IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002790
First-tier Tribunal No:
PA/53622/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 August 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

LC
(ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr M Spencer, Counsel, instructed by Leonard Cannings LLP, Solicitors
For the Respondent: Ms A Ahmed, Home Office Presenting Officer

Heard at Field House on 18 July 2024

DECISION AND REASONS

Order Regarding Anonymity

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.

Introduction

1. By a decision dated 3 July 2023 the First-tier Tribunal dismissed an appeal brought by the appellant, a citizen of Georgia, against a decision of the respondent dated 24 August 2022 refusing his protection and human rights claims.

2. The appellant's partner and three minor children appealed as his dependants.

3. The First-tier Tribunal made an anonymity order and I consider it necessary to continue the order in order to protect the appellant's identity.

Factual background

4. The appellant's account can be summarised as follows. The appellant's father fought on behalf of the Chechens in return for money. After his father's death, the Chechens provided financial support to the family. The Chechens subsequently demanded that the appellant join them, hide weapons in the house, convert to Islam and fight in their war. When he refused, the Chechens made threats against him and his family, including showing him photographs of his wife and child, who were already hiding in Russia. The appellant had sought help from the Georgian authorities to retrieve his father's body from the Chechens but, as a result of this, he was questioned about his involvement in the Caucasus and he was badly beaten up. When he sought help following the requests from the Chechens for him to join them, the authorities asked him to spy for them by joining the Chechens in order to report information back to them. The appellant fears that, on return to Georgia, he would be at risk from either the Chechens or the state authorities.

5. The respondent accepted the appellant's nationality, that he had attended university, worked in a bank and that he had completed one year's military service. The respondent also accepted that the appellant had given an internally consistent and detailed claim about his encounters with the Chechens. However, it was not accepted by the respondent that his claim had been externally consistent or credible.

6. The Judge of the First-tier Tribunal ("the judge") heard oral evidence from the appellant and she considered the background evidence and two expert reports provided by Associate Professor Alexander Kupatadze from King's College London ("the expert"). The judge noted that the case "hinged" on the appellant's credibility: [35]. She noted the appellant had provided a consistent narrative: [36]. She considered the reasons put forward by the respondent for making an adverse credibility finding against the appellant and she rejected those reasons: [37]-[42]. She concluded that the appellant had given a credible account of events in Georgia and she accepted that he believes he is at risk of persecution on return: [43]. However, she did not accept that the appellant's fear was objectively well founded. Her reasons were as follows:

> "45. On this aspect of the appellant's fear, I find that he has not demonstrated to the lower standard that he would be at risk of persecution on return. Whilst the objective evidence demonstrates that arbitrary detention does take place, he has not demonstrated why he would be of interest to the authorities on return.
>
> 46. In his report, Mr Kupatadze, although asked to do so, did not specifically answer the question. He states that the question is how the appellant's flight from Georgia would be viewed. He states tat whatever interpretation is put on it, the authorities would be looking into his case on return. What is missing from the report is the approach the Georgian authorities take to returned asylum seekers, how returnees are monitored on return, whether there is routine questioning, a stop list etc. There are many unreferenced assertions.
>
> 47. In his initial report, Mr Kupatadze has not acknowledged his duty to the Tribunal when preparing the report. I have found that he has not addressed the nuances in some of the sources he has cited, choosing to quote some parts of the report which are discussed in a more considered way in different parts of the text. For the reasons above, I have found this report to be of limited assistance as I could not attach much weight to it."

7. In order to understand the last sentence quoted above, it is necessary to consider the judge's more detailed analysis of the expert's reports. She noted that the respondent had not taken any issue with the expert's expertise: [23]. She noted that the source material relied upon by the expert for his opinion that the appellant would face interrogation with physical and psychological violence at the hands of the security services (SUS) was based on a report about police investigations into criminal activity rather than what would happen to a failed asylum seeker returning to Georgia: [27]. She considered the expert's conclusion that the SUS might detain the appellant to be speculative. In particular, the expert had failed to note that the number of incidents of the security forces committing abuses had decreased from the previous year: [28]. She noted the source report stated that there were no reports that the government or its agents committed arbitrary or unlawful killings and the expert had made no reference to this general position. The judge considered this led her to question his objectivity: [29]. Furthermore, she found there was no authority for his proposition that the appellant's actions would be considered as treason by the Chechens and his observations about resourceful individuals (being able to trace the appellant on return) was also speculative: [29]. The judge noted that the expert's first report did not refer to his understanding of his obligations to the tribunal as an expert witness and his updated report only contained a simple confirmation that he understood those duties. Given her concerns about the treatment of the source materials, the judge did not consider that the expert's reports reflected an understanding of those duties and she concluded she could attach little weight to the evidence: [30].

8. Having found that the appellant, whilst giving a truthful account, had not demonstrated to the lower standard of proof that his fear of persecution was well-founded, the judge dismissed the appeal. She noted that the Chechen militants would not have the required resources or ability to know that the appellant had returned to Georgia and, even if they did, he would

no longer be at risk of harm given there had been no contact since he left Georgia in 2018: [49]. The appeal was dismissed on all grounds. In relation to the human rights grounds of appeal, the judge treated these as standing or falling with the protection claim. She noted that counsel for the appellant, Mr Byrne, indicated that no arguments were being advanced under Article 8: [22].

Issues on appeal to the Upper Tribunal

9. There are three grounds of appeal. The first is that the judge's finding that the appellant would not be at risk on return is irrational in the light of her factual findings and the objective evidence. The positive findings of fact made by the judge and confirmed by the expert evidence, clearly demonstrated that the appellant would be of great interest to the authorities because of his high value as an informant, given his father's history with the Chechens and the fact that the Chechens were actively seeking to recruit him. The expert confirmed that the threat from Chechens remained a priority for the SUS. The judge had not applied paragraph 339K of the Immigration Rules so as to acknowledge that a finding of previous persecution should be regarded as a serious indicator of risk on return absent good reasons to consider that such persecution would not be repeated. Furthermore, having noted that the appeal hinged on credibility, the judge had gone on to dismiss the appeal notwithstanding her positive credibility finding.

10. The second ground is that the judge erred by failing to consider relevant evidence and through procedural unfairness. The ground then takes issue with the judge's evaluation of the expert evidence. For example, there is in fact no reference to a decrease in the incidence of security force abuses in the relevant section of the US State Department report, contrary to the belief of the judge.

11. The third ground refers to the judge's record of counsel for the appellant indicating that no arguments were being advanced under Article 8. Mr Byrne, who settled the grounds of appeal, states he has no recollection of making any such concession and his attendance note of the hearing records that submissions were made on Article 8 outside the rules.

12. The First-tier Tribunal granted permission to appeal on all three grounds.

13. The respondent has not filed a Rule 24 response.

The error of law hearing

14. Prior to the hearing, despite there having been a previous adjournment, the recording of the hearing in the First-tier Tribunal had not been obtained in order to address the third ground of appeal. Having obtained it, I offered the representatives the opportunity to listen to the entirety of the recording. However they helpfully agreed that it was only necessary to listen to the beginning and end of the recording to establish what had

been said about the grounds of appeal pursued and whether in fact any concession had been made.

15. I should record here that Ms Ahmed argued that the notice of appeal and appeal skeleton argument had not raised Article 8 and to allow the appellant to pursue a new ground was contrary to the guidance in Lata (FtT: principal controversial issues) [2023] UKUT 00163 (IAC). However, having heard the recording, it is fair to say that Mr Byrne initially confirmed that Article 8 was not pursued but then went on to argue, albeit very briefly but with the permission of the judge, that it would not be in the best interests of the appellant's children, who are not qualifying children for the purposes of section 117D of the Nationality, Immigration and Asylum Act 2002, to return to Georgia with their parents. There was no question of family separation.

16. Mr Spencer argued persuasively that there was materiality in the Article 8 ground outside the protection claim because, having found that the appellant did not have a well-founded fear of persecution, she might realistically have been able to find that the appellant faced very significant obstacles to his integration in Georgia. He pointed out that Mr Byrne recorded having made exactly that submission in his attendance note, as transcribed into the grounds of appeal. Unfortunately, there are parts of the recording which are extremely difficult to hear and I am not convinced I heard Mr Byrne make that submission, albeit he referred to the Article 8 claim being made on the basis of the same factual matrix. Fortunately, it is not necessary for me to have to resolve this issue because I find the appellant's appeal succeeds on the first and second ground and I do not therefore propose to deal with the third ground.

17. In relation to the first two grounds, Mr Spencer relied on Mr Byrne's written grounds. He maintained the judge's decision was irrational in the sense of being 'Wednesbury unreasonable': Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223. However, the judge's errors went beyond that. In particular, she had failed to apply paragraph 339K of the Immigration Rules. The judge had accepted the appellant's entire account, including that he had been beaten up and interrogated by the SUS on two occasions. This clearly amounted to past persecution. The appellant had made a case that it was clear and obvious that he would be a high-value target on return and that he would face an impossible choice between joining the Chechens to become an informant for the SUS or face further beatings from the SUS. The judge had focused on the wrong question in asking herself whether the appellant would be at risk on the point of return as a failed asylum seeker. The appellant would be at risk at any time after return because he could not live without any contact with the authorities. As the grounds of appeal point out, the judge's decision is incoherent, as shown by her statement that the appeal turned on credibility but, in the result, concluding otherwise.

18. As for the criticism of the expert reports, weight is clearly a matter for the judge. However, the judge's treatment of the evidence was irrational and unfair. For example, she reasoned from the fact the source material only refers to ill-treatment by the police that there was insufficient

evidence showing that the SUS used such tactics. However, she had already found that the appellant had been ill-treated by the SUS on two occasions. In any event, the US State Department report did refer to abuse by the security services. The judge's reference to a decrease in incidents was inexplicable. Neither he nor Mr Byrne had been able to find any such reference. The judge's reliance on the expert not referring to there being no unlawful killings asked the wrong question. The appellant did not claim to fear unlawful killing. The absence of a statement of his duty to the tribunal in the first report had been remedied in the second version of the report and this had been before the judge.

19. Ms Ahmed strenuously opposed the appeal on all grounds and she characterised the first two grounds of appeal as nothing more than mere disagreement with the decision. She rightly pointed out that there is a very high threshold for a finding of irrationality. The respondent's review had made the point that Chechen militants were non-state actors. She argued the judge had been entitled to regard the expert as failing to answer the question posed as to why the appellant would be a target for the SUS on return. The expert had not addressed the issue of what happens to failed asylum seekers on return. She said the reports contained unreferenced assertions. The judge was entitled to find credibility was not determinative of the appeal. She maintained that the expert reports did not comply fully with paragraphs 6.2(i) or 6.3 of the Senior President of Tribunal's Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal of 13 May 2022. The judge was entitled to give the reports little weight. It was not correct that the points taken by the judge about the expert were not raised so as to give the appellant an opportunity to address them. The points were made in the respondent's review. There was therefore no procedural unfairness.

20. Mr Spencer replied that Ms Ahmed had not addressed his point about the judge not applying paragraph 339K of the rules. The absence from the expert reports of a statement of truth was not a point previously taken by the respondent so Ms Ahmed could not rely on it now.

The law

21. The jurisdiction of the Upper Tribunal on an appeal from the First-tier Tribunal lies only in relation to an error of law, not a disagreement of fact. The following are possible categories of error of law, as summarised in R (Iran) & Ors v SSHD [2005] EWCA Civ 982 at [9]:

> "i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");
>
> ii) Failing to give reasons or any adequate reasons for findings on material matters;
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> iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> iv) Giving weight to immaterial matters;

v) Making a material misdirection of law on any material matter;

vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;

vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

Decision on error of law and on the appeal

22. I remind myself that the test of irrationality has a high threshold. It requires a forensic analysis of the reasoning of the decision-maker to decide whether the decision was so unreasonable that no reasonable decision maker could have reached it.

23. In my judgment, the judge's decision is sufficiently flawed that it must be set aside. The plain fact is that the judge accepted the appellant had given a truthful account and that means she accepted that he had been seriously beaten up by the SUS after approaching the police on two occasions. Implicitly, she accepted therefore that he was being pursued by the Chechens and that the Georgian authorities not only failed to protect him but tried to force him to become an informant. These incidents are described in detail in the interview record and repeated in the appellant's witness statement. The judge records that the appellant gave evidence at the hearing and was cross-examined. She makes no adverse credibility points arising from cross-examination.

24. Paragraph 339K sets out the principle that a finding of past persecution is to be regarded as a serious indicator that the appellant's fear is well-founded, subject to there being clear evidence of a change of circumstances. The effect of this provision is that, where the circumstances are the same, then past persecution or serious harm is to be regarded as predictive of future persecution or serious harm, absent a change of circumstances: GJ and others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319 (IAC), at [428].

25. There is nothing in the decision to suggest that the judge took this into account and there are certainly no reasons given for suggesting there has been a material change of circumstances for the appellant such that he should not benefit from this provision.

26. The short section of the decision in which the judge provides her reasons for dismissing the appeal notwithstanding her positive credibility finding relies exclusively on her criticisms of the expert reports: [45] to [47]. However, even if her rejection of the expert evidence were warranted, her reasoning is simply not sufficient to show why, having been beaten up on the two occasions in the past that he approached the police for protection, the appellant would not be at a real risk of a repetition on return. Implicit in her positive findings was acceptance of the fact that the appellant is of

interest to the SUS. It cannot safely be discounted that the SUS would not apply the same techniques of persuasion given the appellant's value as a potential informant on the Chechens.

27. Turning to the judge's assessment of the expert evidence, I agree with many of Mr Spencer's points. Having read the expert evidence, it is not particularly detailed, thorough or well-referenced. However, the expert sets out very impressive credentials and there was no challenge to his expertise from the presenting officer at the hearing in the First-tier Tribunal: [23]. His opinions would therefore ordinarily deserve considerable weight. Furthermore, his opinions do include that the SUS is not accountable to anyone and has a free hand. The likelihood of extra-legal action such as harassment, threats and blackmail is quite high. Blackmail is used as a means of recruiting spies. The appellant's profile makes him a great target for intelligence agencies. His family history would make him a high-value asset. The appellant's flight from the country would be interpreted by SUS as a lack of willingness to help or even implication of collaboration with the Chechens. They would look into his case on return. At the very least, he would expect repeated interrogations with some possibility of accompanying violence. The risk of torture or abuse is high. Ill-treatment by the police, security forces and prison staff is not a rare occurrence. The source for the last sentence is the US State Department report.

28. Clearly, this is powerful evidence supporting the appellant's case and it also appears consistent with the objective country reports. As regards the judge's specific criticisms, I agree with Mr Spencer that the judge appears to have focused exclusively on the point of arrival and what would happen to the appellant as a failed asylum seeker in which case she lost focus on the ongoing risk of detection at the point of any future interaction with the authorities. Whilst time has elapsed and the SUS appears to operate in a different sphere to the police, the judge must be taken to have accepted that the police handed the appellant over to the SUS on both occasions he approached them. Previous contact with the authorities would be a matter of record. Ms Ahmed did not point to any passage in the country reports showing the judge was right to believe there had been a decrease in abuses. There is clearly a real distinction between evidence of unlawful killings and other abuses. The absence of the former does not lessen the likelihood of the latter. The statement of his duties to the tribunal is included in the second version of the expert's report and his failure to include this in the first version is no reason at all to discount the weight to the given to the content of the report.

29. For these reasons I consider the decision of the judge involved the making of a material error of law and I set it aside.

Re-making the decision

30. Ms Ahmed proposed that, in the event I set aside the judge's decision, there should be a continuation hearing at which submissions could be made and the appellant could give evidence as to the up to date position.

Mr Spencer was content for me to re-make the decision without further evidence or argument.

31. There is no suggestion that the parties wished to call further evidence and I consider the submissions which had already been made were more than sufficient to address the substantive issues in the appeal, which are straightforward and extremely narrow. The appellant has pursued this appeal since mid-2022 and his appeal was heard in the First-tier Tribunal over a year ago. It is appropriate for this appeal to be resolved at the earliest time.

32. I re-make the decision as follows.

33. The starting-point must be the unchallenged findings made by the judge, which I adopt in their entirety. As such, it is clear the appellant's father was heavily involved with Chechen separatists and, after his death, the appellant was abused and threatened by the same separatists who wished to recruit him. The appellant did not want to join. He therefore went to the police on two occasions and, on both those occasions, rather than protect him, the police handed him over to the SUS for interrogation. The appellant was detained and severely beaten up. He refused to become an informer for the SUS against the Chechens. Threats were made against the appellant's wife and child, after which the appellant fled Georgia. The appellant fears the Georgian authorities and the Chechens.

34. As discussed above, the fact the appellant was twice abused by the state authorities is a strong indicator that his fear of a repetition of persecution is well-founded. The burden of proof is on him but the low standard of proof applies to the assessment of risk on return. In my judgment, the burden is amply discharged by the background evidence showing that the security forces commit abuses. I also accept the expert's opinion that the appellant would be targeted as a high-value asset given his family history. I accept the SUS use violence against detainees. I see nothing in the evidence to suggest the appellant's circumstances would be changed on return to Georgia so as to deprive him of the benefit of paragraph 339K of the rules. The expert evidence and the background reports strongly support the view that the appellant would remain at risk on return for the same reasons he was persecuted in the past. I do not consider the passage of time would reduce the risk meaningfully given the ongoing threat from separatists and the likelihood that the appellant's previous contact with the security forces would be documented. He must have some degree of contact with the authorities on return which I find makes it reasonably likely that adverse interest in the appellant would be triggered at some point, if not on arrival. The risk from the Chechens is more remote but I do not need to make a finding on this. The risk from the authorities in Georgia is sufficient by itself to entitle the appellant to refugee status.

35. I allow the appellant's appeal on asylum grounds.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law. It is set aside and I remake that decision by allowing the appellant's appeal.

N Froom

Deputy Judge of the Upper Tribunal
(Immigration and Asylum Chamber)

19 July 2024