Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-001967
On appeal from PA/51584/2021
[IA/06154/2021]

THE IMMIGRATION ACTS

Heard at Field House
On the 25 August 2022

Decision & Reasons Promulgated
On the 02 November 2022

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE LEWIS

Between

RMA
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Robinson of Counsel instructed by Wilson Solicitors
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. Each of the parties to these proceedings has raised different challenges to the Decision of First-tier Tribunal Judge Coll, promulgated on 31 March 2022.

2. RMA is an appellant in his own challenge and a respondent to the Secretary of State's challenge; similarly the Secretary of State is an appellant in her own challenge and a respondent to the Appellant's challenge. For convenience we shall refer to RMA as the Appellant and the Secretary of State as the Respondent.

Background

Appellant; asylum claim; previous appeal

3. The Appellant is a Palestinian born in Lebanon on 27 May 1990. He lived in a refugee camp in the Lebanon. He claims that he left the camp in April 2014, staying with an aunt for a while in Beqaa whilst arrangements were made for him to leave Lebanon. He arrived in the UK in December 2014 and applied for asylum; a screening interview took place on 16 December 2014, following which there was an attempt to remove him to Hungary on 'third country' grounds. This proved unsuccessful and a substantive asylum interview was conducted on 30 April 2015. The Respondent refused the asylum claim on 30 November 2015.

4. The Appellant appealed to the IAC. His appeal (ref. AA/13405/2015) was heard by First Tier Tribunal Judge Lawrence on 3 January 2017. The Appellant was represented by counsel instructed by Duncan Lewis; he gave oral evidence at the appeal hearing. The appeal was dismissed in a 'Decision and Reasons' promulgated on 26 January 2017 on 'protection' and 'human rights' grounds (Respondent's bundle A48-A57).

5. The Appellant was granted permission to appeal to the Upper Tribunal. By a decision promulgated on 19 September 2013, Deputy Upper Tribunal Judge Sheridan set aside the decision of Judge Lawrence for error of law. A resumed hearing was held on 17 November 2017 before Judge Sheridan. The Appellant was again represented by counsel instructed by Duncan Lewis; however, on this occasion, he did not give oral evidence:

> "*The appellant did not give oral evidence at the hearing. [Counsel for the Appellant] stated that the respondent had already had an opportunity to cross examine the appellant and the evidence was a matter of record. I reminded [Counsel] that none of the findings of fact of the First-tier Tribunal had been preserved and that the entire matter, including the appellant's credibility, was being heard afresh. He maintained his position that the appellant would not be tendering himself to give evidence.*" (paragraph 6)

6. Judge Sheridan remade the decision in the appeal dismissing it on 'protection' grounds ('Decision and Reasons' promulgated on 5 December 2017, Respondent's bundle A59-A67). The 'human rights' claim was not pursued (paragraph 4).

7. The Appellant's protection claim had been put on the basis summarised at paragraphs 7-8 of the Decision of Judge Sheridan: he had joined the youth

movement of Hamas in 2009 where his role had been to play a drum and hold flags during marches; he denied any political motivation and claimed not to have been involved in any fighting; in May 2014 another band member told him that Hamas wanted him, the Appellant, to fight in Syria; in fear of being forced to fight against his will he left to make his way to the UK.

8. The Respondent did not accept that the Appellant was a member of Hamas or faced a risk of being sent to fight in Syria; the Respondent's reasons, as summarised by Judge Sheridan, included that the Appellant had been "*unable to answer even basic questions about Hamas and that even on his own account he was not approached by Hamas (he was only told he was being sent to Syria by a fellow band member) and did not know other individuals sent to fight in Syria*" (paragraph 10).

9. Judge Sheridan found "*that the appellant's account of his reason for leaving Lebanon is not credible*" (paragraph 18). Reasons for this conclusion were informed in part by the expert evidence presented on behalf of the Appellant: an opinion by Dr Andrew Arsan included a statement to the effect that he was not aware of any incidences of Hamas recruiting fighters in the Palestinian refugee camps in Lebanon to fight in Syria, and he considered it no more than 'plausible' that this might have been occurring (see paragraphs 11-12 and 19a).

10. We consider it appropriate to note at this juncture that the notion of recruitment referred to by Dr Arsan (and similarly references to Hamas seeking to 'enlist' fighters) is not inevitably congruent with the notion of forced conscription. Whilst Judge Sheridan did not expressly refer to the distinction between 'recruitment' and 'conscription', he did observe at paragraph 19c – "*Nor has any explanation been given as to why Hamas would be seeking to force the appellant to fight in Syria, rather than seeking volunteers who would be willing to fight for their cause*".

11. In addition to the risk from Hamas, it had also been argued before Judge Lawrence that it was difficult to obtain medication for the Appellant's Type II Diabetes in the refugee camps. Judge Lawrence considered and rejected this aspect of the case with reference to Article 3 (paragraphs 33-34). It is not absolutely clear from the decision of Judge Lawrence how the Appellant's Article 8 claim was presented, and in particular it is not clear to what extent, if at all, Judge Lawrence factored in the claim in respect of diabetes medication; be that as it may, Judge Lawrence observed that the Appellant had "*a family in the Lebanon with whom he is in touch… He speaks the same language as that spoken there and [is] still familiar with the culture and custom there. There is nothing to indicate that he is not an 'insider'*" (paragraph 37). As noted above, no Article 8 claim was pursued before Judge Sheridan. Nor was any free-standing claim advanced on medical grounds.

<u>Further submissions – 'fresh claim'</u>

12. On 24 April 2020 the Appellant, now instructing Wilson Solicitors, made further submissions to the Respondent.

13. The covering letter (Respondent's bundle A1-A5) has a subject heading in two parts: 'Further Submission: claim for humanitarian protection and human rights claim under articles 2, 3 and 8 ECHR' and 'Further asylum claim submissions to follow'. It may be seen from the heading, and the content, that the focus was not on risk of persecution but on the living conditions on return – with particular emphasis on the Appellant being "*at much higher risk of severe illness and death*" from Covid 19 by reason of being diabetic. The supporting evidence enclosed with the further submissions comprised in the main part medical evidence relating to the Appellant's diabetes, and country information in respect of Covid 19 in Lebanon.

14. Beyond the reference to 'Further asylum claim submissions to follow', it is apparent on the face of this letter that the purported 'fresh claim' at this point did not include reliance upon risk of persecution by Hamas or anybody else. See, for example:

> "*The basis of our client's initial asylum claim was his fear that he would be subject to persecution in Lebanon by Hamas.*
>
> *Our client now makes further submissions on entirely new grounds, namely humanitarian protection grounds and human rights grounds (Articles 2, 3 and 8 ECHR).*
>
> *We submit that our client has a very strong claim for humanitarian protection and/or leave to remain on human rights grounds. However, if the Secretary of State is minded to reject our client's further submissions, there can be no question that our client would have a realistic prospect of success before a Tribunal Judge.*"

(See similarly the 'Conclusion' section of the letter which makes no reference to protection under the Refugee Convention.)

15. The letter did express "*ongoing concerns*" arising from "*potential learning difficulties and possible trauma from previous experiences both in [the camp] and throughout his life*". However, it was said that these matters would be investigated and further evidence and submissions provided as necessary, but that such matters had not yet been undertaken because of difficulties arising from the pandemic. In the event, it does not appear any further such evidence was forwarded to the Respondent prior to the decision of 15 March 2021 refusing the Appellant's further submissions but accepting that they constituted a fresh claim.

16. We pause to note two matters accordingly:

> (i) The further submissions in support of a purported fresh claim did not repeat the earlier claim to be at risk of persecution from Hamas and did not seek to rely upon the Refugee Convention.

(ii) The reference at the stage of making the further submissions to possible cognitive deficiency – "*potential learning difficulties*" - was not drawn to our attention by either party at the hearing. It has only been noticed by us in the context of preparing this Decision.

17. We draw attention to the latter because one of the matters considered by First-tier Tribunal Judge Coll was the delay between Wilson Solicitors being instructed by the Appellant (in or about April 2020) and the instruction of an expert witness in respect of cognitive impairment (15 December 2021) - e.g. see Decision of Judge Coll at paragraphs 72(iii), 74, and 80. In particular, it now seems to us that Judge Coll's observation at paragraph 80 – "*Also relevant to my assessment is why Wilson Solicitors themselves did not identify a possible cognitive impairment earlier. I note that their instruction of Dr Aidan was over 19 months after their fresh submissions*" – and consequential analysis may have been based on a misconception fact, if, as now seems likely, the Appellant's solicitors did identify a possible cognitive impairment almost immediately upon being instructed.

18. Necessarily we did not hear submissions in this regard because we had not been alerted to the particular passage in the letter of further submissions. In the event it does not make any material difference to our conclusion in respect of 'error of law'. However, we hereby alert both parties to this passage in the letter of further submission: hereafter it is a matter for them as to how they might seek to address any issues arising at the hearing to remake the decision in the appeal.

19. The Appellant's further submissions were refused by way of, and for reasons set out in, a decision letter of 15 March 2021. Consistent with the manner of the presentation of the submissions by way of the covering letter of 24 April 2020, the letter - although headed 'Asylum Decision' - notes that the Appellant had "*applied for a grant of humanitarian protection*", and that "*Consideration has been given to your medical claim and your personal circumstances if he were returned to Lebanon*", otherwise noting "*You have not raised a further claim for asylum. Your asylum claim therefore has not been reconsidered...*".

20. The Appellant appealed to the IAC.

<u>The present appeal proceedings</u>

21. On appeal the Appellant reasserted his asylum claim. In support, amongst other things, he filed evidence in relation to his psychological state seeking to address the critical view of his credibility taken previously on the basis of his apparent inability to advance a coherent narrative, and expert opinion 'country' evidence addressing, in part, Hamas recruitment.

22. It is to be recalled that the fresh claim further submissions presented to the Respondent had not included a claim in respect of protection, and accordingly the Respondent did not reconsider asylum in the RFRL of 15

March 2021. This is apparent both from the Appellant's Skeleton Argument before the First-tier Tribunal, and from the decision of Judge Coll.

23. The Appellant's Skeleton Argument appeared to envisage the potential that the protection element of the Appellant's claim might be subject to the 'new matters' procedures under section 85 (5) and (6) of the Nationality, Immigration and Asylum Act 2002:

> "*New matters*
>
> *7. A has clarified his account in his appeal witness statement and this includes information regarding military training he undertook with Hamas at three camps. A has explained why he did not previously refer to this. The Respondent has not considered this in the RFRL.*
>
> *8. A has not previously adduced evidence regarding his psychological health and so this has not been previous considered in the RFRL.*
>
> *9. As part of conducting the review of the case R is asked to indicate her position in terms of the potential new matters and to the extent that it is necessary she is asked to provide her consent to the Tribunal considering these.*"

(In the event the Respondent did not produce a further Review; accordingly whilst the opportunity was there to address the reintroduced asylum claim prior to the hearing it was not taken. The Respondent's representative at the hearing, however, plainly engaged with the asylum claim substantively.)

24. Judge Coll was plainly alert to the reintroduction of the asylum claim subsequent to the Respondent's decision, noting: "*… the respondent made a decision without sight of these fresh asylum claim submissions*" (paragraph 16), including a heading between paragraphs 17 and 18 'New matters raised in his appeal documents', and at paragraph 18 again acknowledging that the Respondent had not considered the revised / 'clarified' narrative account evidence or evidence regarding his psychological health.

25. Beyond the reference in the Skeleton Argument to the possible requirement of permission further to section 85(5), there does not appear to be any further specific reference to the 'new matters' procedures on the part of either party or the First-tier Tribunal Judge. Nor has this been raised by either party as a contentious issue before us: indeed we were not alert to its potentiality until drafting this decision. However, having identified that it was adverted to before the First-tier Tribunal by the Appellant and not seemingly further addressed, for completeness we consider it appropriate to make the following observation. It seems to us that although the Refugee Convention protection claim was not reasserted in the 'fresh claim' further submissions, it was a matter previously considered by the Respondent both in the context of the earlier proceedings, and also – critically – in the context of the current

Respondent's decision even if only to note that there was no apparent change asserted by the Appellant in this regard. As such the reintroduction of the Refugee Convention claim was not subject to the procedures of section 85(5) and (6).

26. The appeal was heard by way of a hybrid hearing on 16 March 2022 by First-tier Tribunal Judge Coll. The Appellant gave oral evidence: the Judge treated him as a vulnerable witness notwithstanding that this was opposed by the Respondent (paragraph 20).

27. For reasons set out in the Decision promulgated on 31 March 2022, Judge Coll allowed the appeal on human rights grounds pursuant to Article 8 of the ECHR in respect of private life, with particular reference to paragraph 276ADE(1)(vi) of the Immigration Rules, but dismissed the appeal on asylum grounds, humanitarian protection grounds and on human rights grounds based on Articles 2 and 3 of the ECHR. The refusal in respect of protection grounds related both to risk of persecution and risk of deterioration of health.

28. Both parties sought permission to appeal to the Upper Tribunal: both applications were considered and granted by First-tier Tribunal Judge Parkes; the Respondent was granted permission to appeal on 16 May 2022, the Appellant on 13 June 2022. Both parties have filed Rule 24 response. (The respective Grounds of Appeal, the grants of permission to appeal, and the Rule 24 responses are a matter of record on file and are known to the parties, it is unnecessary to reproduce them here.)

Consideration of 'Error of Law' challenge

29. In hearing submissions from the representatives, we indicated that we considered it would be helpful first to consider Ground 1 of the challenge raised by the Appellant – which has the heading 'The FTT erred materially in its approach to the fresh evidence in terms of Devaseelen and failed to take account of material evidence'. The ground focuses on the Judge's approach to the evidence of Dr Egnal, a consultant clinical psychologist and Ms Laizer, a country expert.

30. Further to this Ground, and taking into account the submissions of the representatives before us, in summary we have reached the conclusion that the First-tier Tribunal Judge erred in law to a sufficient material extent to warrant the setting aside of the Decision. The Judge erred in relying upon her conclusion that there was no good reason why evidence of cognitive impairment (now provided by way of Dr Egnal's report) was not provided at the time of the hearing before Judge Sheridan, as justification for not conducting her own evaluation of the Appellant's credibility.

31. In the first instance we are troubled by paragraph 24:

> "*I note the appellant's oral evidence for the record. Whether I make any findings about it in relation to his protection claims will depend*

*on my conclusions under **Devaseelan** about whether I am permitted to depart from you UTJ Sheridan's findings.*"

32. **Devaseelan** offers guidance to a second Judge as to how to evaluate evidence that was not before a previous Judge; however, it is premised on the notion that the second Judge has a new appeal, is not considering an appeal against the earlier decision, and must ultimately reach his or her own independent evaluation of the case. The findings in the earlier proceedings will be an important starting point, but the second Judge cannot avoid the obligation to address the merits of the case on the evidence then available before her. Paragraph 24 hints at a misunderstanding that there may be circumstances in which Judge Coll considered it would be unnecessary to make any findings on the Appellant's account – "*Whether I make **any** findings about [the appellant's oral evidence]*" (our emphasis).

32. The Judge did embark on an evaluation Dr Egnal's evidence *qua* evidence: see paragraphs 45-58 under the heading 'What is the nature and level of the appellant's cognitive impairment?'

33. The Judge made some remarks critical, or cautious, as to the methodology of Dr Egnal's report. For example, it is said "*there would appear to be a slight problem in accepting without reservation his assessment of the degree of cognitive impairment*" (paragraph 47), for reasons explained at paragraphs 48-50 - although this is not subsequently amplified or articulated in support of any conclusion one way or the other. The Decision goes on to record the findings and conclusions of Dr. Egnal, summarising at paragraphs 51-55. The Judge then identifies matters potentially relevant to the delivery of an oral account whether by way of interview or in instructing advisers (paragraph 56):

> "*Dr. Egnal stated that the appellant did not have specific learning difficulties. I highlight conclusions relevant to his performance during an interview and in instructing his solicitors.*
>
> *i) He can give instructions and a limited account of his background.*
>
> *ii) His cognitive ability does not specifically interact with his diagnosis of Major Depressive Disorder and anxiety apart from the effect this may have on lowering his attention and concentration.*
>
> *iii) Questions should be put slowly, simply and unambiguously.*
>
> *iv) He will have difficulty in understanding and responding to some questions and the court needs to be aware of this. He should be given time to answer and collect his thoughts.*"

34. We invited both representatives' observations as to the extent to which any of this constituted a finding in respect of the Appellant's cognitive impairment. We have concluded that it is adequately clear that the Judge did accept that the Appellant was suffering from cognitive impairment: indeed, as much was accepted by Ms Ahmed. In this context it is to be

noted that the Judge must have considered that there was presently a degree of cognitive impairment because it informed the decision in respect of paragraph 276ADE(1) – "*I add into my consideration also the appellant's cognitive impairment*" (paragraph 96), which the Judge found would cause difficulties in adapting to changed circumstances were he to find himself in a refugee camp in the Lebanon.

35. What is not clear is what the Judge found either in terms of the extent of any cognitive impairment, or the duration for which the Appellant had been suffering from cognitive impairment, and in particular whether such cognitive impairment existed at the date that he presented his asylum claim and first appeal. It is be noted that Dr Egnal's assessment of 'borderline intellectual function' included consideration of limited progress at school which is suggestive of a condition that pre-dated arrival in the UK. Ms Ahmed invited us to consider that it was implicit that the Judge was making a finding both that the cognitive impairment was not as severe as suggested in the report of Dr Egnal and also that it had not existed at the time of the earlier proceedings. We do not consider it safe to reach such a conclusion on such significant matters merely by way of implication: if, which is far from clear, this was the view of the Judge, then that should have been stated with clarity.

36. Against this context – where the Judge seemingly accepted that the Appellant had cognitive impairment that might impact upon his ability to present a narrative account – it seems to us that it was incumbent upon the Judge in reaching an independent evaluation of the Appellant's testimony to give some consideration to, and reach her own findings in respect of, the extent to which cognitive impairment was operative at the time of the earlier application and appeal proceedings, and to consider how such matters might have impacted upon the earlier decisions.

37. However, this is not what the Judge did. The Judge went on to evaluate the reasons for there being no report in respect of cognitive impairment in the earlier proceedings, and having concluded that in her judgement there was no good reason essentially excluded from consideration the evidence of cognitive impairment from the protection claim. We note in particular: "*I interpret that 'greatest of circumspection' to mean in this context that there has to be a good reason why the evidence was not produced then. I therefore need to make findings about why this was not done, as best as I can on the evidence before me*" (paragraph 72); the ensuing paragraphs in which the Judge analysed the circumstances in which the previous representatives had not considered it necessary to obtain any expert evidence as to the Appellant's cognitive abilities and the circumstances in which the current representatives had reached such a conclusion; the Judge's subsequent conclusion to the effect that no adequate explanation for not obtaining such evidence previously had been provided; and the conclusion: "*On that basis, I may not make new findings of fact about the appellant's protection claims and I may not depart from UTJ Sheridan's findings of fact.*" (paragraph 81), which also led the Judge to conclude that she could not consider the country expert report.

38. We also note in this context that the fourth paragraph of the **Devaseelan** guidelines – 'Facts personal to the Appellant not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection' – which refers to "*suspicion*" in respect of credibility - contains the caveat that "*considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute*". Accordingly, if, as appears to be the case here, a second Judge concludes that the fact newly relied upon has been established (i.e. in this case accepts the fact of cognitive impairment), the caveat is engaged and the 'suspicion' or 'greatest circumspection' is not operative.

39. For the reasons given, the First-tier Tribunal Judge's approach was in error. We find a material error of law in respect of the protection claim accordingly. In the circumstances it is not necessary to consider the other grounds of challenge in respect of protection.

40. As regards the Respondent's challenge to the Article 8 claim, in our judgement in circumstances where the protection claim must now be revisited, and such an exercise will include a very close and particular consideration of such matters as cognitive impairment, we cannot realistically preserve the findings that supported the Article 8 conclusion. The decision in the appeal needs to be remade with all issues at large. The appropriate forum is the First-tier Tribunal.

Notice of Decision

41. The decision of the First-tier Tribunal contained a material error of law and is set aside.

42. The decision in the appeal is to be remade further to a hearing in the First-tier Tribunal before any judge other than First-tier Tribunal Judge Coll or First-tier Tribunal Judge Lawrence with all issues at large.

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. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: I A Lewis Date: **3 October 2022**

Deputy Upper Tribunal Judge I A Lewis