



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/08312/2019

**THE IMMIGRATION ACTS**

**Decided at Field House**

**Decision & Reasons  
Promulgated**

**On 1 November 2021**

**On 18 November 2021**

**Before**

**UPPER TRIBUNAL JUDGE CANAVAN  
UPPER TRIBUNAL JUDGE O'CALLAGHAN**

**Between**

**BISS (EGYPT)  
(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr. A Bandegani, Counsel, instructed by Duncan Lewis Solicitors

For the Respondent: Mr. P Deller, Senior Presenting Officer

**Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings**

## **DECISION AND REASONS**

### **Introduction**

1. The First-tier Tribunal (Judge of the First-tier Tribunal Lawrence) allowed the appellant's appeal against a decision to deport him on human rights (article 3) grounds by a decision sent to the parties on 9 March 2021. The respondent subsequently granted the appellant five years' leave to remain on humanitarian protection grounds.
2. By a decision dated 16 March 2021, Judge of the First-tier Tribunal Parkes granted the appellant permission to appeal the First-tier Tribunal's refusal of his Refugee Convention appeal.
3. Upper Tribunal Judge Rintoul issued a Memorandum and Directions, dated 19 April 2021, observing, *inter alia*:
  - '2. The Upper Tribunal notes that the issue in this appeal is narrow: did the First-tier Tribunal err in concluding that there was no 'nexus' between the serious harm the appellant faces on return to Egypt and the Refugee Convention.
  3. The Upper Tribunal considers that this issue is such that it would be assisted by skeleton arguments from both parties addressing this issue, and in particular, Articles 9.3 and 10 of the Qualification Directive and *EZ v. Germany* [2020] EUECJ C-238/19; and, to the extent that these continue to represent the law.
  4. The Upper Tribunal observes that the First-tier Tribunal appears not to have engaged with *DH (Particular Social Group: Mental Health: Afghanistan)* [2020] UKUT 223; or with *EZ v. Germany*; or with *Shah & Islam* [1999] UKHL 20 or *K & Fornah* [2006] UKHL 46.'
4. The error of law hearing in this matter was listed to be heard before a panel on 1 November 2021. The parties filed a rule 39 consent order on 29 October 2021.
5. We are grateful for the efforts of Mr. Deller, Mr. Bandegani and Mr. Kett in this matter, the latter being the appellant's solicitor.

### **Anonymity**

6. An anonymity order was issued by the First-tier Tribunal and having carefully considered the circumstances arising in this matter we

conclude that the appellant's article 8 rights outweigh the public interest in open justice, as protected by article 10. It is presently in the interests of justice that the appellant is not publicly recognised as someone seeking international protection. We therefore confirm the anonymity order above: *Cokaj (anonymity orders, jurisdiction and ambit)* [2021] UKUT 202, at [17]-[28].

### **Extension of time - Application to continue appeal**

7. On 17 September 2021 the appellant was granted leave to remain by the respondent on humanitarian protection grounds. Section 104(4B) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') establishes that an appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to remain. Section 104(4B) permits an appellant to give notice in accordance with rule 17A(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the Procedure Rules') that he wishes to pursue an appeal in so far as it is brought on asylum grounds.
8. The appellant filed and served the required notice on 26 October 2021, some 9 days outside of the permitted 30-day period. He seeks an extension of time in which to file his application. An explanation for the delay was provided and the respondent takes no issue with the delay. Consequently, being mindful of the overriding objective, time is extended to 26 October 2021 for the filing of the appellant's notice.

### **Decision**

9. Mr. Deller informed both the appellant and the Tribunal by email correspondence on 26 October 2021 that the respondent now accepted that the appellant's claim discloses a Refugee Convention reason of imputed political opinion, based on the unchallenged findings of prison conditions exacerbated by the appellant's mental health and inflicted to the extent necessary by reason of the Egyptian authorities' attitude to draft evaders and, by extension, deserters. Mr. Deller confirmed that the respondent would grant leave to remain reflecting refugee status.
10. The parties filed a rule 39 consent order. The relevant sections of the consent order are detailed below:
  1. Upon the Appellant's application to proceed with his protection ground under section 104(4B) of the 2002 Act notwithstanding the grant of leave to remain for 30 months based on a belief that the appeal had been allowed only on the basis of Article 3 medical considerations in the light of AM (Zimbabwe) - and his extension of time request being granted by the Tribunal; and

2. Upon the Respondent assuring the Appellant and the Upper Tribunal that the Appellant will be granted leave to remain based on Refugee status without undue delay; and
  3. Upon the Respondent assuring the Appellant and the Upper Tribunal that she will bring to the attention of the Country Information Policy Unit:
    - a. The appellant's complaints as to paras 2.22. and 2.23 and 2.45 of the Respondent's CPIN: Egypt, November 2019; and
    - b. The concession (at 4 below); and
    - c. The expert and public domain evidence in this appeal.
  4. The parties consent to the disposal of the appeal on the following agreed basis:
    - a. Contrary to the conclusion reached by the First-tier Tribunal, the Secretary of State accepts that the Appellant is at risk of ill-treatment reaching the persecution threshold by reason of imputed political opinion (namely desertion or evasion from the Egyptian military which the Egyptian state perceives to be an expression of public opinion);
    - b. Consequently, the Judge erred in holding there was no 'nexus' between the ill-treatment and a Convention reason;
    - c. The Tribunal shall set aside the decision of the First-tier Tribunal, preserving findings of fact which have not been challenged; and
    - d. The Tribunal proceeds summarily to allow the Appellant's appeal on remaking.'
11. We observe the following findings of fact made by the First-tier Tribunal:
- i. The respondent conceded that the appellant has served with the Egyptian military
  - ii. The appellant deserted during military training due to his poor treatment by his superiors in rank at some point in mid-2011
  - iii. If returned to Egypt the appellant would be detained on arrival and/or placed in pre-trial detention for desertion in

conditions that would violate his protected rights under article 3 ECHR.

12. We further note the First-tier Tribunal's acceptance of evidence presented by Hugh Miles, journalist, particularly:

- i. The usual expected punishment for avoiding the draft of men of service is from two to three years imprisonment
- ii. Draft evaders are normally dealt with by the army and military police, rather than by the regular police or civil authorities
- iii. The government's rhetoric is dominated by hyper-nationalism and in such climate draft-evaders risk being viewed not just as criminals, but traitors
- iv. Prisons in Egypt are often extremely overcrowded, and prisoners are denied their basic rights, such as access to medical care. The use of physical and psychological violence towards prisoners is common.

13. The First-tier Tribunal concluded:

'91. The detention of the Appellant on arrival and/or in pre-trial detention as a returnee from abroad and for desertion in conditions that would violate his rights under Article 3 ECHR would meet the threshold of harsh and disproportionate punishment.

92. There must however be a nexus from such punishment to a Convention reason.

93. In the Appellant's case, the closest the evidence comes to establishing such a nexus is Mr. Miles' opinion, which I have accepted, that the Egyptian regime's rhetoric is dominated by hyper-nationalism and the so-called war on terror, creating a climate in which draft-evaders (and deserters) risk being viewed not just as criminals, but traitors. That could conceivably point towards the punishment being for the Convention reason of political opinion, but I did not read or hear developed submissions on the point, and I do not consider that the Appellant has established the existence of such nexus.'

14. We are satisfied that the respondent was correct to concede that the appellant's claim discloses a Refugee Convention reason of imputed political opinion. Desertion is perceived by the Egyptian authorities to be an adverse expression of political opinion conducted in the public

sphere. Schieman LJ held in *Noune v. Secretary of State for the Home Department* [2001] I.N.L.R. 526, at [8], if it is shown that there is a reasonable likelihood that the persecutor will attribute a political opinion to the victim and persecute him because of it, the fact, if it be a fact, that the persecutor would be in error in making that attribution does not disqualify the victim from refugee status. We are satisfied that the First-tier Tribunal materially erred in law by concluding that there was no nexus between the prohibited treatment and the Convention reason of political opinion.

15. We set aside the decision of the First-tier Tribunal in respect of the Refugee Convention appeal, preserving the findings of fact. We remake the decision and find on the facts found by the First-tier Tribunal that the appellant has established a well-founded fear of persecution at the hands of the Egyptian authorities for the Convention reason of (imputed) political opinion.

### **Notice of Decision**

16. The decision of the First-tier Tribunal, dated 9 March 2021, involved the making of a material error on a point of law in respect of the Refugee Convention appeal and is set aside on that ground alone. The First-tier Tribunal's findings of fact are preserved.
17. We remake the decision in respect of the Refugee Convention appeal and allow the appeal.
18. The anonymity order is confirmed.

Signed: D O'Callaghan  
**Upper Tribunal Judge O'Callaghan**

Date: 1 November 2021