Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04935/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 April 2019	**On 01 May 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

GLENNA MAHMOOD SMAIL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms B Jones of Counsel, instructed by UK & Co Solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge A K Hussain promulgated on 24 May 2018 in which he dismissed the Appellant's protection appeal against a decision of the Respondent dated 9 April 2018.

2. The Appellant is a citizen of Iraq born on 21 February 1993.

3. The appeal comes before the Upper Tribunal pursuant to permission to appeal granted by Upper Tribunal Judge Chalkley on 15 October 2018, following a refusal of permission to appeal by First-tier Tribunal Judge Adio on 20 June 2018. The grant of permission to appeal is narrow in its scope. The full extent of the reasons for granting permission to appeal are in these terms:

> "*I have not been able to find any reference in the determination to the standard of proof this Judge applied and on that basis,* ***and that basis alone****, I grant permission*".

4. In preliminary discussions today it was acknowledged by both parties that there *was* a reference to the standard of proof which appears at paragraph 3 of the Decision of the First-tier Tribunal. It is in these terms:

> "*The appellant accepts that her claim does not engage a [Refugee] convention ground and therefore does not pursue an asylum claim. She instead relies on a claim for humanitarian protection and under Articles 2, 3 and 8 of the ECHR. The standards and burdens of proof involved in these claims are too familiar to all to bear repeating*".

It then may be seen in the body of the Decision that the Judge deals sequentially with Articles 2 and 3 together, and then Article 8 of the ECHR.

5. Bearing in mind the contents of paragraph 3 it was common ground before me that the real issue pursuant to the grant of permission to appeal was not so much the absence of a reference to the standard of proof so much as whether the reference at paragraph 3 was adequate. In this context I remind myself of the observations of Lord Justice Burnett giving the judgement of the Court in **EJA v Secretary of State for the Home Department [2017] EWCA Civ 10** at paragraph 27:

> "*Decisions of tribunals should not become formulaic and rarely benefit from copious citation of authority. Arguments that reduce to the proposition that the F-tT has failed to mention dicta from a series of cases in the Court of Appeal or elsewhere will rarely prosper. Similarly, as Lord Hoffmann said in Piglowska v Piglowski [1999] 1 WLR 1360, 1372, "reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account". He added that an "appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself"'. Moreover, some principles are so firmly embedded in judicial thinking that they do not need to be recited. For example, it would be surprising to see in every civil judgment a paragraph dealing with the*

> *burden and standard of proof; or in every running down action a treatise, however short, on the law of negligence. That said, the reader of any judicial decision must be reassured from its content that the court or tribunal has applied the correct legal test to any question it is deciding*".

6. Ms Jones makes the observation that the proceedings in the IAC are not inevitably civil in nature, and emphasises that the applicable standard of proof is different depending upon the type of case or issue being considered. Such observations are well-made and are inevitably correct.

7. However, the principal matter of note at paragraph 3 is that the Judge plainly recognised that there were indeed different standards of proof in play in the context of the issues before him. Accordingly the criticism that is now made before me is that it is not clear exactly what the extent of the Judge's recognition of this distinction might have been. The difficulty with that submission is illustrated by the observations in **EJA** to the effect that absent anything clear to the contrary, it may be assumed that the Judge knew the task before him; having identified that there was a distinction in the standard of proof applicable depending upon the type of case, it was to be assumed that the Judge understood the nature of that distinction – unless it could be shown from the Decision that he did not.

8. I accept the substance of Mr Avery's submissions that the Appellant has not otherwise demonstrated that the Judge failed to recognise that it was the lower standard of proof of 'reasonable likelihood' that was applicable so far as Articles 2 and 3 were concerned. In this context Mr Avery directs my attention to paragraph 7 of the Decision where the following is stated:

> "*In drawing an adverse inference I realise that there is no requirement on an applicant for international protection to corroborate her evidence but when that evidence is in the precincts of the tribunal building and there is no explanation for the failure of the witnesses to support an appellant said to be in danger of her life then I am of the view that common sense demands that I take their failure to give evidence into account*".

9. The subject of that passage was the fact that the Appellant's brother attended the hearing centre but was not called as a witness in support of the Appellant's case, notwithstanding it was his alleged conduct that was at the core of the Appellant's own claimed risk. However, more particularly, what Mr Avery invites me to draw from that passage is that it was clear that the Judge had in contemplation that he was dealing with a protection claim, that there was a recognition of a claim of risk to life, and that due allowance was to be made with regard to the nature and quality

of supporting evidence in considering a claim for international surrogate protection.

10. It also seems to me apparent that the Judge had in mind the nature of the case and the standard of proof applicable by reason of his reference at paragraph 4 of the Decision to the 'reasons for refusal' letter ('RFRL') dated 9 April 2018. The Judge offers a summary of the Respondent's decision and reasons as set out in the RFRL, from which it is evident that he had had regard to its contents. The RFRL makes repeated reference to the applicable standard of proof in protection claims: see paragraphs 5, 90, 91, and 92.

11. In all those circumstances it seems to me that when the Judge arrived at the very clear findings at paragraph 22, and then sets out his conclusion at paragraph 23, he has done so in recognition that there are different standards of proof applicable, depending upon the exact nature of the issue being considered; moreover there is nothing to indicate that he misunderstood the applicable standard of proof – or failed to apply it - in the instant case. Paragraphs 22 and 23 are in these terms:

> "*22. In the circumstances, taking everything into account, I am satisfied that:*
>
> *(a) It has not been shown that [F] has a sister or that she is dead or that she died in the care of the appellant's brother;*
>
> *(b) It has not been shown that her brother is a Doctor;*
>
> *(c) It has not been shown that her brother worked at the East Emergency Hospital;*
>
> *(d) Even if he was a Doctor, he was not involved in any way with the claimed death of [F]'s sister;*
>
> *(e) He has not shown that he was kidnapped; and*
>
> *(f) That consequently no demand was made of the appellant or her family for her to be offered in compensation via marriage to [F].*
>
> *23. I have come to the above conclusion after taking everything into account which led me to the conclusion that the appellant was simply not credible. She did not give her evidence in a straightforward manner, was evasive and speculative and did not know the answers to the questions that it was reasonable for her to know. I did not find her to be a witness of truth*".

12. Ms Jones has acknowledged the limitations placed on the scope of the submissions that she can pursue before the Tribunal by virtue of the terms of the grant of permission to appeal; she was duly cautious not to trespass into the other grounds of appeal presented in support of the application for permission to appeal. Such caution was appropriate both by reason of the restriction of the terms of the grant or permission, and by reason of the merits of the other grounds. For the main part those grounds assert inadequate reasons and cite various cases and provisions relevant to the assessment of credibility, but are slight on particularising any specific error. It was also pleaded in the grounds that the First-tier Tribunal should have heard the Appellant's appeal at the same time as her brother's appeal. However, no specific details were advanced in this regard in the Grounds. I am given to understand today that in fact the brother's appeal was heard prior to the Appellant's appeal, albeit that a decision had not yet been promulgated at the time of the Appellant's hearing before the First-tier Tribunal. In any event, no application was ever made to the Tribunal to link the appeals. I am also told by Ms Jones that not only did the brother not give evidence in the instant appeal, but the Appellant did not give evidence in his appeal. Those were matters for the Appellant and her brother to make decisions upon, presumably with the legal advice available to each of them. Absent any application to link the cases, and where the brother's appeal had already been heard, there is no basis to impugn the First-tier Tribunal Judge for not hearing the appeals together.

13. The grounds of appeal also make reference to risk on return, but it seems to me that those grounds are inevitably contingent upon the Appellant's narrative account being accepted, which it was not - and the challenge to which I reject.

14. As I say, Ms Jones was cautious not to trespass into these areas. Nonetheless she did invite consideration to the absence of any detailed reference by the Judge to the country situation, submitting that this might be indicative of a failure to apply the applicable standard of proof. As a 'free standing' ground, failure to have regard to the country situation is not in itself a ground of challenge before me. I am not otherwise persuaded that even if made out it is a reliable indicator that the Judge misunderstood the nature of the burden and standard of proof in this appeal. I reject this line of argument.

15. Accordingly, I find that there is no substance to the limited basis of challenge permitted consideration by the Tribunal pursuant to the grant of permission to appeal.

16. Notwithstanding, I acknowledge that there is something unattractive in the Judge's almost too casual reference to standard or proof. Given that there are different standards of proof 'in play' in the work of the IAC, I would suggest best practice advocates a brief sentence that states clearly the standard or standards applicable to the instant issue.

Notice of Decision

17. The decision of the First-tier Tribunal contained no error of law and accordingly stands.

18. The Appellant's appeal remains dismissed.

19. No anonymity direction is sought or made.

The above represents a corrected transcript of ex tempore reasons given at the conclusion of the hearing.

Signed: Date: **27 April 2019**

Deputy Upper Tribunal Judge I A Lewis