IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003749

First-tier Tribunal No: PA/56011/2021
IA/17971/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

3rd January 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

KAA
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr G Goddard, Citizens Advice, Southwark, by video link
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on 6 December 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers 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 (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

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Introduction

1. The appellant is a citizen of Iraq born on 1 February 1992. The appellant had applied for asylum on 22 September 2016, the date of his clandestine arrival in the UK.

2. The appellant's claim was that in 2012, following a brief relationship with the daughter of a powerful member of the PUK, he was attacked, detained and ill-treated for approximately one week and left with severe scarring. In addition, the appellant later ran an estate agency business with his brother in Kirkuk and claimed that they refused to provide housing to men believed to be associated with Daesh and received threats of harm with their premises being destroyed by explosion.

3. The appellant's claim was refused initially by the respondent on 22 March 2017 with First-tier Tribunal Judge Holmes dismissing his appeal on 15 June 2017. The appellant made further submissions in November 2019 and provided a Freedom from Torture medico-legal report dated 30 October 2019. The respondent refused that fresh claim on 6 December 2021; whilst it was accepted that the appellant was a victim of torture and that he suffers from PTSD and a depressive illness and that he has been suicidal and at a future risk of suicide, it was not accepted however that the appellant had a well-founded fear of persecution or serious harm. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Mr J G Raymond ("the judge") on 3 April 2023, following a hearing on 6 March 2023.

4. Permission to appeal was granted by Judge of the First-tier Tribunal Elliot on 4 September 2023 on the basis that it was arguable that the First-tier Tribunal Judge had erred in law. Whilst the judge's lengthy and detailed decision was noted, the judge appeared to have failed to engage with submissions made in the skeleton argument and oral submissions regarding the effect of past persecution, however it occurred, on future risk, or in relation to the appellant's arguments under Article 3 and Article 15(c) of the Qualification Directive. Permission to appeal on all grounds was granted.

5. The matter came before me to determine whether the First-tier Tribunal had erred in law and if so whether any such error was material and thus whether the decision should be set aside. At the end of the hearing I found an error of law and indicated that the appellant's appeal would be remitted to the First-tier Tribunal for the reasons set out below.

Submissions – Error of Law

6. In the grounds of appeal and in oral submissions by Mr Goddard it is argued, in short summary, for the appellant as follows.

7. The respondent had accepted that the author of the medico-legal report was a reliable expert and in light of that report the respondent had accepted at paragraph 37 of the reasons for refusal letter, that the appellant is a victim of torture, suffers from PTSD and depressive illness, that he has been suicidal and is at future risk of suicide. It was argued that the judge had attempted to go behind the medico-legal report and to discredit its opinion, with the central criticism concerning late disclosure and the failure of the previous representative to provide a medical report for the previous appeal. The judge found there to be "no credible basis" [29] of the decision, for the appellant not providing a medico-

legal report to the previous tribunal. It was argued that the judge failed to appreciate difficulties in funding, obtaining expert evidence, or to appreciate why late disclosure of torture is not uncommon and that the appellant cannot be criticised for the way he was previously represented and to find there to be "no credible basis" was irrational.

8. It was argued that the correct approach to credibility should have been to consider whether the new evidence which was accepted by the respondent, that the appellant was a victim of torture, throws light on the credibility of the appellant's claim. This was both in terms of whether as a now accepted victim of torture with diagnostic scars, this made his claim to have been tortured in the manner he described more likely; and also through considering the evidence the appellant had provided during the asylum process afresh, through the lens of evidence provided by a recognised victim of torture suffering from trauma.

9. It was argued that at paragraphs [65] to [69] the judge had impermissibly speculated that the torture was likely to have occurred outside of Iraq, but for reasons unconnected to the appellant's claim, with the judge speculating that the appellant may have been a Peshmerga fighter or there may have been a bomb explosion, with no sustainable evidence for these findings.

10. The grounds went on to argue that in considering the risk of persecution the judge had failed to give consideration to the fact that past persecution is a serious indication of a well-founded fear of persecution or risk of suffering serious harm in line with paragraph 339K of the Immigration Rules. This had not been considered by the judge despite being set out at [14] of the skeleton argument and in oral submissions. It was further argued that the judge's consideration of the appellant's health claim and the test in **AM (Zimbabwe) v SSHD [2020] UKSC 17** had used the wrong starting point, given that the appellant is an accepted victim of torture and given the expert report from Dr Engerland, whose expertise the judge did not question, which indicated that the appellant would be highly unlikely to have access to mental health facilities, which were "barely existent due to cultural stigma" and because of unaffordability and risk of unsafe fake medication.

11. The grounds also argued that the judge failed to consider that even if the appellant's family are contactable in Iraq, Dr Engerland stated that they may well reject the appellant owing to shame given the appellant's sexual assault and/or the perceived risk brought on the family, which the judge did not consider. It was further argued that the judge's consideration of Article 3 and the humanitarian situation was flawed as the judge had failed to consider the personal circumstances of the individual in regard to the humanitarian situation, with the appellant's mental health problems inevitably affecting his ability to cope in Iraq. It was argued that the judge failed to consider the sliding scale analysis of risk in regard to the security situation in Iraq when considering Article 15(c), as per **SMO & KSP (Civil status documentation; article 15) Iraq CG [2022] UKUT 00110 (IAC)** ("**SMO2**") paragraph 144A(5). Again as an accepted victim of torture, it was argued that his associated mental health problems would invariably affect his ability to avoid risk, which was not considered by the judge.

12. Although there was no Rule 24 response, in oral submissions for the respondent Mr Wain argued, in short summary as follows.

13. The judge's approach was sound, and it was submitted that the judge was entitled to take the negative credibility findings reached by Judge Holmes as a

starting point in line with **Devaseelan STARRED SSHD [2002] UKIAT 00702 (13 March 2002)** but that the judge had gone on to assess credibility and properly cross-referenced the medico-legal report and the evidence as a whole.

14. The judge at paragraph [67] considered the possibility of injuries being caused by an explosion and that the dishonesty and concealment of the appellant in his asylum narrative had forced him to do this. Whilst the judge had speculated as to other potential causes including at [67] including possibly an explosion with debris, that did not, in Mr Wain's submission, undermine the material finding that the appellant's account was not credible.

15. Mr Wain argued that the judge considered inconsistencies between the appellant's past and current evidence and the account given to the medical expert and found these damaged the credibility of the appellant's asylum narrative. Mr Wain relied on the judge's conclusions at [39] with the judge having doubts over a real connection between the signs of violent effects on the body of the appellant with the asylum narrative that the previous judge had found to be a fabrication. Mr Wain relied on the judge's findings at [32] that it was incredible that the appellant would not have provided an account of being tortured with knives for an extended period and of being raped in his account before Judge Holmes despite the fact that he was represented at the time.

16. Mr Wain submitted that Judge Raymond was required to carry out a credibility assessment which was not the function of Dr Smith. Whilst the Secretary of State accepted that the appellant was a victim of torture it was the appellant's account that had been rejected. Mr Wain relied on what he asserted was the judge's thorough assessment of credibility from [29] to [48] and his conclusions at [65] through to [69]. The judge was not bound by the medico-legal report and was required to consider credibility for himself.

17. The judge had considered the reasons why the appellant indicated that he had not given this account previously at [37] to [38] and the judge considered at [33] to [34] the prior absence of a medico-legal report. Mr Wain argued that the judge was entitled at [37] and [38] to take into consideration that Dr Munir made no mention of the causes of the appellant's condition namely that he had endured sexual violence during a prolonged week of brutal physical torture with knives. The judge at [34] and [35] mentioned Dr Wong and the judge considered the dates of the reports provided and the judge found it incredible that there was no reference to the appellant having been a victim of sexual violence.

18. Mr Wain drew attention to the judge's comparison including at [43] of what the appellant told the previous judge, to what the appellant told Dr Smith in 2019. The judge at [41] found it "deeply damaging" to the appellant's credibility that the previous judge was given no inkling to the extent to which the asylum narrative, which before Judge Holmes had related to a one-off event, had moved on.

19. Mr Wain made submissions the remaining grounds: In relation to the **AM (Zimbabwe)** point and the credibility of the appellant's account, the judge had looked at the evidence of the appellant's mental health, including that he was on antidepressants with no counselling and was entitled to reach the finding that the first limb of **AM (Zimbabwe)** was not met, notwithstanding the diagnosis of PTSD and the judge went on to consider at [74], Dr Engerland's report and the availability of medication, adequately reasoning his findings in relation to the availability of healthcare.

20. In relation to risk of suicide, Mr Wain submitted that the judge assessed this at [76] and was entitled to take into account that the asylum narrative was fabricated. The ground in relation to the appellant's contact with his family, related again to findings made on the premise that the appellant's evidence was not accepted in relation to the appellant's family. The judge had also considered the country evidence and the judge had not accepted that the family had lost contact.

21. Whilst Mr Wain accepted that there had been heavy reliance on Judge Holmes' decision, he submitted that the judge had considered the new evidence, including at [52] to [54] in relation to lack of contact with his family.

22. Mr Wain also relied on paragraph [59] in relation to links with his family and this was considered in the context of the appellant and the appellant's partner. At paragraph [73] it was submitted that the judge properly considered the family's background and considered the country guidance in **SMO2** and the ability to obtain a CSID card and it was argued the judge made clear findings in relation to the ability of the appellant being able to return and obtain a CSID by proxy. In respect of Article 15(c) and Article 3, the starting point is the area of return where there generally is no Article 15(c) risk and Mr Wain relied again on paragraph [74] as indicating that the judge has taken into account the appellant's personal circumstances.

Conclusions – Error of Law

23. Although the judge undertook a detailed consideration of the issues in a lengthy judgment, the judge's approach to credibility and **Devaseelan,** in light of the new evidence, in particular the Freedom from Torture medico-legal report dated 30 October 2019, authored by Dr Alison Smith, was irrational, albeit that this is a high bar.

24. The Court of Appeal in, **SSHD and BK (Afghanistan) [2019] EWCA Civ 1358**, at paragraph 32 set out the **Devaseelan** guidance:

"The Tribunal in *Devaseelan* then gave guidance that can be summarised as follows:

> (1) The first adjudicator's determination should always be the starting-point. It is the authoritative assessment of the appellant's status at the time it was made. In principle issues such as whether the appellant was properly represented, or whether he gave evidence, are irrelevant to this.
> (2) Facts happening since the first adjudicator's determination can always be taken into account by the second adjudicator.
> (3) Facts happening before the first adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second adjudicator.
> (4) Facts personal to the appellant that were 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.
> (5) Evidence of other facts, for example country evidence, may not suffer from the same concerns as to credibility, but should be treated with caution.

(6) If before the second adjudicator the appellant relies on facts that are not materially different from those put to the first adjudicator, the second adjudicator should regard the issues as settled by the first adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated.
(7) The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is some very good reason why the appellant's failure to adduce relevant evidence before the first adjudicator should not be, as it were, held against him. Such reasons will be rare.
(8) The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second adjudicator to decide which of them is or are appropriate in any given case."

25. The Court of Appeal in **BK** reviewed subsequent consideration of **Devaseelan** by the Courts including what was said in **Djebbar v SSHD [2004] EWCA Civ 804** including the importance of not allowing the guidance to place unacceptable restrictions on the second adjudicator's ability to determine the appeal in front of them.

26. Whilst the judge was required to take Judge Holmes' decision as his starting point, it was incumbent on the First-tier Tribunal to assess the appellant's evidence and his credibility through the lens of the now accepted fact that he is a victim of torture and suffering from PTSD.

27. Whilst that of course does not mean that the judge had to accept the explanation the appellant gave for how that torture occurred, rather than considering whether the accepted medical evidence might lead to different conclusions being reached in relation to credibility (than those reached by Judge Holmes) the judge sought to undermine the expert evidence by reliance on the findings of the previous judge.

28. It was accepted by the respondent that the report from Dr Smith, dated 30 October 2019 was reliably provided by Freedom from Torture. The respondent had accepted that Dr Smith was a GP with 34 years' practice with relevant expertise, experience and training to conduct a medico-legal report and it was accepted she had the required credentials. The respondent accepted at paragraph 37 of the refusal letter, that due to the education, experience and reliability of the examiner and the fact that the appellant met the diagnostic criteria set out by Dr Smith, it was accepted that the appellant was a victim of torture and as a result has PTSD and depressive illness. It had been argued on behalf of the appellant that the respondent had then failed to assess the appellant's account in light of those accepted findings. I am of the view that the First-tier Tribunal judge fell into the same error .

29. The judge at [27] found that 'even after the medico-legal report concluding that the appellant was tortured, the essential question before me is whether there is credible evidence arising within the asylum narrative that the previous Judge found to have been fabricated, which could lead me to differ from that conclusion'. In doing so the judge placed unacceptable restrictions on his ability to determine the appeal in front of him, in treating the previous judge's decision as effectively fixed.

30. It was incumbent on the judge to consider whether the accepted new evidence, including that the appellant was a victim of torture with 61 out of 62 scars attributed to ill treatment, 39 highly consistent, five typical and four consistent with 13 out of 61 scars, being diagnostic scars (which could only have occurred in the manner attributed) cast any light on the credibility of the appellant’s claim.

31. Such a consideration ought to have involved an analysis of whether the accepted evidence made the appellant’s claim to have been tortured in the manner he recounted, more likely or not. The judge also had to consider the evidence the appellant had provided, including to the previous Tribunal, as that given by a recognised victim of torture, suffering from PTSD. It was the role of the second Tribunal to decide whether the new evidence considered in the round, had any impact on the appellant’s credibility. Where the judge fell into error, was to instead start from the fixed position that the appellant’s account was fabricated and then to ask himself whether anything in the medico-legal and expert evidence would change that conclusion.

32. This resulted in the judge, although accepting that the appellant was a victim of torture, seeking to undermine and discredit the medico-legal report and resorting to his own unsubstantiated speculation as to how those injuries might have been caused. At the very least this speculation fails to take into account that the accepted medico-legal report made diagnostic findings of knife injuries whereas the judge speculated that the scars might have been caused by an explosion. The judge speculated at paragraphs [65] to [69] that the torture was likely to have occurred outside of Iraq, or in Iraq but for reasons unconnected to the appellant’s claim. The judge’s consideration failed to adequately reason how this was consistent with Dr Smith’s report, including of not insignificant diagnostic scarring. Nor did the reasoning take account of Dr Engeland’s country expert report in relation to the ongoing human rights abuses/violence in Iraq, which might be said to make the appellant’s account of how the torture occurred more plausible. If the judge rejected that evidence, it was incumbent on him to give reasons.

33. The judge’s reasoning returned throughout the decision and reasons to the findings of Judge Holmes, including that the appellant was not a reliable witness. However, notwithstanding the fact that, at [23], the judge stated that he had had regard to the psychiatric evidence and had decided to treat the appellant as a vulnerable witness, the judge fails to consider how Judge Holme’s findings might have been impacted, if at all, if Judge Holmes had had the benefit of both Dr Smith’s report and the respondent’s acceptance that the appellant is a victim of torture suffering from mental health conditions.

34. The medico-legal report specifically considered the Istanbul protocol, including paragraph 105(f) and the question of whether the clinical picture suggests false allegations of torture. Dr Smith noted that the appellant did not attribute all of his scars to ill treatment and Dr Smith ultimately concluded that ‘the history, examinations and timeline are clinically congruent with no evidence of embellishment or exaggeration’. The judge failed to provide adequate specific reasoning as to why Dr Smith’s clinical conclusion was rejected.

35. The judge’s conclusion, at [29] that there is ‘no credible basis’ for the failure of the appellant/his previous representatives to provide a medical report, which featured heavily in the judge’s rejection of the appellant’s account, is unsustainable and fails to take into account that late disclosure of torture is not uncommon and that there are a number of possible reasons why such a report

may not have been obtained/why his claimed sexual abuse may not have been disclosed at an earlier stage.

36. The approach of the judge is infected by a misapplication of the **Devaseelan** principles, with the judge's findings, rather than taking the first judge's findings as a starting point, being an attempt to justify and maintain the negative findings of the first Tribunal. What was required, was for the First-tier Tribunal to properly consider the effect, if any, of the new medical and expert evidence and the acceptance by the respondent that the appellant is a victim of torture, on the assessment of credibility.

37. It is of further significance that the judge also failed to adequately address the impact of the accepted evidence that the appellant is a victim of torture on the appellant, including considering the established principle, as enshrined in paragraph 339K of the immigration rules, that the fact that a person has already been subject to persecution or serious harm will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

38. Whilst it does not in any way automatically follow that the appellant's account is credible or that he will be successful in his protection claim (and the appellant's account is not without issues), it cannot be definitively said that the judge would have reached the same conclusions had he followed the correct approach to the previous adjudicator's decision and to the new evidence.

39. The parties agreed at the hearing that given that the first ground of appeal was made out, it followed that none of the remaining findings were safe.

40. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of 25 September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

41. I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re-hearing is necessary. The appellant's case is remitted to the First-tier Tribunal, any London centre, for hearing de novo.

Notice of Decision

(1) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

(2) I set aside the decision of Judge Raymond. The appellant's appeal is to be remitted to the First-tier Tribunal other than to Judge Raymond to be heard afresh.

M M Hutchinson

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

20 December 2023