Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08692/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30th October 2020	**On 6th November 2020**

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

'MB'
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:

For the appellant: The appellant represented himself
For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Powell (the 'FtT'), promulgated on 11th December 2019, by which he dismissed the appellant's appeal against the respondent's refusal of his protection and human rights claims.

Background

2. The appellant, an Algerian national, entered the UK unlawfully, claiming to have done so on 30th August 2004, and as later recorded by the FtT in his decision, was convicted of wounding with intent at Blackfriars Crown Court on 23rd September 2014, following which he was sentenced to three years and four months imprisonment. Following his conviction, he was served with notice of liability to deportation. He was subsequently deported on the basis of a false assumed identity to France but returned when the French authorities discovered his true nationality. He applied for asylum in 2015 and by virtue of his offence, the respondent certified the appellant's case under section 72 of the Nationality, Immigration and Asylum Act 2002, as he had been convicted in the UK and sentenced to a period of imprisonment of at least two years, so it was presumed that he had been convicted of a particularly serious crime and remained a danger to the community of the UK.

3. The appellant had claimed asylum and asserted that his removal to Algeria would breach his rights under articles 2, 3 and 8 of the European Convention on Human Rights ('ECHR') on the basis that he was a former member of the Algerian army, having left Algeria in 2002 and was likely to attract the adverse attention of Islamist terrorist groups in Algeria, particularly in his home area. He also feared persecution because of the relationship between a family member and an ex-Islamist leader, in his family neighbourhood. The issues before the FtT were therefore whether the appellant had rebutted the presumption under section 72 of the 2002 Act and whether the appellant had a well-founded fear of persecution or his removal risked a breach of his rights under articles 2, 3 and 8 of the ECHR.

The FtT's decision

4. The FtT considered a potential language barrier to the appellant participating in the hearing before him, dealing with this at §[18] of his decision, which we set out in further later in these reasons. In summary, the FtT was satisfied that the appellant understood everything that was put to him and that everything was translated via an interpreter "efficiently, effectively and accurately".

5. The FtT upheld the respondent's certification of the appellant's claim under section 72, (§[46]), regarding it as "finely balanced" in light of the appellant's previous good character, no previous convictions and no further offences, as well as the fact that the appellant had not been charged with any offences arising from his assumption of a false nationality. Nevertheless, the FtT took into account the Parole Board decision that the appellant posed a medium risk of serious harm.

6. Having upheld the certification, the FtT concluded at §[47] that he need not consider whether the appellant faced a real risk of persecution in Algeria, and at §[48], for the same reasons, the appellant was precluded from relying on articles 2 and 3 of the ECHR. However, the FtT went on to consider whether the appellant was at risk of persecution or serious ill-treatment or harm if returned to Algeria. The FtT concluded that he had not shown, to the lower standard of proof, that there was such a risk of persecution or ill-treatment or harm. At §[54], the FtT noted that the appellant was one of many who completed national service and had not been engaged in any particular activities against Islamist groups or other terrorist groups. There was nothing to suggest that he would attract the adverse attention of terrorist groups in Algeria. At §[55], the FtT recorded that the appellant had remained in Algeria for around two years after his military service, during which time he was bullied and whispered about, but had not come to any harm nor had he received any threats. He had lived openly, and the bullying and whispering did not amount to treatment of such seriousness so as to engage article 3 ECHR. The appellant's brother had also served in the military, as recorded at §[56], a few years earlier and the brother had not experienced any difficulties. The appellant had family in Algeria living in the same area and there was no evidence to show that they had been alerted to potential difficulties for the appellant.

7. Considering also the objective country evidence, the FtT concluded that the appellant would not be risk of persecution or serious ill-treatment and that even if he would, it would not be unduly harsh him to relocate internally within Algeria.

8. In relation to the appellant's rights under article 8, the FtT noted that the appellant did not have any family life in the UK. He was not married and had no partner. He had no children and while there was reference to another brother in the UK, he was present illegally. The FtT analysed the appellant's private life at §[65]. He had not been lawfully resident in the UK. The FtT was not satisfied that there were very significant obstacles to the appellant's integration into Algeria where he had been born and raised and educated and where he had spent the majority of his life. He therefore dismissed the appellant's appeal.

The grounds of appeal and grant of permission

9. The appellant lodged grounds of appeal which essentially relate to the quality of interpretation during the hearing before the FtT. The appellant asserted that he had requested a North African Arabic translator and asserted that the translator was not proficient in North African Arabic but was instead Sudanese. He referred to his evidence before the FtT, which he asserted had been misrecorded or misunderstood, with which we deal below.

10. First-tier Tribunal Judge Haria granted permission on 14th January 2020, regarding it as at least arguable that factual errors may have resulted partly or wholly due to difficulty in interpretation, noting the authority of TS (Interpreters) Eritrea [2019] UKUT 00352 (IAC). The grant of permission was not limited in its scope.

The hearing before us

11. At the beginning of the hearing, we identified two arguably 'Robinson obvious' points (see: R (Robinson) v SSHD [1998] QB 929), namely there is readily discernible an obvious point of Convention law which favours the appellant although he has not taken it. The first was the FtT's reference to paragraph 339D of the Immigration Rules at §[31], and his suggestion that because a person would be excluded from a grant of humanitarian protection, he would be ineligible for a grant of humanitarian protection "*in respect of articles 2 and 3 of the ECHR*". In addition, at §[48], the FtT concluded that because he had upheld the appellant's certification under section 72 of the 2002 Act, the appellant was "precluded from relying on articles 2 and 3 of the ECHR."

12. Both statements conflate humanitarian protection, as a concept, with rights under articles 2 and 3 of the ECHR, which are separate rights. It does not follow that by virtue of exclusion from humanitarian protection, that a person's rights under articles 2 and 3 ECHR are similarly excluded.

13. The second arguable error was at §[47], which stated:

> *"As such, having upheld the section 72, it follows that I must dismiss the appellant's appeal without needing to consider whether he faces a real risk of persecution in Algeria."*

14. It appeared to us that if the section 72 certification applied, then absent any further issue, the appellant became a 'refoulable' refugee. On the basis of Essa (Revocation of protection status appeals) [2018] UKUT 00244, even where section 72 certification was upheld, and where, as a result, the FtT was obliged to dismiss the appeal under section 72(10), the FtT needed to go on to consider whether the appellant nevertheless had status as a refugee, albeit a 'refoulable' one, as this could have important practical implications for the appellant.

15. We nevertheless needed to consider whether any such obvious errors were material on the basis that the FtT had considered both the refugee claim and the claims under articles 2 and 3 in the alternative (§[51] to [62] onwards).

Preliminary issue - translation

16. The appellant raised the question of whether the interpretation for the hearing before us was sufficient. Ms Al Ashi, an accredited interpreter, translated between English and Arabic. The appellant raised the issue that in two previous hearings, the interpreter had not been competent; in one earlier hearing, the interpreter was from Iraq; in the hearing before the FtT, from Sudan. The latter had been unable to understand when the appellant switched from Arabic to French, which was natural for people from Algeria. He felt more comfortable speaking in a combination of the two, although he accepted that he had not asked for an interpreter in both Arabic and French.

17. Ms Al Ashi disclosed to us that she was from a Palestinian background, but had lived in Algeria from some ten years, and had no difficulty in understanding the appellant. She could not translate French.

18. We reminded ourselves of the guidance set out in the authority of TS (Interpreters) Eritrea. We asked the appellant a series of questions and monitored his answers, checking throughout the hearing that he had understood the matters and whether he wished to add anything. The appellant was able to answer all of the questions, at length and with detailed elaboration. He himself explained to us that his understanding of Ms Al Ashi was excellent and indeed his English was good enough that he usually understood what was said by the Tribunal before it needed to be interpreted. Where the difficulty had been with the FtT was that he would sometimes naturally start speaking French and the interpreter had been unable to interpret some of those comments without referring to a mobile phone translation. He was therefore worried that what he had said had not been conveyed fully but he also explained to us candidly that some of the issues that worried him, for example working in the logistics department of the army, which he regarded as particularly relevant, had not been issues he had in fact raised before the FtT, not because of a difficulty in translation but because he had not had legal advice and did not believe them to be important. That is, of course, a different matter from not being able to express evidence because of a deficiency in translation.

19. We were entirely satisfied that in the hearing before us, the appellant was able to answer a series of complex questions with detailed and factual answers and indeed in answering those questions, he did so at length for nearly an hour. On two brief occasions he began speaking French, typically in relation to numbers, but was able to re-express these in a way that could be interpreted to us. We are therefore satisfied that he was able to participate effectively in this appeal before us.

Discussion and conclusions

20. The appellant had referred to the following grounds where he identified concerns about the conduct of the hearing:

    20.1. at §[42], the FtT had referred to a Parole Board decision of 2012, when it was in fact in 2018.

    20.2. At §[38], the FtT had referred to the appellant not appealing against his sentence following his criminal conviction or complaining about his solicitor. The appellant explained he had not done so, because of his limited access to a lawyer whilst in prison.

    20.3. At §[55], the FtT had not remained in Algeria for two years after completing his military service, but instead only for 15 months.

    20.4. At §[56], the appellant's brother had been referred to as having served in the Algerian military a few years earlier. He had in fact served in the military in 1978. This was prior to the start of the civil war in Algeria.

    20.5. In relation to the appellant's private life at §[64], the FtT had not referred to the appellant's three cousins who are British citizens, as well as his many friends.

20.6. Finally, the appellant referred to an unnamed person who had been seated behind the appellant during his hearing before the FtT, which the appellant found uncomfortable, and his lack of legal representation because solicitors had refused to take on his case.

The Law

21. We considered the well-known authority of TS (Interpreters) Eritrea [2019] UKUT 00352 (IAC) and set out below relevant headnotes, in relation to difficulties with interpreters:

> *"(1) An appellate tribunal will usually be slow to overturn a judge's decision on the basis of alleged errors in, or other problems with, interpretation at the hearing before that judge (Perera v Secretary of State for the Home Department [2004] EWCA Civ 1002). Weight will be given to the judge's own assessment of whether the interpreter and the appellant or witness understood each other.*
>
> *(2) Such an assessment by the judge should normally be undertaken at the outset of the hearing by the judge (a) putting questions to the appellant/witness and (b) considering the replies. Although he or she may not be able to speak the language of the appellant/witness, an experienced judge will usually be able to detect difficulties; for example, an unexpected or vague reply to a specific question that lies within the area of knowledge of the appellant/witness or a suspiciously terse translation of what has plainly been a much longer reply given to the interpreter by the appellant/witness. Non-verbal reactions may also be factored into the judge's overall assessment.*
>
> *(3) Where an issue regarding interpretation arises at the hearing, the matter should be raised with the judge at the hearing so that it can be addressed there and then. Even if the representatives do not do so, the judge should act on his or her own initiative, if satisfied that an issue concerning interpretation needs to be addressed.*
>
> *(4) In many cases, the issue will be capable of swift resolution, with the judge relying upon the duty of the parties under rule 2(4) of the Procedure Rules of both of the Immigration and Asylum Chambers to help the Tribunal to further the overriding objective of dealing with the case fairly and justly.*
>
> *(5) A challenge by a representative to the competence of a Tribunal-appointed interpreter must not be made lightly. If made, it is a matter for the judge to address, as an aspect of the judge's overall duty to ensure a fair hearing. Amongst the matters to be considered will be whether the challenge appears to be motivated by a desire to have the hearing aborted, rather than by any genuine material concern over the standard of interpretation.*
>
> *(6) It will be for the judge to decide whether a challenge to the quality of interpretation necessitates a check being made with a member of the Tribunal's administrative staff who has responsibility for the booking of interpreters. Under the current arrangements for the provision of interpreters, it may be possible for appropriate enquiries to be made by the administrative staff of the Language Shop (a quality assurance service run by the London Borough of Newham in respect of the Ministry of Justice's language contract), as to whether the interpreter is on*

the register and whether there is any current disclosable issue regarding the interpreter. The initiation of any such enquiries during a hearing is, however, a matter for the judge. In practice, it is unlikely that it would be necessary or appropriate to take such action. In most cases, if the standard of interpretation is such as seriously to raise an issue that needs investigating, the point will probably already have been reached where the hearing will have to be adjourned and re-heard by a different judge (using a different interpreter).

(8) On an appeal against a judge's decision, even if it is established that there was or may have been inadequate interpretation at the hearing before the judge, the appeal will be unlikely to succeed if there is nothing to suggest the outcome was adversely affected by the inadequate interpretation. This will be the position where the judge has made adverse findings regarding the appellant, which do not depend on the oral evidence (Perera, paragraphs 24 and 34)."

The appellant's submissions

22. The appellant reiterated the FtT's reference to the incorrect date for the Parole Board decision; the FtT's reference to the incorrect period of time after leaving the military that the appellant had lived in Algeria; he showed us a list of friends in the UK which had been ignored by the FtT; he explained again his reasons for not appealing his sentence, the gist of which was that he was advised that his prison sentence might be increased; the fact that he had served in the logistics section of the Algerian Army, which was particularly sensitive, although he accepted that he had not referred to this matter before the FtT. He also explained the reasons for delaying leaving Algeria, because of difficulties in obtaining a visa. He referred to the sixteen years between 2004 and 2020 in which he had lived in the UK and the friendships and family that he had established in the UK in that period. Having checked with the appellant each of the items in the grounds of his appeal, we were satisfied that he had had every opportunity to provide any additional comments he wished to make.

The respondent's submissions

23. In brief submissions, (without any criticism of Mr Tufan), in summary, to the extent there were any initial errors identified in relation to the conflation of articles 2 and 3 ECHR and humanitarian protection, and the reference to not needing to consider these articles, or the protection claim in the event that certification was upheld, they were not material.

24. We should be slow to overturn any First-tier Judge because of difficulties in interpreting, (see headnote [8] of TS (Interpreters)). Unless we identified any adverse effect on evidence, any appeal was unlikely to be successful. Mr Tufan then went to deal with each of the points in the list of the appellant's grounds, each of which essentially related to the lack of relevance or materiality.

Decision on error of law

25. We conclude that there are no material errors of law in the FtT's decision. Our reasons for this conclusion are as follows.

26. First, as Mr Tufan readily accepted, while there had been errors in the FtT's reference to not needing to consider refugee status and articles 2 and 3 in light of the upholding the section 72 certificate, what is clear is that the FtT fortunately then went on to consider in detail those very same risks at §[51] to [60] of his decision. As a consequence, whilst we accept that they were clear errors, we are satisfied that they did not render the FtT's decision unsafe, such that it should be set aside.

27. Dealing with the next issue of difficulties in interpretation, we considered the FtT's reference at §[18] of his decision. The FtT had resolved this, in our view, in an exemplary way, as follows:

> "At the beginning of the hearing I enquired of the appellant if he understood the interpreter. He told me he was having some difficulty because the interpreter was not using North African Arabic. The interpreter explained that he had lived and worked with North African Arabic speakers and was confident there was no real problem. The appellant agreed. It was also apparent that the appellant spoke English to a degree. I kept a careful eye on the interpretation throughout the hearing and I was satisfied that there was a fluent narrative between the appellant and his interpreter. The appellant raised no concerns at all about the interpreter and I am entirely satisfied that the appellant understood everything that was put to him and that the interpreter translated his evidence to me efficiently, effectively and accurately."

28. In essence, the FtT in our view applied the authority of TS (Interpreters) in a flawless way, checking and monitoring the appellant's understanding. Moreover, considering headnote [8] of TS (Interpreters) and in particular that an appeal would be unlikely to succeed if there was nothing to suggest that the outcome was adversely affected by the inadequate interpretation, even if, for one moment, we accept the criticism of interpretation (for which there is no evidence), we conclude that there has been no adverse effect in this case before the FtT, by reference to the grounds listed by the appellant, as set out below.

29. The FtT's reference to the Parole Board decision in 2012 at §[42] is clearly a typographical error in light of the FtT's earlier reference to the conviction in 2014 (§[3]). Nothing turns on the date of the decision in the FtT's analysis, noting at §[43] that he accepted that the appellant was a man of previously good character.

30. The appellant's reference to the FtT considering that the appellant had not appealed against his criminal sentence was something which, despite his assertions of an inability to do so, the FtT was unarguably entitled to take into account. Put simply, the FtT could not go behind the fact of a criminal conviction, in the absence of an appeal, whatever the reason for not appealing might be.

31. The challenge to the FtT's reasons at §[55] is similarly unsustainable, on the basis that the appellant says that he had remained in Algeria for one year and five months, but he says that the FtT had referred to two years. The FtT clearly refers at §[55] to the period of 'about two years' and there is no suggestion that it was exactly two years. Nothing, in our view, turns on the additional six months.

32. We similarly regard the challenge to the FtT's reference at §[56] to the appellant's brother serving 'a few years earlier' as opposed to a specific reference to his military service in 1978 as not beginning to undermine the FtT's findings on the protection claim, when there was no distinction in that claim between those who had completed military service in the early part of this century, as opposed to in the late 1970s. In reality, the appellant's real complaint is that he had wished that he had referred to having worked in the logistics corps of the Algerian Army, but accepts that he had not raised this with the FtT because of the lack of legal representation. The FtT cannot be criticised for that.

33. At §[64] the FtT was unarguably entitled to take into account the fact that the appellant did not have family life for the purposes of article 8 ECHR. We distinguish family life for the purposes of article 8, with the wider sense of family life such as, for example, with adult cousins who are British citizens, and the FtT was clearly considering in this case in the context of section 117C of the Nationality, Immigration and Asylum Act 2002 and whether there was a qualifying partner or children. In those circumstances, the lack of reference to adult cousins is one that clearly would have made no difference and the FtT is not obliged to refer to every piece of evidence or relationship in their decision.

34. Two final points arise. The first is the appellant's unease about an unidentified person being present during his hearing before the FtT. As Mr Tufan rightly points out, hearings of this nature are typically ones which are held in public and the FtT cannot be criticised for continuing the hearing in public when there had been no request, nor would it be usual, for the hearing to be held in private.

35. Finally, reference is made by the appellant stating that he would like more time to get solicitors but as he candidly admits now, he has sought to get legal representation but does not have the financial means to do so. In these circumstances, there cannot be any criticism of the FtT for proceeding with the hearing simply on the basis that the appellant would ideally wish to be able to afford legal representation.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of any errors of law such that the decision is unsafe and should be set aside.

The appellant's appeal is dismissed and the decision of the First-tier Tribunal stands.

The anonymity directions will continue to apply

Signed J Keith Date: 4th November 2020

Upper Tribunal Judge Keith