on credibility lay on the basis of contrasting statements and identifying the inherent implausibility of parts of the claimant's account. The real issues had been why the claimant had resumed his activities after his release; how he had been able to travel to Paris; whether the authorities had raided the claimant's home as he maintained when he went to Paris; and why he had not claimed asylum there.
28. Mr Tufan suggested that we might consider that the stipulation that cross-examination was to proceed on the basis of open questions might have been an error, exceeding what was permitted by the guidance, and might have been material where credibility was crucial.
29. Given that more time had been offered by the judge on the day of the hearing, and that the Secretary of State had had the scarring report and psychiatric information for at least some time, ground of appeal 10 was not advanced.

Claimant

30. Mr Sellwood adopted the submissions in his Rule 24 note. In essence his position was that the procedural options adopted by the F-tT judge were reasonably open and not susceptible to challenge. In any event, these decisions were ultimately of no materiality.

31. It should be noted that the claimant had given his account of being tortured on four occasions and on a fifth to Professor Katona. He had been interviewed by the Secretary of State's representatives. These were legitimate considerations to consider against the background of the unchallenged opinion of Professor Katona in determining how this vulnerable person was to be questioned and cross-examined.

Analysis

32. Before the F-tT was an unchallenged psychiatric report from Professor Katona. The Secretary of State did not seek time to obtain alternative medical opinion, a delay of several months was sought to reconsider the whole claim.
33. The F-tT judge had regard to JPGN and was also referred to the guidance to be found in the Court of Appeal decision in *AM (Afghanistan) v Secretary of State for the Home Department* [2018] 4 WLR 78.
34. Given Professor Katona's report about his mental health and the likely effect of adversarial questioning, the claimant was properly viewed as a sensitive witness by the judge who was entitled to conclude that he was also a vulnerable adult within the scope of JPGN.
35. Para 6 of JPGN, referring to vulnerable and sensitive witnesses, articulates powers which are also inherent in courts and tribunals in order to ensure that natural justice is done; *AM (Afghanistan)* at para 44. Para 6 advises:

"6. In the final analysis it is the Tribunal's decision whether specific arrangements are made, what those arrangements are and whether the hearing can proceed in their absence."
36. Para 10.2 of JPGN comprises a number of paragraphs of which the following are most relevant to this appeal:

"iii. Ensure questions asked are open ended wherever possible; broken down to avoid having more than one idea or point in each question and avoid suggesting a particular answer.

iv. Curtail improper or aggressive cross examination; control the manner of questioning to avoid harassment, intimidation or humiliation. Ensure that questions are asked in an appropriate manner using a tone and vocabulary appropriate to the appellants age, maturity, level of understanding and personal circumstances and attributes. Pay special attention to avoid re-traumatisation of a victim of crime, torture, sexual violence."
37. We are satisfied that it was within the powers of the F-tT to require that cross-examination should proceed by way of open questions. The Tribunal is encouraged to ensure that questions are open ended wherever possible and that the questions should avoid suggesting a particular answer. The material before the judge justified

the decision that cross-examination should proceed through open questions. It was not the judge's responsibility that the Secretary of State's representative chose not to cross-examine at all. It is plain that the F-T Judge was seeking to be fair to both sides in applying guidance which has the endorsement of the Court of Appeal; *AM (Afghanistan)*.

Materiality

38. Mr Tufan accepted that the claim was a reasonably strong one given the supporting evidence available. Having conceded that the exclusion of questioning about torture and ill-treatment was not important in the particular circumstances of this case, he was unable to articulate how the ruling that open questions should be used in cross-examination materially prejudiced the Secretary of State. The best he could do was to suggest that it might have made a difference, it could not be known what might have happened had closed-question cross-examination been allowed.
39. On that last point, we consider that the Secretary of State might have been in a better position to demonstrate what might have been different if an attempt had been made to cross-examine with open questions.
40. Mr Tufan was candid in accepting that the real grounds of attack on the claimant's credibility lay in contrasting different sources of information, exploring inconsistencies in the claimant's accounts and in arguing that parts of it were inherently implausible.
41. All of those means remained open to the Secretary of State and, from the terms of the determination, they appear to have been deployed. Some of the plausibility arguments were defeated by other sources of information, including country information. Some of the inconsistencies had been explained by the claimant in a subsequent statement and the evidence about his PTSD was relevant in evaluating their significance.
42. The approach of the Court of Appeal in *AM (Afghanistan)* rather undermines any suggestion that an ability to cross-examine at large with closed questions is a necessary feature of a fair trial in the asylum context; paras 21 and 22 where the court favoured the assessment of the relevant evidence being carried out holistically. In the claimant's case there was independent supportive evidence which, in light of the *AM (Afghanistan)* analysis, may render challenge by cross-examination less important than it might otherwise be.
43. Judges in the Immigration and Asylum Chamber know to be extremely circumspect about giving any weight to demeanour because the Tribunal routinely hears witnesses from a variety of cultures and traditions. Any potential benefit from hearing and seeing the witness give evidence would be of still more limited value in this case because of the unchallenged expert opinion about the claimant's PTSD and depression and the effects it would have. It can only be speculative as to how much difference there would have been in the claimant's demeanour on being cross-examined on the basis of open rather than closed questions. Again we observe that the Secretary of State

might have been in a better position to demonstrate what might have been different if an attempt had been made to cross-examine with open questions.

44. The determination is conspicuous for the care with which the judge evaluated all of the evidence and submissions made. Neither the reasoning nor the conclusion is criticised.
45. The Secretary of State is unable to demonstrate in what way the fairness of the proceedings was undermined by the ruling as to the form of questions to be used in cross-examination. If there was an error by the F-tT judge, the Secretary of State is unable to demonstrate any material impact on the outcome of the appeal before the F-tT.

Notice of Decision

The Secretary of State's appeal against the F-Tt's decision of 8 February 2018 is dismissed.

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 14 September 2018

Lord Beckett sitting as an Upper Tribunal Judge.