IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002674

FtT No: PA/54899/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 24 August 2023

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

S A
(anonymity order made)

Appellant

and

S S H D

Respondent

Heard at Edinburgh on 9 August 2023

For the Appellant: *Mr T Haddow, Advocate, instructed by Mr A Sirel, of JustRight, Solicitors*
For the Respondent: *Mr A Mullen, Senior Home Office Presenting Officer*

DECISION AND REASONS

1. The appellant claimed to be at risk in Iran from the family of a girl, S, with whom he had a premarital relationship. Her male relatives discovered them having intimate relations at her family home, assaulted him physically and sexually, made a video of the incident, and threatened to publish it. His uncle arranged for him to flee immediately to the UK, where he arrived 6 weeks later.

2. The respondent refused the claim by a decision dated 24 September 2021, accepting at [17 – 18] and [27] that the appellant had a relationship with S, but explaining at [28 – 33] why the rest of his account was not accepted:- it was not clear why S would invite him into her home, knowing her father and brothers were there, why he would not leave on finding they were not alone,

or why they would jeopardise their secret; he contradicted himself over whether there had been anything to fear; and it was unclear why her family would put themselves and S at risk of being perceived as homosexuals, and S at risk of the harsh punishments applying to women. At [34-36], section 8 of the 2004 Act was taken as adverse to credibility. At [37-43], the relationship was held not to create a risk of persecution from the authorities. At [44] and at [46-53], internal relocation was held to be available.

3. The appellant appealed to the FtT. In advance of the hearing, he provided a report by Mr Rudy Crawford, consultant in accident and emergency medicine, dated 12 December 2021. Mr Crawford states his conclusions in an initial summary and again at 8.0, paragraphs 1 – 8. He finds the appellant to have given a convincing account, consistent with his evidence, clearly differentiating between injuries sustained in the assault and earlier childhood injuries, and that he suffered severe psychological symptoms, including complex PTSD, although deferring to the opinion of colleagues in that respect. The appellant's skeleton argument also relied on a report by a country expert, Roya Kashefi.

4. A respondent's review prior to the FtT hearing, "acknowledges the findings" of the medical report but says that it "does not sway the decision that there are too many inconsistencies" in the account and that the appellant is not accepted "as a witness of truth". The expert's view that the police would pursue the appellant is not accepted. It is observed that there is no evidence of such a risk as he is no longer in the relationship and has been out of the country for over 2 years.

5. FtT Judge Agnew dismissed the appellant's appeal by a decision dated 9 March 2022. In light of the 3 grounds of appeal to the UT and the submissions thereon, it is useful firstly to identify the key elements of the decision.

6. At [23] the Judge summarised the agreed issues as (a) risk of persecution and (b) availability of internal relocation, both "based around finding the appellant credible in his claims of what occurred at S's home".

7. Under the heading, "Background country information and expert evidence", she dealt at [25] onwards with the appellant's argument that he should succeed based on what was accepted. That is a distinct point, which is rejected, and is not now controversial.

8. At [37], she accepted from the expert report that "… if the appellant's claims are accepted in full, he would face enormous difficulties in returning to Iran." She explained what those difficulties would be, without stating a conclusion expressly in terms of the test for internal relocation. She did not

go on to accept the appellant's claims in full and did not return to this issue. Both parties both took [37] as holding that internal relocation would not be available. I was not asked, if setting the decision aside, to preserve any finding. The issue is intricately linked to the precise extent to which the appellant is eventually found credible.

9. The next heading in the decision, "Medical evidence", is followed by [38 – 95], but further headings, rather unhelpfully, seem to be missing. The subsequent paragraphs intersperse narration of the report and other evidence with findings at various points.

10. At [46], the Judge notes that the medical examination was 2 years after the incident, expresses surprise that the appellant was not treated immediately, expects that he would have been examined and treated on arrival in the UK, and notes the absence of any such evidence.

11. At [55] the Judge notes the submission by Mr Sirel for the appellant on inherent probability not being a safe basis for rejection of an account, and on the need for assessment "through the lens" of country evidence to support an account; on which basis, she turns at [56] to consider "credibility issues relating to the appellant's behaviour".

12. From [57 – 65] she considers additions to the appellant's claim, on further threats and the power of S's uncles, which she finds to be fabrications designed to address the respondent's decision.

13. At [66], the Judge turns to the appellant making no attempt to find out the fate of the girl he claimed to love so much and to whom he might have caused great harm, taken with his claim to have no contact with his uncle or anyone else in Iran. She sets out her detailed questioning and the appellant's answers. She finds discrepancies at [71] over whether the appellant ever had, or lost, his uncle's telephone number, and at [72] over whether his phone "died", or he ever had one. At [73], she accordingly finds the appellant not credible over contact with his family in Iran.

14. At [74] she begins consideration of the "most crucial" matter in controversy, whether "while in a relationship where he secretly met S in an abandoned house, he nevertheless had sexual intercourse with her in her own home and was discovered by her father and brothers." As part of that assessment, the Judge considers a point which "may seem minor but … should not be ignored altogether":- whether the meeting with S at the house was impulsive or pre-arranged. At [80 – 82] and [87 – 91] she records her detailed questioning on the issue. At [92 – 94], she finds the appellant's evidence not to make sense, having given him the opportunity to elucidate;

that there is no cultural element to support his account; and that it is "wholly lacking in credibility" and "fabricated".

15. At [95] the Judge says that she may add that "… paying an agent or agents to get the appellant all the way to the UK, despite having the opportunity to be in safe countries *en route*, does not indicate that safety was the first priority for the appellant or whoever paid to get him here" (an apparent agreement with the respondent in respect of section 8 of the 2004 Act).

16. The decision ends under the heading, "Conclusions", at [96 – 101], which is a summary of conclusions already reached and explained, as set out above.

17. The FtT refused permission to appeal to the UT.

18. The appellant applied to the UT for permission on 3 grounds, each set out in detail, headed as first, treatment of medical report, second, excessive judicial intervention, and third, credibility assessment.

19. On 9 September 2022 UT Judge Kamara granted permission: …

> 2. The second ground refers to what is described as 'excessive judicial intervention' by the judge who it is said questioned the appellant for 38 minutes immediately following a cross-examination lasting around 48 minutes. The grounds state that the judge relied upon the replies given by the appellant to the judge's questions to arrive at negative findings. It is arguable that if this ground is made out, the appellant's treatment by the judge was unfair.
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> 3. Permission is granted on all grounds.
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> Directions
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> i. The appellant's representatives are to provide a witness statement from his representative at the hearing.
> ii. Both representatives are to provide their respective notes of the hearing.
> …

20. The appellant has provided a statement by Mr Sirel, who represented him before Judge Agnew, and a copy of his (full and legible) handwritten notes. The respondent has not provided any notes. Mr Mullen accepted the record as accurate and did not seek to cross-examine.

21. Mr Haddow's careful and clear submissions were along the lines of the grounds, with apposite reference to authority. I deal with the first and third grounds before turning to the second.

22. As to the 4 points made on the medical report:

(i) A medical expert may support truthfulness, and a Judge should deal with such a finding. The Judge did not say what she made of Mr Crawford describing the account as convincing, but that description was not based on any element of his expertise beyond differentiation of elements of scarring from episodes apart from the pre-flight incident. In substance, the report *was* on consistency, with little further impact on the evaluation of the rest of the evidence, and no reason to treat the author as better placed (or even as equally well placed) to assess veracity.

(ii) The Judge was inaccurate in saying that "most" rather than "all" of the scars were consistent with the account, but that is minor. There is no reason to think she did not take account of the appellant's differentiation of dates and causes, having recorded the details and the submission.

(iii) The Judge did not speculate, or go beyond her remit, about other causes. She made no more than a common-sense observation.

(iv) The Judge went too far at [46] on whether, if his account is true, the appellant would have needed treatment in Iran, would have been able to undertake an arduous journey, or would have had an immediate examination by the UK authorities. Those are matters on which there might have been evidence, for example, from Mr Crawford, if notice had been given by the respondent; but as the case was developed before her, in absence of evidence of how serious the wounds would have been when inflicted, and of the healing process, there was an inadequate basis for adverse findings in those respects.

23. I doubt whether the decision should be set aside on ground one (iv) alone; but given my conclusion on the second ground, that does not matter.

24. On the points of challenge to the credibility assessment:

(i) The Judge did not rely only on inherent improbability and immaterial factors or allow her view of "apparent exaggerations on a peripheral issue" to infect her approach to the core – see the reasoning identified above, which is not fully reflected in the challenge. It is also unfair to say that no account was taken of the propensity of adolescents for impulsive and risk-taking behaviour, or that the appellant was given no credit for the extent to which he told a consistent story. Those characterisations are veiled insistence and disagreement on the facts.

(ii) The grounds say at [23] that the risk of discovery "might be dependent on very specific cultural or local factors (for instance, layout and construction of rural Iranian dwellings and norms around separation and privacy between adolescent girls and male relatives) of which the FtT has no knowledge and about which there was no evidence". This is continuation and development of the dispute on the facts. The appellant was on the clearest notice that the credibility of the alleged incident in the home was the crux. He offered no evidence of culture or of the locus to show his account to be more likely. The background evidence tended in the other direction.

(iii) It is not shown that the Judge gave any more significance to walking time between locations, and discrepancies over phones and phone numbers, than she was entitled to do.

(iv) The discrepancy over whether the meeting was pre-arranged or spontaneous is not shown to have been given any more weight than it should bear. This was rationally thought to be revealing.

(v) The grounds at [25 (4)] complain that the arrangement of the meeting was not put; but it was, in detail, as set out in the decision and in Mr Sirel's note, plus the opportunity to ask further questions, and to make submissions.

(v) The Judge, as the grounds acknowledge, directed herself on the need to take account of the obvious temptation for appellants to exaggerate. She was not bound to disregard the exaggeration because internal relocation was ruled out for other reasons. Even if irrelevant to the outcome, that was not apparent to the appellant. The matter bore on the extent to which he was a truthful witness.

(vi) The Judge did not fail to assess the core evidence on its own merits.

25. The decision, read fairly and as a whole, as summarised above, is clear and thoroughly reasoned. It is not shown to be less than legally adequate as an explanation to the appellant why his credibility was not established. There is no error in that respect, apart from the matter identified in terms of ground one (iv).

26. I have found ground two more problematic. Mr Haddow helpfully directed attention to several authorities.

27. In *WN* (Surendran; credibility; new evidence) Democratic Republic of Congo [2004] UKIAT 00213 the IAT (Mr Justice Ouseley, President, with other two members) said at [28]:

> These [citations] show that neither in Scotland nor in England and Wales is it thought in the higher courts that every point which concerns an Adjudicator when dealing with the credibility of an Appellant needs to be raised explicitly with the Appellant in order for him to pass a comment upon it. There may be tactical reasons why an Appellant and his advocate decide not to grapple with what might be thought to be a problem; they may hope that the Adjudicator will not see it as a significant point or indeed may not spot it at all; but it is for an Appellant whose credibility is challenged as this Appellant's credibility most emphatically was, and challenged in almost every possible respect, to put forward all the evidence he can and to deal with the discrepancies which arise. Even where the Secretary of State is not represented, the Appellant cannot assume that points which are not put by the Adjudicator to him for his comment are points which are to be regarded as accepted, especially if they are obvious points of contradiction or implausibility which he has failed to grapple with. It is not necessary for a fair hearing that every point of concern which an Adjudicator has, be put expressly to a party, where credibility is plainly at issue. As we have said elsewhere, it is a matter of judgment whether to omit to do so is unfair or whether to do so risks appearing to be unfair as a form of cross-examination. On balance, the Adjudicator's major points of concern are better put, especially if they are not obvious. The questions should be focussed but open, not leading, expressed in a neutral way and manner, and not at too great a length or in too great a number. But, whether or not that is done, it is for the Claimant to make his case.

28. Mr Haddow relied particularly on [38]:

> Questions [by the Adjudicator, or Judge] should not be asked in a hostile tone. They should not be leading questions which suggest the answer which is desired, nor should they disguise what is the point of concern so as to appear like to a trap or a closing of the net. They should be open ended questions, neutrally phrased. They can be persisted in, in order to obtain an answer; but they should not be persisted in for longer than is necessary for the Adjudicator to be clear that the question was understood, or to establish why it was not being answered, or to pursue so far as necessary the detail underlying vague answers. This will be a matter for the judgment of Adjudicators and it should not usually take more than a few questions for an Adjudicator to establish the position to his own satisfaction. An advocate should always be given the chance to ask questions arising out of what the Adjudicator has asked, which will enable him to follow up, if he wishes, the answers given thus far. The Adjudicator can properly put, without it becoming a cross-examination, questions which trouble him or inferences from answers given which he might wish to draw adversely to a party. These questions should not be disproportionate in length to the evidence given as to the complexity of the case, and, we repeat, an Adjudicator should be careful to avoid developing his own theory of the case.

29. In *WA* (Role and duties of judge) Egypt [2020] UKUT 127 (IAC) the hearing Judge, for no apparent reason, had adjourned in course of the evidence to give the appellant the opportunity to improve his case. The UT (a panel comprising Mr Justice Lane, President, and Mr C M G Ockelton, Vice President) said at [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.

30. Mr Haddow also referred to *Southwark Borough Council v Kofi-Adu* [2006] EWCA Civ 281 at [142 – 146], where classic jurisprudence on the role of the Judge is cited – the difference in demeanour of a witness questioned by the Judge, rather than by counsel; the risk of descending into the arena, and vision being clouded by the dust of conflict; the greater the intervention, the greater the risk; and the risk depending not on appearance, but on impairment of judgement.

31. *WN* cited with approval *Koca* (22 Nov 2002, CSOH, unreported, other than at IAS Update 2004 vol 7 no 4) where Lord Carloway (as he then was) found that the Adjudicator had not been bound to put to the appellant, either at the stage of examination or submission, discrepancies which had not been specifically addressed, or to reveal its thinking for comment by the parties. Mr Haddow took me to the unreported decision and suggested that the Inner House in *Koca* [2005] 1 SC 487 did not disagree with what the Lord Ordinary said about the role of the Judge.

32. *Koca* turned on the overriding requirement for a fair hearing. At [20] the Court said:

> … In this case we consider that the adjudicator's failure to put her concerns regarding what she perceived as contradictions or discrepancies of importance in his evidence to [the appellant] meant that the hearing was conducted unfairly.

33. Judges must tread a fine line between reticence, risking criticism for failing to give an appellant a fair chance to deal with matters, and expressing their concerns, risking criticism for undue intervention, or for rushing to judgement. The authorities all require an assessment of fact and degree in a particular set of circumstances.

34. The Judge here did not hide her approach. She took pains to set it out fully. The respondent's cross-examination took 48 minutes. Mr Sirel thought it was thorough and robust. His notes and statement establish that the Judge's questions took 38 minutes. That comes as no surprise, after reading the decision. The Judge was clearly anxious to avoid unfairness through the appellant not having the opportunity to explain himself.

35. This, unfortunately, left the appellant's representative with an understandable sense that the Judge expressed disbelief, and essentially conducted another cross-examination, on distinct themes. Mr Sirel did not raise his concerns at the hearing, as ideally should have been done, did not elect to put further questions, and made submissions on the evidence as it

had emerged, which all tends against a finding that anything went wrong. However, representatives are sometimes in a quandary between fearlessly advancing their clients' cases, as is their duty, and restraint in suggesting that a Judge has crossed a line. I accept that Mr Sirel was uneasy about the conduct of the hearing, although stopping short of raising his concern.

36. This is a case of two participants in the same event, both acting in good faith, having genuine but opposed impressions of its nature.

37. The Judge had valid concerns of her own, which were better put than withheld; but the length and detail of the questions which followed gave the appearance of a second cross-examination, not clarification, and turned into an inquisitorial exercise. It may be easy to say with the benefit of hindsight, but it would have been better to put those concerns to representatives, not directly to the appellant, and leave it to them whether and how they should be further ventilated. In trying to avoid the error of unfairness through surprise, the Judge inadvertently trespassed over the boundary into the error of intervening directly and unduly with the appellant.

38. The appeal to the UT is allowed. The decision is set aside, other than as a record of what was said at the hearing. The case is remitted for an entirely fresh hearing before a differently constituted tribunal.

39. The FtT made an anonymity order. The UT makes an order to similar effect. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant 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 him. Failure to comply with this order could amount to a contempt of court.

Hugh Macleman
Judge of the Upper Tribunal, Immigration and Asylum Chamber
11 August 2023