IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004912

First-tier Tribunal No: PA/51162/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

11th March 2024

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

AZ
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr P Nathan
For the Respondent: Mr E Tufan

Heard at Field House on 23 February 2024

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 the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge G Clarke heard on 15 June 2023.

2. However, for ease of reference hereafter the parties will be referred to as they were before the First-tier Tribunal.

3. Permission to appeal was granted by First-tier Tribunal Judge Parkes on 17 November 2023.

Anonymity

4. An anonymity direction was made previously and is maintained because this is a protection matter.

Factual Background

5. The appellant is a national of the Russian Federation now aged 54. He arrived in the United Kingdom in mid-2014. In 2015, the appellant was arrested on a provisional warrant and shortly afterwards applied for asylum. The Russian Federation Authority made an extradition request to the Secretary of State. The appellant's asylum claim was refused, and he was excluded from the Refugee Convention under Article 1F(b). The extradition proceedings were drawn out but ultimately, the appellant was discharged from them on Article 6 ECHR grounds during 2018. The decision of the Chief Magistrate was that the appellant's extradition would be a breach of Article 6 of the ECHR and on that basis the appellant would be entitled to Restricted Leave should all other aspects of his appeal be dismissed. The Secretary of State withdrew the previous decision and reconsidered the appellant's claim. The claim was refused again on 25 February 2021 on the basis that the appellant was excluded from the Refugee Convention under Article 1F(b).

6. The relevant details of the applicant's claim as summarised in Mr Nathan's Rule 24 response are as follows.

> The Respondent is a National of Chechnya in the Russian Federation. He claims to have fought in the two Chechen Wars and that, as a result of that service, that he faces trumped up charges in the Federation relating to the death of a (named person). The Respondent fled the Russian Federation and first travelled to Belgium where he lived for a number of years with Refugee Status. While in Belgium it is accepted that the Respondent was convicted of Robbery and Weapons offences for which he was sentenced to 18 months imprisonment. While there he was also tracked down by the Russian authorities who sought his extradition to face trial in relation to offences of aiding and abetting the murder of (named person). The Respondent fled Belgium after losing his extradition case and came to the UK in 2014. In 2015 his whereabouts became known and he was arrested by the UK authorities on behalf of the Russian authorities. The Respondent claimed asylum and the Russian authorities again pursued his extradition.

The decision of the First-tier Tribunal

7. At the hearing before the First-tier Tribunal, the judge decided that the Joint Presidential Guidance Note No. 2 of 2010, "Child, Vulnerable Adult and Sensitive Appellant was applicable given the medical evidence that the appellant suffered from PTSD and acquired traumatic brain injury. Counsel for the Secretary of State conceded the appellant's Article 3 conditions of detention claim as the assurances given in the extradition proceedings could not be verified with the authorities in Russia. Consequently, the appeal was allowed on Article 3 grounds for this reason. Counsel for the appellant informed the judge that the appellant's Article 8 claim was not being pursued in light of the concession regarding Article

3. That left the issue of exclusion, under Article 1F(b) or from a grant of Humanitarian Protection, as the sole issue to be determined.

8. The judge found the appellant's evidence to lack credibility, with reference to his conviction in Belgium but concluded that there was insufficient evidence to show that this conviction met the serious threshold under Article 1F(b). In relation to the appellant's conviction in Russia, the judge concluded that the respondent had failed to prove that the appellant was involved in this matter. Consequently, the judge decided that the appellant was not excluded from the protection of the Refugee Convention.

The grounds of appeal

9. The application for permission to appeal was filed out of time. The grounds of appeal raised the following arguments which are summarised here.

10. Firstly, there had been a conflation of Article 1F(b) with Article 33(2) of the Refugee Convention. Secondly, the Tribunal had misapplied the burden of proof. Thirdly, there had been a failure to apply *Devaseelan* [2002] UKAIT 702. Fourthly, there was a failure to provide adequate reasons as well as perversity. Fifthly and lastly, there was a misapplication of the law on Humanitarian Protection.

11. In relation to the delay in seeking permission to appeal, an application was made to extend time for appealing on the following basis.

> The SSHD was served with the decision on 27 September 2023 but did not receive a right to appeal on the myHMCTS system. Rather, she was given a power of review. An application was made to the Tribunal to be able to appeal the decision on 11 October 2023, this was accepted, and a grant of permission 14 days was given to put in the application.
>
> In any event, the SSHD argues that permission to appeal should be granted as the delay was caused by a technical issue with the court, and in any event the grounds raise a principle of law of public importance that outweigh the minimum delay in procuring permission. The SSHD apologises for not filing the grounds straight away on 11th October 2023, but due to other ongoing commitments, the author was only given an opportunity to complete the grounds today.
>
> Additionally, such delay has little if any impact on the Appellant who is aware that he will be granted leave to remain in the UK considering the article 3 concession. Thus, as there is no removal, the prejudice of the delay is limited by comparison to the weight of the grounds.

12. Permission to appeal was granted on the basis sought, with the judge granting permission making the following remarks.

> The application is in time.
>
> The grounds argue that the Judge in attaching weight to the Belgian decision not exclude the Appellant from the convention, the power did not arise in the circumstances. The decision showed a confusion between exclusion under 1F and non-refoulment. The Belgian authorities could only have revoked the Appellant's status if they were satisfied he was a danger satisfying the appropriate criteria. It is also argued that the Judge misapplied the burden of proof. The Judge failed to apply Devaseelan. It is also argued that the Judge failed to provide adequate reasons having regard to the conviction of (D) and her circumstances. The Judge also erred on exclusion from humanitarian protection.

> The Appellant has convictions in Russia and Belgium, both sets are serious but those in the former much more so. The Judge made significant adverse credibility findings against the Appellant. It is arguable that the Judge erred in the approach to article 1F and the characterisation of the Appellant's Belgian convictions given the actions of the Belgian authorities. If the Appellant is excluded from the protection of the refugee convention he would be excluded from humanitarian protection too. The grounds are arguable.

13. This matter came before the Upper Tribunal on 2 January 2024 but was adjourned owing to the non-attendance of counsel for the appellant for unavoidable reasons.

14. In advance of the resumed hearing, the respondent filed submissions further addressing the reasons for the late application for permission to appeal.

The error of law hearing

15. Both representatives made submissions on the timeliness issue. While I was minded to extend time, Mr Nathan belatedly accepted that I had no jurisdiction to consider the issue, given what was said in *Ndwanyi* (Permission to appeal; challenging decision on timeliness) [2020] UKUT 378 (IAC). Like the judge in *Ndwanyi,* the judge granting permission in this case had made a clear statement that the application was in time and similarly this statement was factually incorrect. I note that in *Ndwanyi*, the judge granting permission had made a note which indicated that he had engaged with the timeliness point whereas in this case there is no such evidence. On this point, it suffices to reproduce the following extract from [11] of *Ndwanyi* which shows that it makes no difference.

> This is not a case where the judge has simply overlooked the fact that the application was out of time; on the contrary, he has engaged with the issue of timeliness and has reached an unequivocal decision on that issue. The circumstances here are, perhaps, unusual as we have the judge's file note but, even if we did not, it is difficult to see how it would be possible to go behind his clear finding at paragraph 1 of the grant that the application had been made in time. It follows that, if a remedy exists, then it is not to be found in the principles of law and practice articulated in *Boktor* and *Samir.*

16. The decision of the First-tier Tribunal that the application for permission to appeal was in time is an excluded decision according to the Appeals (Excluded Decisions) Order 2009 (SI 2009/275, as amended) and may only be challenged by way of judicial review.

17. Owing to the attendance of a journalist midway through the hearing, Mr Nathan requested that the matter be heard in camera. I denied this request given that the hearing was anonymised, the journalist provided his press identity and confirmed that he would abide by the anonymity direction and the appellant would not be giving evidence.

18. Mr Tufan requested an adjournment some time into the proceedings on the basis that the respondent wished to be represented by Mr Singh KC who had appeared before the First-tier Tribunal. He was unable to explain why no such application had been made in advance of the hearing or on the previous occasion this matter was listed, when Mr Tufan had also been representing the Secretary of State. Mr Nathan initially supported the request but later voiced his strong objections. Mr Tufan could point to no evidence to show that Mr Singh KC had been instructed to represent the respondent at the Upper Tribunal. Taking into account the foregoing matters, that the grounds of appeal were drafted by a senior Home Office Presenting Officer and that I had no confidence that counsel

would be instructed for the respondent on a future (third) occasion, I was satisfied that the hearing could proceed fairly and declined to adjourn in these circumstances.

19. Thereafter, I heard succinct submissions from both representatives. At the end of the hearing, I reserved my decision.

Decision on error of law

20. The first complaint in the grounds, set out in paragraphs 5-8, is that there had been a conflation of Article 1F(b) with Article 33(2) of the Refugee Convention. There are four specific criticisms in this regard. It is said in (5) of the grounds that the judge wrongly attached weight to the decision of the Belgian authorities not to exclude the appellant from the Refugee Convention. The judge addressed this point in detail at [61-73] of the decision. The grounds are misconceived because the judge firmly rejected the appellant's submission that he was bound by the Belgian authorities decision not to exclude the appellant under Article 1F or to find that the appellant's offending in Belgium was not serious as can be seen from [67] of the decision and reasons.

> In my view, the fact that the Belgian authorities did not remove the Appellant's refugee status on the basis of his criminal convictions in Belgian does not mean that the Belgian authorities did not regard the Appellant's offending as serious. The fact is that the Belgian authorities did act against the Appellant and did remove his refugee status from him. The fact that this was done under a different route rather than invoking Article 1F does not automatically mean that the Belgian authorities did not regard the offences as serious. In any event, I am of the view while I take the approach of the Belgian authorities into account as part of my overall assessment, I am not bound by their decision not to apply Article 1F to this Appellant,

21. At (6) of the grounds, there is criticism of the judge's reasoning at [67], it being said that it 'demonstrated a lack of understanding,' albeit this point is not developed. In any event, there is no basis for the respondent's complaint given that the judge accepted the submissions made on behalf of the Secretary of State.

22. Paragraph 7 of the ground again asserts that the judge demonstrated 'a lack of understanding' regarding his conclusion at [73] that the Belgian offences did not reach the threshold of serious in terms of Article 1F. The content of the ground is hard to follow and amounts to little more than disagreement with the judge's findings.

23. In (8) of the grounds, the judge is criticised for attaching weight to the Secretary of State's failure to provide evidence relating to the Belgian convictions and 'misapplied' *AH (Algeria)* v SSHD [2013] UKUT 00382 at [83] & [87]. This point was not developed by Mr Tufan. I conclude that the reference by the judge at [71] regarding this admitted failing are no more than commentary. There is nothing to support the suggestion that excessive weight was attached to this matter. Furthermore, I take into consideration Mr Nathan's submission that there was no application for an adjournment by the respondent to supply evidence to support the argument that the Belgian offences were sufficiently serious for the purposes of Article 1F(b). It is difficult to understand where it is said the judge erred here.

24. In ground two, it is asserted that the Tribunal misapplied the burden of proof because,

> though the FTTJ mentions the correct burden, it is clear they were looking for evidence and applied a much higher threshold, closer to the criminal standard of 'sure beyond all reasonable doubt.'

25. This ground is confused between burden and standard of proof but amounts to no more than disagreement. It is obvious from the decision that the judge directed himself correctly as to the burden and standard of proof [17-18] and there is no indication that this was misapplied. In addition, the judge adhered to the approach set out in *Al-Sirri* [2012] UKSC 54. Furthermore, the judge considered with care the extradition decisions at [46-57] prior to reaching his findings.

26. The third ground involves a contention that there had been a failure to apply *Devaseelan* [2002] UKAIT 702. Mr Tufan pointed to no evidence that this authority had been referred to let alone relied upon at the First-tier Tribunal, his submission being that 'it is a given' that it needed to be applied. Having carefully examined the detailed skeleton argument of Mr Singh KC, it is apparent that the respondent was not seeking to rely on this authority before the First-tier Tribunal. However, this is not a case where there has been a previous immigration appeal and therefore, it is unsurprising that *Devaseelan* was not raised. I accept the submission on behalf of the appellant that it was not appropriate for the judge to take the extradition decisions as the starting point given the vastly different legal issues involved.

27. In the fourth ground it is asserted that there was a failure to provide adequate reasons and that the decision of Judge Clarke was perverse. In this ground it is wrongly said that the judge's findings were unsupported and that he failed to consider various parts of the evidence or failed to provide an explanation. There is no reference in the grounds to any passage of the decision which was 20 pages long and contained 107 paragraphs. It is not the role of the Upper Tribunal to look for extracts from a decision to support the grounds of appeal of a professional representative. Nor did Mr Tufan draw my attention to any part of the decision or expand upon this ground. The judge was under no illusions as to the outcome of the extradition proceedings or the credibility of the appellant's evidence as can be seen from [96] of the decision.

> I have already found that the Appellant in various courts and Tribunals has been found to lack credibility and his evidence before me lacked credibility. I also rely on the fact that the one witness to the Appellant's alleged involvement in the murder has given inconsistent accounts over the years. (the witness's) accounts have ranged from being tortured to implicate the Appellant to stating that he provided her with the gun to proclaiming his innocence. Given the vastly different accounts and her lack of credibility, I conclude that there is insufficient evidence for me to find that it is more likely than not that the Appellant was involved in the murder.

28. I would add that the judge looked at the evidence before him with care and provided rational and sustainable reasons for concluding at [96] that the respondent failed to prove that it is more likely than not that the appellant was involved in a serious, non-political crime in Russia. It followed that the judge found at [105] that the appellant would be at risk of persecution in Russia as a former Chechen combatant.

29. Mr Tufan did not pursue the fifth ground which contained the legally unsupported contention that there had been a misapplication of the law on Humanitarian Protection. He was right not to do so given that the judge was entitled to rely upon his earlier findings.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

T Kamara

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 March 2024

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email