Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09769/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decisions & Reasons sent out on**
On 29 January 2020	**On 16 March 2020**

Before

MR JUSTICE LANE, PRESIDENT
MR C. M. G. OCKELTON, VICE PRESIDENT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer.
For the Respondent: Mr J Dixon, instructed by Duncan Lewis & Co Solicitors (Harrow).

DECISION AND REASONS

1. This is an appeal by the Secretary of State. The respondent, whom we shall call "the claimant", is a national of Egypt who appealed to the First-tier Tribunal against the refusal of his protection claim. That claim was based on his assertion that, if returned to Egypt, he would be at risk as being, or being perceived to be, a supporter of the Muslim Brotherhood. It has at all relevant stages been recognised that the claim stands or falls with the credibility of the claimant's account of his past activities in Egypt.

2. Substantial documentation was prepared for the hearing before the First-tier Tribunal, including the papers submitted to the Secretary of State and a record of the claimant's interview, other documents relating to his family members, supporting evidence from individuals who know him, and country material, including a report by Dr Alan George. The appeal was listed for hearing before Judge P J M Hollingworth on 24 January 2019. The claimant was called, and began to give his evidence. He was cross-examined by Mr Hogg, a Presenting Officer. There was a series of questions about ill-treatment he had described in his oral evidence, but which, Mr Hogg put to him, he had not previously detailed. Mr Hogg then went on to ask the claimant questions about his connection with the Muslim Brotherhood and the Freedom and Justice Party. The claimant indicated that he had advocated civil disobedience, but was not in any way linked to any political party. He had had one or two thousand leaflets printed.

3. At this point in the claimant's cross-examination there was an interruption. The judge records in his decision as follows:

> "13. At this point there was an application for adjournment by Learned Counsel to take a further statement for the Appellant and seek further evidence in relation to the issue of the Appellant's support for the opposition to the government in Egypt. Mr Hogg objected to this. I made the following decision. The scope of the case had significantly altered during cross-examination and unfairness arose to the Appellant in relation to the scope of the case as presented to the Tribunal on the basis of the witness statement submitted. The adjournment was granted to rectify this."

4. Mr Dixon indicated to us that, save possibly in some wholly formal sense, it was not right to say that he had asked for an adjournment. The initiative had come from the judge. Whether or not that is right, the matters leading up to it are wholly unclear. The grounds of appeal, drafted by a Presenting Officer who was not the Presenting Officer at the hearing, assert that the claimant had claimed both to be a member and not to be a member of the Freedom of Justice Party and the Muslim Brotherhood. It is far from clear to us that any claim to have been a member of either of those bodies appears in the claimant's own account. Given, however, his claimed association with both parties, we cannot see that there could have been any objection to Mr Hogg's asking him for clarification. Unfortunately, the judge did not take the opportunity to set out either what the issue was or his reasons for resolving it in the way he did.

5. The principal ground of appeal by the Secretary of State is that the resulting decision, allowing the appeal, after a series of further events which we shall set out in due course, was unfair. The judge, without any apparent reason for doing so, gave the claimant an opportunity to improve his case at a point where questions and cross-examination were getting difficult. The claimant's response, made by Mr Dixon in writing and orally, is that the judge considered that the questions about the claimant's activity appeared to extend beyond what was in his witness statement.

We do not think that that is right or that it would give any good reason for granting the adjournment.

6. During the course of taking evidence, a judge's role has to be merely supervisory. In dealing with representatives, and in assessing their submissions, the judge is entitled to take a role as interventionist and active as he considers appropriate. But while evidence is being taken, he should limit himself to making sure that the evidence is given as well as may be. He should be alert to the witness's welfare; he should check that there are no obvious problems with interpretation. He will ensure that there are no undue interventions from the other side, reminding representatives, if necessary, that they will have an opportunity in due course to ask their questions. When both sides have finished their examination, he may ask questions of his own by way of clarification; if he does, he should give both sides an opportunity to ask any further questions arising from his. If there are any questions which are manifestly unfair, he might simply direct that they be not asked, or if already asked, not answered. It is not, however, easy to see how a relevant question about the claimant's own life and activities could be unfair. If a new issue is raised and is thought to be of importance, it may possibly be necessary to supplement evidence by some means: but that in itself would not be a reason for adjourning during the course of taking evidence.

7. If something exceptional happens during a hearing, causing a disruption of the normal course of events, such as the continuous taking of evidence, it is essential that the judge should record exactly what happened and why; who said what, and what decision the judge made and on what basis. In that way any subsequent challenge to the judge's action on the grounds of fairness or appropriateness can be properly dealt with.

8. In this case we have no basis for saying that the judge acted properly in taking the extraordinary step of granting, possibly of his own motion, an adjournment to allow the claimant to supplement his evidence during the course of a cross-examination challenging his credibility. Without an explanation or justification, his action has to be seen as an error of law in breaching procedural expectations and inducing a sense of unfairness. To that extent, it appears to us that his decision was affected by error of law.

9. It is not at all clear what, if that error stood alone, would be the appropriate remedy. It is not now said that there were other matters which the Secretary of State would have wanted to put to the claimant, but that an opportunity did not arise. The damage, if it were damage, had already been done by the granting of the adjournment, enabling the claimant to put together what further material he chose, and cannot be remedied. It may, however be, that we should have decided that, in order to erase any sense of unfairness, the matter should be reheard.

10. As it happens, however, the error which we have identified does not stand alone.

11. The case resumed before the judge on 23 May 2019. The claimant adopted a new witness statement, made on 15 April 2019, and Mr Hogg resumed his cross-examination. The claimant was re-examined. His wife was called to give oral evidence and was cross-examined. Submissions were then made. At this point the judge's decision throws some (very little) light on what happened earlier. Mr Hogg is noted as having begun his cross-examination by reference to a new witness statement from Dr Maha Azzam, describing himself as Head of the Egyptian Revolutionary Council and noting that the claimant "was part of the setting up of the Freedom of Justice Party" and "was actively involved in canvassing for the party". Further detail in the judge's description of the re-examination of the claimant and the evidence of his wife suggests that one of the questions was whether he was accurately described as one of the founders of the Freedom of Justice Party. If that was the issue which the judge considered so important that it was necessary to interrupt the claimant's evidence in order to obtain further material, it is surprising that the judge appears to reach no conclusion on the evidence now before him on that issue.

12. What is much more to the point is that it is very difficult indeed to see what were the judge's conclusions and on what evidence he based those conclusions. Paragraphs 14-17 are, for the most part, a narrative of the evidence given on 23 May 2019, in continuous prose. There is no attempt anywhere in the decision to assemble evidence under a subject matter. Instead, each question and answer is set out simply as it was given. A comparison with the judge's note seems to show that this part of the decision is simply a transcript of the notes the judge took during the hearing.

13. It appears that the reasons for the judge's decision allowing the appeal are to be derived largely from paragraphs 20 to 22. Those three paragraphs extend over pages 10-17 of the decision. Paragraph 20, which begins "In the refusal letter the Respondent has accepted that the Appellant is a national of Egypt", is nearly two pages long. Paragraph 21, which begins "The Appellant described the work which he did", is over a page long. Paragraph 22, which begins "The Respondent has set out an analysis of the Appellant's claims in relation to his arrest and that which took place in Egypt" extends over more than four pages, some 4,200 words in all, with no structure. Each of these paragraphs consists of a mix of references to part of the evidence, parts of the submissions, parts of the respondent's letter of refusal, comments by the judge and, from time to time, sentences beginning "I find". Undoubtedly the end result is that the judge concludes that every point raised by the respondent as a matter of credibility has been sufficiently explained by the claimant. What is difficult is to understand the extent to which, and the reasons why, the judge has concluded that the explanations are satisfactory. It would, we think, be possible to draw support for that proposition from a number of places in the decision. For simplicity, we will cite only the closing passage of paragraph 22:

> "22. … The Respondent applied Tanveer Ahmed in relation to the documentation produced by the Appellant. The Respondent considered the application of Section 8. The Appellant arrived in the UK on 26th July 2016. Although, the Respondent continued, the Appellant claimed he was travelling with the intention of escaping his problems in Egypt and was in fear when he arrived because of his problems there he did not claim asylum on arrival because he did not know about asylum then. The Respondent noted the Appellant had family in the UK i.e. his wife's two brothers who had become naturalised British citizens and therefore had knowledge of the UK immigration system. The respondent considered it reasonable to expect the Appellant to have asked them for help and information. I find some limited damage has been done to the Appellant's credibility by his failure to claim asylum on arrival. I take into account the Appellant's explanations in this context. The Appellant has explained that when they came to the UK in July 2016 his wife's brother advised them that they could not return to Egypt because it was not safe. He told the Appellant that he would be moving to Ireland for work and took them with him. After three months they came back to the UK because his work was not doing well and they went to see a solicitor in London who advised them to apply under the EEA Regulation but the application was refused. The sister then told the Appellant he should leave the country but the Appellant explained what had happened in Egypt which is when the Appellant was advised to claim asylum."

14. The first assertion made there is in relation to Tanveer Ahmed. That is the only reference to that case in the judge's decision. It is notable that the judge does not express any view of his own about the application of Tanveer Ahmed to the documents in the case. The judge goes on to consider s. 8. He records the respondent's view. He records the explanations. He does not indicate whether the accepts the explanations. He says that "some limited damage has been done to the Appellant's credibility", but gives neither here nor elsewhere, any indication of the extent of that damage. Indeed, elsewhere, he appears to indicate that the claimant's testimony is wholly credible.

15. Only after the narration of the judge's stream of consciousness in paragraphs 20 to 22 does the judge record any thoughts about the report from Dr George. The report had been the subject of submissions which the judge had recorded. The report is evidently of importance in the context of this appeal. A particular passage in it, to which Mr Hogg referred, is as follows:

> "113. Should the Tribunal determine that [the claimant's] testimony is credible, in my opinion he would be at grave risk in Egypt.
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> 114. I must express surprise, however, that [the claimant] was able to evade the authorities for so long after his release from detention in February 2015. He testifies that he was released on condition that he report to the authorities with information about the Muslim Brotherhood. He failed so to report, and relocated within Cairo. In my view it is likely that the police would have responded to his defiance of their reporting instructions and would have been able to trace him to his new address. I note in this regard that in the period February 2015 - May 2016 he made separate trips to the United Arab Emirates and Saudi Arabia, travelling on his own passport

> through Cairo airport without encountering any difficulties from the authorities (as the Home Office notes at Paragraph 55 of its Asylum Decision Letter); and that he flew to the UK without difficulty in July 2016 using his own passport and passing through Cairo airport (as the Home Office notes at Paragraphs 59-60 of Asylum Decision Letter). I note also that in February 2016 he was issued a new Egyptian passport without facing any problems (as the Home Office notes at Paragraph 56 of its Asylum Decision Letter). It is very likely that when applying for this document he would have had to provide the authorities with his address.
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> 115. I would add that corruption is widespread amongst public officials in Egypt (see my Paragraph 101). As a result, it would be plausible that a person wanted by the authorities could pass through an airport unhindered; and [the claimant] claims that this explains why he was able to leave Egypt and return without being stopped and detained. He states that when he left Egypt for the UK he was assisted through Cairo airport by the police general … who had also engineered his release from detention in 2016 and whose son [the claimant] had assisted (Question 63 of the Asylum Interview Record). Against the same background of corruption, it is not implausible – but it is surprising, in my opinion – that [the claimant] would have been able to leave Egypt and return unhindered twice in the 2015-2016 period, before coming to the UK. To the best of my understanding, he has not explained this.
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> 116. [The claimant] claims that in January 2018 the police formally summoned him to appear at a police station. I agree with the Home Office (Paragraph 61 of the Asylum Decision Letter), that it is unclear why the police would have delayed for so long before issuing such a summons."

16. As the judge noted, Dr George had reminded himself that the credibility of the claimant was a matter for the judge. But, as the Secretary of State's grounds of appeal assert, other than because it is a matter for him, it is not at all easy to see how the judge deals with the caveats expressed by Dr George. In particular, there appears to be no proper assessment of the claimant's claim to be at risk if returned now, and his experiences both in Egypt and in travelling to and from Egypt in the past. We agree with the Secretary of State that this was a central matter in relation to the claimant's claimed fear of ill-treatment on return. It needed a clear, reasoned response from the judge. It did not have one. It is true that, somewhere about halfway through paragraph 22, the judge refers to the claimant's movements and says that "I find the Respondent has overlooked the potential value to the authorities of acquiring information from the Appellant… in terms of links between the Muslim Brotherhood and the countries visited by the Appellant", but that appears to be simply speculation by the judge: it is a matter that had apparently not occurred to Dr George, and was not advanced by Mr Dixon.

17. The final passage of the judge's decision is as follows:

> "24. … I allow the appeal on the basis of accepting the evidence of the Appellant and that of Dr George. I have set out my reasons. I allow the

> appeal on a further and separate basis. I accept the evidence of the Appellant's wife in addition. I allow the appeal on that basis. I allow the appeal on a further and separate basis to this. In addition I accept the medical evidence which has been provided. I find the medical evidence corroborates the account of the Appellant. I allow the appeal on this third footing."

18. It is very difficult indeed to know what this means. We have already noted that the judge appears to look at the evidence of Dr George after reaching a conclusion on the claimant's own evidence and the individual evidence supporting it. We would normally be slow to derive such conclusions simply because of the order in which matters appear in the decision: but this decision does simply appear to be a narrative of the judge's thought processes and so the criticism may be valid. But there can be no conceivable basis for allowing an asylum appeal by the claimant solely on the basis of his wife's evidence (thus, presumably, even if his own evidence was a complete fabrication), or solely on the medical evidence, which related to orthopaedic problems with his neck and back, and mental health problems which can be fairly summarised as depression. What, instead, these final sentences of the decision indicate is that the judge specifically did not consider the evidence as a whole in assessing whether the claimant was credible in his account of the reasons for his fear of persecution on return to Egypt.

19. We are sorry to say that as well as the error of law in procedure, which we identified earlier in this decision, the judge erred by failing to produce a decision which gave intelligible and sustainable reasons, based on the evidence as a whole, for his conclusions.

20. Before us, the representatives of both parties agreed that, if we found error of law in the decision, it ought to be set aside and remitted for a fresh hearing before the First-tier Tribunal. We agree.

21. The judge's decision involved errors of law. We set it aside. We direct that the appeal be heard entirely afresh by the First-tier Tribunal.

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.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 03 March 2020