IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004160

First-tier Tribunal No: PA/57047/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 3rd of December 2024

Before

UPPER TRIBUNAL JUDGE LODATO

Between

MH
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Kostanecki, counsel
For the Respondent: Ms Cunha, Senior Presenting Officer

Heard at Field House on 13 November 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. I have decided to maintain the anonymity order originally made in these proceedings by the First-tier Tribunal because the underlying claim involves international protection issues in that the appellant claims to fear persecution or serious harm on return to Iran. In reaching this decision, I am mindful of the

fundamental principle of open justice, but I am satisfied, taking the appellant's case at its highest for these purposes, that the potential grave risks outweigh the rights of the public to know of his identity.

2. The appellant appeals with permission against the decision, dated 26 July 2024, of First-tier Tribunal Judge Raymond ('the judge') to dismiss the appeal on international protection and human rights grounds.

Background

3. The procedural and immigration history was not in dispute between the parties. It is unnecessary to repeat it here. The appellant's broad factual case is that he is an Iranian Kurd who was discovered by the authorities to be involved in the distribution of political literature in support of Kurdish rights and against the regime. He further claimed to have engaged in political activity in the UK which was said to place him at risk of persecution on return.

Appeal to the First-tier Tribunal

4. The appellant appealed against the refusal of his claim. The appeal was heard by the judge on 13 May 2024 before dismissing the appeal on all grounds in a decision promulgated on 26 July 2024. For the purposes of the present proceedings, the following key matters emerge from the decision:

a) The judge directed himself according to the applicable standard of proof. [20, 38]

b) The judge found it to be "incredible" and "vague" that the appellant's group was seen by security forces distributing leaflets and yet they escaped confrontation. This was partly founded on a report of the security services shooting seven kolbars without warning in 2023. [41-44]

c) It was "not credible" that the appellant coincidentally went to stay at a relative's home in the immediate aftermath of the leafleting operation when the authorities were sweeping up those involved and targeting his family. The speed of the authorities' claimed response was "incredible" when seen against the precautions taken to drop the leaflets in the dead of night. [46-47]

d) The appellant's claim that his mother called his uncle to warn him of her knowledge of the authorities' interest, but did not speak to him directly, was found to be "incredible". [48]

e) The sequence of events was incredible when seen against the appellant's lack of familiarity with the town where he had claimed to distribute leaflets. [49]

f) The judge summarised the appellant's evidence about how he came to know of the authorities' operation to round up those involved. It was noted that he had not attempted to speak directly to his mother when she called his uncle to warn him while her son was at his home. It was observed that it made little sense that operationally sensitive information should have been revealed to his mother and

then leaving her with the opportunity to relay that information to the appellant. He characterised this sequence of events as “contrived” and “divorced from what would have been the human reality of such an occurrence”. The “unreality” was “further heightened” by the appellant’s lack of interest in attempting to contact his family or friends since his departure through various means including the Red Cross and Facebook. This was regarded as a weighty matter in rejecting the proposition that he had ever come to the attention of the authorities. [50-65]

g) The judge was doubtful that the appellant’s father could have resumed his work as a kolbar after he was shot and injured to his ankle. The failure of the appellant to contact his family undermined the suggestion that the injury was not so serious to prevent further work because he had deprived himself of an opportunity to obtain medical evidence to support this. [66]

h) The notion that the appellant’s father was so impoverished that he was required to work as a kolbar was found to be out of step with the evidence that sufficient funds were available to educate both of his brothers. The failure to contact his family was found to be connected to the likelihood that evidence of the family’s higher than claimed status would emerge. The appellant’s own level of education was cast into doubt because of his Facebook activity. [67-70]

i) The appellant’s lack of knowledge of the Komala Party, for whom he had been distributing leaflets, was found to be “not credible”. Such a party was found to be “hardly likely” to entrust a sensitive propaganda exercise to amateurs. This overall lack of credibility was reinforced by the appellant’s lack of interest in the party once he had reached the UK. [71-75]

j) Turning to the *sur place* dimension of the claim, the judge noted that the evidence going to his activity primarily focussed on him often posing for photographs. The content of the posts and the appellant’s evidence about his activities in the UK were summarised at length. [77-96]

k) The judge began his analysis of whether this activity was pursued in good faith by recalling the earlier findings about the appellant’s claims of his activities in Iran. [97 and 107]

l) The *sur place* activity was described as being at a low level and to have been a “cynical” performance in support of a fictional asylum claim. Two particular posts were referred to as showing that the appellant was not genuinely advocating on behalf of a political cause. The suggestion that he had acted as a steward was emphatically rejected as an exaggeration. Overall, the *sur place* activity was found to be disingenuous and there was no reason why he could not delete his Facebook account before he returned to Iran. [98-101 and 108]

m) The judge considered some of the leading authorities and country guidance decisions in this sphere, including HB (Kurds) Iran CG [2018] UKUT 430 (IAC) in the context of returning as a Kurd with or without a passport (see [114]). [109-114]

n) Partly relying on the adverse findings reached on the protection claim (see [124]), the judge rejected the proposition that the appellant's return would amount to a breach of his Article 8 private life rights. [119-124]

Appeal to the Upper Tribunal

5. The appellant applied for permission to appeal in reliance on the following grounds:

i. Ground 1: the judge failed to properly apply binding country guidance in the shape of HB (Kurds) given the findings that the appellant was an Iranian Kurd who had engaged in political activities against the Iranian regime.

ii. Ground 2: in heavily relying on matters of plausibility, the judge did not properly apply the correct standard of proof which applied given that this claim was made before the Nationality and Borders Act 2022 came into force.

iii. Ground 3: the fact-finding process was unlawfully conducted by improperly relying almost exclusively on matters of plausibility.

6. In a decision dated 5 September 2024, First-tier Tribunal Judge Grimes granted permission for all grounds to be argued.

7. At the error of law hearing, I heard oral submissions from both parties. I address any submissions of significance in the discussion section below.

Discussion

8. For reasons which I hope will become clear, I am minded to address grounds two and three first. Mr Kostanecki recognised that these two challenges were inextricably linked and involved a considerable degree of overlap. In broad terms, his argument was that the judge improperly relied on a groundswell of matters of plausibility and speculation such that there was no proper application of the reasonable degree of likelihood standard which fell to be assessed. He further complained that the judge appeared, at times, to be searching for corroboration.

9. I was directed to a number of authorities during the hearing. However, I am satisfied that I need look no further than the recent and authoritative articulation of the relevant principles in the judgment of the Court of Appeal in MAH (Egypt) v SSHD [2023] EWCA Civ 216; [2023] Imm. A.R. 713. In his summary and synthesis of the leading authorities, Singh LJ explained how fact-finders should approach their task in the assessment of a protection claim. At [52], and between [58] and [77], the following key observations were made:

> 52. It is also well established that the standard required is less than a 50% chance of persecution occurring. Even a 10% chance that an applicant will

face persecution for a Convention reason may satisfy the relevant test: see *Cardozo-Fonseca* , at 440, cited by Lord Keith in *Sivakumaran, at 994* ; and *Chan Yee Kin v Minister for Immigration and Ethnic Affairs (1989) 169 CLR 379* , a decision of the High Court of Australia given by Mason CJ, cited with approval by Brooke LJ in *Karanakaran v Secretary of State for the Home Department [2000] 2 All ER 449, at 464* .

[…]

58. In *SB (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 160, at para. 44* , Green LJ said that appellate courts will accord due deference to the fact-finder who has assessed an applicant's credibility. But the appellate court needs to be able to satisfy itself that the fact finder has at least identified the most relevant pieces of evidence and given sufficient reasons (which might be quite concise) for accepting or rejecting it.

59. At para. 46, Green LJ said:

> "In cases (such as the present) where the credibility of the appellant is in issue courts adopt a variety of different evaluative techniques to assess the evidence. The court will for instance consider: (i) the consistency (or otherwise) of accounts given to investigators at different points in time; (ii) the consistency (or otherwise) of an appellant's narrative case for asylum with his actual conduct at earlier stages and periods in time; (iii) whether, on the facts found or agreed which are incontrovertible, the appellant is a person who can be categorised as a risk if returned, and, if so, as to the nature and extent of that risk (taking account of applicable Country Guidance); (iv) *the adequacy (or by contrast paucity) of evidence on relevant issues that, logically, the appellant should be able to adduce in order to support his or her case* ; and (v), the overall plausibility of an appellant's account." (Emphasis added)

60. At para. 47, Green LJ made it clear that this list was not intended to be exhaustive. Nor, I would add, is it a "checklist", every part of which has to be satisfied in every case. Everything depends on all the circumstances of each individual case. […]

61. At para. 59 of its judgment, the UT referred to the decision of this Court in *Y v Secretary of State for the Home Department [2006] EWCA Civ 1223, at paras. 25-27* . As Keene LJ said at para. 25, the tribunal of fact should be cautious before finding an account to be inherently incredible, because there is a considerable risk that it will be over influenced by its own views of what is or is not plausible, and those views will have inevitably been influenced by its own background in this country and by the customs and ways of our own society. It is therefore important that it should seek to view an appellant's account of events in the context of conditions in the country from which the appellant comes.

62. However, as Keene LJ continued at para. 26, none of this means that the tribunal is required to take at face value an account of facts proffered by an appellant no matter how contrary to common sense and experience of human behaviour that account may be. The decision-maker is not expected to suspend its own judgment. In appropriate cases, it is entitled to find that an account of events is so far-fetched and contrary to reason as to be incapable of belief. Keene LJ supported that proposition by reference to the decision of Lord Brodie, sitting in the Outer House of the Court of Session, in *Awala [2005] CSOH 73* , at para. 24.

63. In that passage, Lord Brodie said that a tribunal of fact making an adverse finding on credibility must only do so on reasonably drawn inferences and not simply on conjecture or speculation. Inferences concerning the plausibility of evidence must have a basis in that evidence. An applicant's testimony should not be lightly or readily dismissed and when it is reasons must be given. Nevertheless, the tribunal of fact need not necessarily accept an applicant's account simply because it is not contradicted at the relevant hearing. The tribunal is entitled to make reasonable findings based on implausibilities, common sense and rationality, and may reject evidence if it is not consistent "with the probabilities affecting the case as a whole." Because the reference to the word "probabilities" may be misunderstood in the present context, where the lower standard of proof applies, it is important to read that passage in context.

64. Lord Brodie went on to cite a passage from a decision of the British Columbia Court of Appeal in *Faryna v Chorny* [1952] 2 DLR 354, at 357, where it was said by O'Halloran JA:

> "In short, the real test of the truth of the story of a witness [where there is conflict of evidence] must be its harmony with the preponderance of the probabilities which the practical and informed person would readily recognise as reasonable in that place and in those conditions."

65. It is important to appreciate that *Faryna* itself was not an asylum case. It was a defamation case. The passage cited by Lord Brodie appeared in the context of consideration of the question of how the credibility of a witness should be gauged. The Court said, in terms which are also familiar in this jurisdiction, that credibility cannot be gauged solely by the test of whether the personal demeanour of the particular witness carries conviction of the truth. It was in that context that the Court said that the story of the witness must be reasonably subjected to an examination of its consistency "with the probabilities". As I have said earlier, in the present context it is important to keep in mind that the tribunal of fact is not concerned with establishing whether the facts have been proved on a balance of probabilities, as it would be in ordinary civil litigation, but is concerned with an assessment of risk.

66. Furthermore, that assessment has to take place in the particularly sensitive context of a claim for asylum, in which there is the need for the "most anxious scrutiny": *Bugdaycay v Secretary of State for the Home Department [1987] AC 514, at 531 (Lord Bridge of Harwich)* .

[…]

77 It is important to appreciate the legal effect of these provisions. What both Article 4(5) of the Qualification Directive and para. 339L of the Immigration Rules provide is that, where certain criteria are met, corroborative evidence is *not* required. It does not follow from this that, where one or more of those criteria are not met, corroborative evidence *is* required. The correct legal position is accurately summarised in the Home Office guidance, which I have quoted above. In those circumstances the decision-maker (here the tribunal of fact) must still consider whether, on the facts of the case, it is appropriate to give the appellant the benefit of the doubt, bearing in mind the relatively low threshold of "reasonable degree of likelihood".

10. While it is fair to say that the judge did not use the express language of assessing the *plausibility* of the appellant's factual claims, I am in no doubt that Mr Kostanecki was correct to characterise this analysis as a litany of plausibility findings in all but name. While the judge repeatedly referred to matters he held against the appellant as being “incredible” or “not credible”, there can be no mistaking that he was, in fact, rejecting these parts of the account as implausible. An example can be seen with the findings which I have summarised above at paragraph 4 c). Although the appellant’s narrative of fortunately being away from home in the aftermath of the leaflet-dropping exercise is described as “not credible”, and the speed of the authorities’ response is framed as being “incredible”, it seemed to me that the judge was really saying that this claimed sequence of events was *implausibly* coincidental and inherently unlikely. The judge came closest to acknowledging that matters of plausibility were being taken against the appellant when it was said that the information his mother was said to have imparted was “divorced from what would have been the human reality of such an occurrence”. At my count of the summary of the judge’s findings at paragraph 4 above, eight hinge on matters of plausibility, some of which involve multiple adverse plausibility findings in the context of the same aspect of the narrative.

11. MAH (Egypt) is clear that there is a place for considering matters of plausibility when considering the evidence in the round and that restraint is needed before an appellate process readily concludes that the fact-finding process adopted by an expert tribunal is materially flawed. However, the judgment is equally clear that assessments of plausibility carry specific dangers because the judge will inevitably bring their own cultural experiences to the exercise and necessarily assess the likelihood of such events occurring through a culturally divergent lens. A further analytical danger emerges from over-relying on matters of plausibility in that it may result in overlooking other useful analytical techniques which assist in deciding whether a whether a witness is credible to the applicable standard. It is worth noting that the judge’s fact-finding process did not meaningfully assess the broad consistency of the appellant’s narrative over time nor was the level of detail obviously assessed save for the isolated reference to vagueness summarised at paragraph 4 b) above. The techniques cited by Singh LJ at [59] of his judgment are not a straitjacket for the process of judicial fact-finding but there is every reason to think that the over-reliance on matters going to the plausibility of the narrative resulted in a number of analytical tools being left unused in the tool bag.

12. A further point which emerges from MAH (Egypt) is the importance of deploying relevant country background information in an effort to bridge the cultural knowledge-gap that is likely to exist when evaluating the plausibility of a factual claim. The only occasion on which the judge brought country background information to bear when assessing plausibility was at [42]. However, I agree with Mr Kostanecki that it was ill-fitted to the account being assessed. The reliance on a recent report of Iranian border guards discharging firearms without warning at kolbars shares little in common with the appellant’s account that he and his fellow leafleteers suspected that there was an unspecified observer who had registered their presence. Simply put, it is difficult to see how country background information about the extreme reaction of Iranian border guards had any material relationship with a claimed casual observation by someone who may or may not have been an informer. This was not a comparison of like with like and was, in reality, a non-sequitur.

13. The sheer number of adverse plausibility points taken against the appellant does not function to add any greater cogency to these points taken in isolation. The plausibility factors are not made stronger by a process of accumulation.

14. Moving away from matters of plausibility, I was also persuaded that the findings reached at [66] involved an inappropriate inference drawn from a lack of corroborative evidence in the shape of medical records about the injury the appellant claimed his father had suffered when working as a kolbar. There was nothing to indicate that this medical information about his father was readily available to him such that its absence should weigh against his credibility. I consider there to be force to the argument that the judge relied on an absence of corroborative evidence as a platform to speculate that the reason it was not available was because it would tend to reveal adverse information about the family's social and economic status in Iran. This struck me as speculation about why potential corroborative evidence was not available which was then relied upon to speculate about what the missing evidence might have shown. This was to compound speculative chains of reasoning to reach legally unsound factual conclusions.

15. When I stand back and assess the overall decision, the concerns I have outlined above inexorably lead me to the conclusion that the judge's fact-finding approach cannot be reconciled with the applicable standard of proof to assess whether the factual claims which underpin the protection claim were credible to a reasonable degree of likelihood. I am satisfied that the overall fact-finding process was vitiated by legal error such that it is appropriate to set the decision aside.

16. It is unnecessary to consider ground one because I have already concluded that the decision involved material errors of law and that the decision falls to be set aside. The findings which I have found involved legal error were partly relied upon to reject the *sur place* dimension of the claim (see [97] and [107]). It follows that it would not be appropriate to preserve those particular findings.

Disposal

17. Given that an entirely new fact-finding process is necessary, I am satisfied that the appropriate venue for a *de novo* hearing is the First-tier Tribunal.

Notice of Decision

The appeal is allowed. The decision involved material errors of law and is set aside. The matter is remitted to the First-tier Tribunal for a *de novo* hearing before a judge other than Judge Raymond.

Paul Lodato

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 November 2024