IAC-AH-KRL-V2

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/03451/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 2 February 2022	**On the 11 April 2022**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

M S I
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Dolan, Counsel, instructed by Shawstone Associates Ltd
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

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

Unless and until a Tribunal or court directs otherwise, Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant and any member of his family should not be identified is granted anonymity. No-one shall publish or reveal any information, including the name or address of the Appellant, likely to lead members of the public to identify the Appellant without

that individual's express consent. Failure to comply with this order could amount to a contempt of court.

1. The Appellant is a citizen of Iraq of Kurdish ethnicity. He was born on 21 February 1988. The parties did not address me on anonymity; however of my own volition I make an order to anonymise the Appellant, applying the Guidance Note 2022 No 2: Anonymity Orders and Hearings in Private. [1]

2. The Appellant was granted permission by First-tier Tribunal Judge Boyes on 8 October 2021 to appeal against the decision of First-tier Tribunal (Judge Manuell) promulgated on 29 July 2021 to dismiss his appeal against the decision of the Secretary of State on 6 May 2020 to refuse his claim on protection grounds.

The Appellant's Claim

3. The Appellant's case is that he lived with his family in a village near Sulaymaniyah in the IKR. He smuggled goods with his father over the border into Iran. In August 2010 a member of their smuggling gang, AMR, was fatally shot by Iranian guards during a smuggling operation. The Appellant was blamed by the deceased's brother (MR), because he and his father chose the route and because they did not attempt to rescue the deceased. Two or three days after the incident the Appellant and his father were attacked after which they spent two or three days in hospital. The Appellant's father delayed reporting the matter to the police for a month because the Appellant was unwell and he was looking after him. However, reporting the incident to the police was futile because MR is a powerful figure within the PUK.

4. In 2015 the Appellant travelled to Finland. After three months he returned to Iraq having been told by his sister that it was safe to return. On return he worked as a shepherd for a family in a village near Akre. His father at this time was in hiding. The Appellant met his father on 21 June 2018 and they travelled together to Turkey. They separated and have lost contact. The Appellant fears MR on return to Iraq.

5. The Respondent accepted the Appellant's nationality, ethnicity and his past activity as a smuggler in the IKR

The Hearing Before the First-tier Tribunal

6. The Appellant relied on authentication reports by Dr Kaveh Ghobadi of 16 November 2020 in respect of documents which he said his sister had sent

[1] Paragraph 28 of the Guidance Note 2022 No 2: Anonymity Orders and Hearings in Private reads: In deciding whether to make an anonymity order where there has been an asylum claim, a judge should bear in mind that the information and documents in such a claim were supplied to the Home Office on a confidential basis. Whether or not information should be disclosed, requires a balancing exercise in which the confidential nature of the material submitted in support of an asylum claim, and the public interest in maintaining public confidence in the asylum system by ensuring vulnerable people are willing to provide candid and complete information in support of their applications, will attract significant weight. Feared harm to an applicant or third parties and "harm to the public interest in the operational integrity of the asylum system more widely as the result of the disclosure of material that is confidential to that system, such confidentiality being the very foundation of the system's efficacy" are factors which militate against disclosure. See R v G [2019] EWHC Fam 3147 as approved by the Court of Appeal in SSHD & G v R & Anor [2020] EWCA Civ 1001

to him. The first document is a letter from Azadi police station requesting the Judge of the Court of Sulaymaniyah to issue an arrest warrant for MR. The second report relates to a complaint letter allegedly submitted to the Investigative Judge of Azadi police station by the Appellant's father. The third report relates to a death certificate relating to AMR and the fourth report relates to a medical report concerning the Appellant. In Dr Ghobadi's opinion the documents are genuine.

7. The Appellant relied on a medical report prepared by a psychiatrist, Dr Balasubramaniam, of 6 October 2020.[2] Dr Balasubramaniam considered the Appellant's scarring and psychological issues. In Dr Balusubramaniam's view the two scars on the Appellant's left buttock are highly consistent with his account of being stabbed. The scars are, however, too old to be able to date the injury. Dr Balasubramaniam found that the Appellant was suffering from depression, PTSD and poor cognitive function. He said that his education was limited and he was probably of below average IQ.

8. In the Appellant's witness statement of 15 July 2019 he said at para. 15 that he had received a call from his sister after he travelled to Finland and she told him that he could safely return. However, she said this as a result of threats made to her. In his asylum interview, he was asked at Q245, why he left Finland and returned to Iraq in 2015. He said that someone had contacted him pretending to be his sister and told him that he had to return as everything had been sorted out. To account for the inconsistency, in answer to Q246, he said that the interpreter had made a mistake when his solicitors took a statement from him. In his oral evidence the Appellant said that his solicitor misunderstood his instructions. His evidence at the hearing was that he had been contacted by someone pretending to be his sister. The judge found at para. 32 that the inconsistency was damaging to credibility and that it was not credible, in any event, that the Appellant would be "fooled by an imposter or that he would fail to detect that his sister was being pressured to persuade him to return.. ".

9. The judge made findings at paras. 25 to 46 of the decision. He found that the Appellant was not credible in the light of inconsistencies in his evidence. The judge accepted the medical evidence. However, he did not accept the Appellant's evidence in relation to who was responsible for the injuries. Having found that the Appellant is not at risk on return to IKR from MR, the judge found in the alternative that he could safely and reasonably relocate.

10. In relation to the evidence of Dr Balasubramaniam the judge stated as follows:-

> 28. Dr Sebramaniam's report was helpful and informative, and was based on the Appellant's NHS records and history as well as on his own clinical observations. Dr Sebramaniam noted that the Appellant is of small stature: the Appellant's NHS summary gives his height as 165.5 centimetres, i.e., 5'4'. The tribunal gives

[2] The First-tier Tribunal referred to Dr Balasubramaniam as Dr Subramanaim. It is an error although nothing turns on this and neither party referred to it.

> weight to Dr Sebramaniam's report. The tribunal accepts that the Appellant (a) has depression and PTSD; (b) is of below average intelligence and (c) has scars to his thigh which are diagnostic of deliberate injury by a third party. (As Dr Subramanian pointed out, the date of the injury cannot be determined from the scars.) It follows that the Appellant's evidence must be assessed with anxious scrutiny on the basis that he has suffered a serious injury and may have problems with recall. He was, as noted above treated as a vulnerable witness at the hearing"

Conclusions

11. I heard oral submissions from the parties at the hearing. I took into account the Rule 24 response from the Secretary of State dated 7 December 2021.[3]

12. The first ground of appeal is that the judge did not consider the Appellant's evidence in the light of his below average intelligence and thus failed to apply Joint Presidential Guidance note 2 of 2010 ("the Guidance").[4] It is submitted that it is entirely credible that the Appellant would be tricked by someone pretending to be his sister. Mr Dolan in submissions stated that although the judge indicated that he applied the Guidance at para. 8 and noted that the Appellant was of below average intelligence, he did not say how this had a bearing on the evidence and his findings. He referred me to the evidence of Dr Balasubramaniam, specifically that at paras. 7.8-9 and 8.1 which read as follows:-

> "7.8 [the Appellant] has limited capacity as defined under the Mental Capacity Act of 2005. At present, [the Appellant] is slowed down, depressed and has poor concentration that is likely to affect his ability to provide evidence in courts or formal interviews. He may find it difficult to respond to questions as has (sic) poor concentration and memory difficulties in recollecting past events, this will all need to be borne in mind.
>
> 7.9 It is known that people who are suffering from PTSD have memory difficulties and may have difficulties in recollecting events in chronological order. His education achievement is also limited, his IQ appears to be below average and this is likely to add to his difficulties in providing evidence in court or formal interviews.
>
> 8.1 I am well aware that the question of [the Appellant's] overall credibility is ultimately a matter for the court to determine. I am aware of literature suggesting inconsistencies are often noted in victims of ill-treatment but these should not necessarily be taken in isolation as evidence of deceit. It is documented that the details of events can sometimes be subject to and furthermore psychological effects of ill-treatment have been shown to compromise the recollection of event. … memory difficulties are recognised in the

[3] The Tribunal Procedure (Upper Tribunal) Rules 2008 Rule 24 allows for the Respondent to provide a response to the grounds of appeal

[4] Joint Presidential Guidance note 2 of 2010: Child, vulnerable adult and sensitive appellant guidance made by Lord Justice Carnwath Senior President of Tribunals on 30 October 2008

> Istanbul Protocol and in studies of asylum seekers recall of traumatic events … in the circumstances it is often difficult for survivors to identify which injury caused which scar, but there is usually some overall memory of the type of injury which occurred (Istanbul Protocol). The Istanbul Protocol requires the examining doctor to make an overall evaluation of the scars found".

13. Miss Everett relied on the Rule 24 response. She submitted that the issues regarding the Appellant's mental health and low IQ are interwoven throughout the decision. She submitted that the judge made findings in the alternative, namely that the Appellant could safely relocate to Iraq bearing in mind that he had returned there and lived and worked in Iraq between 2015 and 2018. In response Mr Dolan said that internal relocation would need a more nuanced assessment, taking into account the Appellant's particular characteristics and vulnerabilities.

14. In relation to ground 1, I conclude that there is no error of law. At para.15 the judge set out the medical evidence including that the Appellant was probably of below average IQ. He made reference to this again in the context of relocation (see para. 41) The judge at para. 8 stated:-

> "It was agreed that the Appellant should be treated as a vulnerable witness in view of the medical evidence referred to below. The appropriate Presidential and ETBB guidelines including breaks were followed"

15. It was not suggested that the reference by the judge to the "guidelines" is anything other than a reference to the Guidance and the Equal Treatment Bench book.

16. The judge at para. 28 stated:-

> "… it follows that the Appellant's evidence must be assessed with anxious scrutiny on the basis that he has suffered a serious injury and may have problems with recall."

17. It was accepted by the judge that the Appellant has PTSD, depressive episodes and limited mental capacity. He accepted that the Appellant had scarring which was highly consistent with the Appellant's account (while the judge refers to the location of scarring on the Appellant's thigh which is not accurate, nothing turns on this and it is not an issue raised in the grounds).

18. The thrust of the complaint is that the judge did not say in the decision what effect the medical evidence had on the evidence. Mr Dolan submitted that the judge needed to say more about the impact that the medical evidence and particularly the Appellant's low IQ had on his findings. I am not sure what more the judge could have said in this respect. He was clearly mindful of the evidence and he considered credibility in the light of it. Mr Dolan did not identify any specific part of the Guidance that the judge did not apply. However, I have considered it,

specifically paras. 14 and 15 which concern the judge's determination.[5] Paragraph 28 of the decision that discloses the judge was cognisant of the medical evidence and the Appellant's vulnerabilities. The judge identified a number of inconsistencies in the Appellant's account and at para. 32 stated that they could not be explained by memory loss. It is without doubt that the judge was mindful that Dr Balasubramaniam was of the view that the Appellant appeared to have a lower than average IQ and memory problems. I am not persuaded that the judge was merely paying lip service to the Guidance and did not properly apply it when assessing credibility.

19. One of the inconsistencies in the Appellant's account identified by the judge related to the Appellant's sister. At para. 32 the judge stated as follows:-

> "It seems to the Tribunal that these differences are much more than mere translation errors nor can they be explained by memory problems. It is in any event not credible that the Appellant would be fooled by an imposter, or that he would fail to detect that his sister was being pressured to persuade him to return, when he had left, supposedly to save his life so recently".

20. The Appellant complains that because he has a low IQ he would be fooled by an imposter and therefore the judge's finding is irrational. The judge identified that the Appellant had given three different accounts about this issue (this is not challenged in the grounds). It is worth noting that no IQ test was undertaken and that Dr Balasubramaniam does not make an unequivocal finding but opines that the his IQ *appears* to be below average (this is not quantified) and this is *likely* to add to his difficulties in providing evidence in court or formal interviews. Nonetheless the judge accepted that the Appellant is of below average intelligence (see para 28).

21. It does not follow that an unquantified below average IQ would necessarily lead to a conclusion that the Appellant would believe that an imposter was his sister. The expert does not engage specifically with the issue. The judge considered the evidence in the light of the medical evidence and was entitled to conclude that it was not an answer to the serious inconsistencies in the Appellant's account.

22. In respect of the Guidance, I take into account what Popplewell LJ said in in AA (Nigeria) v Secretary of State [2020] EWCA Civ 1296 (09 October 2020), [2020] 4 WLR 145 at [34]; namely, "experienced judges in this specialised tribunal are to be taken to be aware of the relevant authorities

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[5] 14. Consider the evidence, allowing for possible different degrees of understanding by witnesses and appellant compared to those are not vulnerable, in the context of evidence from others associated with the appellant and the background evidence before you. Where there were clear discrepancies in the oral evidence, consider the extent to which the age, vulnerability or sensitivity of the witness was an element of that discrepancy or lack of clarity.

15. The decision should record whether the Tribunal has concluded the appellant (or a witness) is a child, vulnerable or sensitive, the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it and thus whether the Tribunal was satisfied whether the appellant had established his or her case to the relevant standard of proof. In asylum appeals, weight should be given to objective indications of risk rather than necessarily to a state of mind[7].

and to be seeking to apply them without needing to refer to them specifically, unless it is clear from their language that they have failed to do so". The same must apply to relevant guidance. In this case the judge did not set out the guidance in any detail but there is no requirement for him to have done and there is nothing brought to my attention that would support that the judge did not properly apply it.

23. Mr Dolan drew my attention to para. 30 of the decision where the judge found that, " Dr Subramaniam's report cannot assist as to who caused the injury to the Appellant". Mr Dolan said this was irrational. In my view it is not helpful to focus on this sentence in isolation. The judge recognised that the report is capable of supporting causation, having found that the Appellant had been attacked in the manner he described. While the report is capable of supporting credibility generally, what is meant by the finding at para.30 is that it does not directly support the evidence in respect of the identification of the perpetrators responsible for the attack. The finding must be considered in the context of the findings generally and the credibility issues properly raised by the judge. There is no error of law arising from the final sentence of para. 30.

24. Ground 2 asserts that the judge took into account immaterial matters at para. 30 where he stated, " No less than 46,000 knife crimes were recorded in the United Kingdom in 2020 according to official statistics" just before he concluded that the medical evidence does not assist with as to who caused the injury. I agree with the grounds in so far as they assert that the statistic is unhelpful and immaterial. However, nothing turns on this. The judge did not accept that the Appellant was attacked by MR. His findings are reasoned and grounded in the evidence.

25. The second part of ground 2 refers to the evidence of Dr Ghobadi. Mr Dolan submitted that there was no mention by the judge of important aspects of the evidence of Dr Ghobadi. It is submitted that his evidence goes beyond stating that the general format and layout of the documents supported that they are original documents (as suggested by the judge at para. 35). The judge did not engage with the evidence of Dr Ghobadi that through his source in Iraqi Kurdistan, Mr Karwan Osman, a PHD student from the University of Exeter currently based in KRI, the documents were checked with Mr Meqdam Makwan, the head of the directorate of crime and evidence. After checking the documents he confirmed that the letter from Azadi Police Station was issued by Azadi Police Station, the medical reports were issued by the directorate of the Sulaymaniyah health-medical reports and that the death certificate was issued by the office of health-Sulaymaniyah government, Department of Health Statistics. Mr Dolan said that it was a clear error of law that the judge did not engage properly with this evidence. Ms Everett relied on the Rule 24 response in which it is asserted that the judge took the documentary evidence and expert evidence into account when assessing the evidence as a whole.

26. I do not find that the judge erred. The judge had before him the evidence of Dr Ghobadi in respect of four documents. The judge was not obliged to set out the evidence in detail. The judge did not attach weight to the

evidence. He found that it was unreliable. He gave sustainable reasons for his conclusion. Considering the evidence as a whole it is clear why the judge reached this conclusion. The evidence was not to be viewed in isolation. While it was capable of supporting the Appellant, the judge properly considered it in the round. While the judge focused on one aspect of the evidence of Dr Ghobadi, in the first sentence of para. 30, there is no support for the assertion that he did not take into account the extent of it simply because he did not record it in his decision. I must be slow to infer that a relevant point not expressly mentioned has not been taken into account: MA (Somalia) [2010] UKSC 49 at [45]. The grounds ignore that the judge raised issues about these documents at para. 35, some of which are not challenged, including that the documents had no context. The judge was entitled to query why a copy of an arrest warrant would be given to a complainant. The reporting of the matter to the police and the issue of an arrest warrant was rationally found to be at odds with the Appellant's evidence about the influence of the perpetrator.

27. The third part of ground 2 is that the judge's finding at para. 35 in respect of the evidence concerning the reporting of the assault in 2010 to the police was not rational. The judge queried why the offence was reported if the perpetrator was, as asserted by described by the judge "untouchable". The judge also stated in the same paragraph that," reporting a crime a month after the event hardly offers the police a good opportunity to conduct a successful investigation, as the evidence will no longer be fresh". I do not accept that the findings are irrational as asserted in the grounds. They were open to the judge on the evidence. In any event, these specific findings are not determinative of the outcome.

28. The findings must be considered in context. The Appellant's evidence that MR is well connected and has influence was unarguably undermined by the fact that he remained in Iraq for five years after he was attacked without being harmed. He left Iraq briefly and returned in 2015 where he remained until 2018.

29. The grounds ignore the flaws in the Appellant's account not least inconsistencies in his evidence about the attack on him in 2010 (para. 30) and the timeline which unarguably undermines his account to be at risk. His evidence in relation to risk on return was found to be lacking in credibility because of inconsistencies properly found by the judge. His account was rationally found to be implausible because of the time line which presented a significant problem for the Appellant. I take into account what the judge stated at para. 36:-

> "Placing these various problems on one side, some of which are perhaps more significant than others, the largest flaw in the Appellant's story is that neither he nor his father were further harmed after the initial attack in 2010 …".

30. The grounds do not identify an error capable of making a difference to the outcome of the appeal. The grounds in truth are no more than disagreement with the First-tier Tribunal's evaluation of the facts and conclusions.

The Grant of Permission

31. At this point I refer to the grant of permission which reads as follows:-

> "The grounds assert that the judge erred in numerous respects. A significant proportion, if not all, of the grounds centre on various reports and what they may have said or how they should have been interpreted. In order that those claims can be examined, I do not have access to the evidence bundle, permission is granted on all matters raised".

32. A panel comprising the President and Vice President of the Upper Tribunal in SYR (PTA; electronic materials) Iraq [2021] UKUT 00064 identified a potential problem faced by judges dealing with permission applications in a digital world. The headnote reads;-

> *As paper is increasingly replaced by electronic forms of communication, it is particularly important that judges engaged in the permission to appeal process, whether at First-tier or Upper Tribunal level, satisfy themselves that they have the requisite materials before them in order to make a proper decision on permission. Accordingly, a judge should not grant permission to appeal on the basis that the requisite documentation is not before him or her.*

33. Having identified the potential problem, the panel at para. 8, expressed an expectation that it would be taken up by those responsible for such matters in the First-tier Tribunal. Regrettably the terms of the grant of permission in this case disclose the very mischief that the Upper Tribunal in SYR intended to prevent. It is an improper grant of permission. Judges engaged in the appeal process are reminded of the ratio in SYR and the expectation expressed by the panel.

34. There is no material error of law properly identified in the grounds. Not only has the grant of permission to appeal given the Appellant false hope, it has in this case resulted in a waste of time and resources of the parties and the Upper Tribunal, which the panel in SYR were at pains to avoid.

35. The Appellant's appeal is dismissed.

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

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Signed Joanna McWilliam
Date 23 February 2022
Upper Tribunal Judge McWilliam