Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00584/2020 (P)

THE IMMIGRATION ACTS

Determined without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008	**Decision & Reasons Promulgated On 2 February 2021**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

NA
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Grounds of appeal and Further written submissions and reply provided by Ms K Smith, counsel
For the Respondent: Written submissions provided by Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS (P)

1. This is an 'error of law' decision determined without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008, paragraph 4 of the Practice Direction made by the Senior President of Tribunals: *Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal* on 19 March 2020, and the Presidential Guidance Note no 1 2020:

Arrangements During the Covid-19 Pandemic, as amended on 19 November 2020.

2. The appellant appeals against the decision of Judge of the First-tier Tribunal Chowdhury (the judge) who, in a decision promulgated on 18 December 2020, dismissed her appeal in respect of a decision by the respondent dated 10 January 2020 refusing her protection and human rights claim.

3. Permission to appeal to the Upper Tribunal was granted by Judge of the First-tier Tribunal Feeney in a decision dated 11 September 2020 but sent on 14 September 2020.

4. On 5 November 2020 the Upper Tribunal issued directions to the parties authored by Upper Tribunal Judge McWilliam expressing her provisional view that, in light of the pandemic, it was appropriate to determine the questions (i) whether the judge's decision involved the making of an error of law and, if so, (ii) whether the decision should be set aside, without a hearing. On 19 November 2020 the Upper Tribunal received further submissions from the appellant in respect of the two questions. The appellant made no submissions in respect of whether the two questions could be determined without a hearing. on 25 November 2020 written submissions were received from the respondent. No submissions were made in respect of whether the two questions could be determined without a hearing. On 3 December 2020 the appellant provided a written reply to the respondents written submissions.

5. Having regard to the overriding interest in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 to deal with cases justly and fairly, and having considered the nature of the appellant's challenge to the judge's decision (which focuses on whether the judge made a mistake of fact amounting to an error of law in in respect of which she attached undue weight, the judge's assessment of medical evidence and the judge's evaluation of the availability of the internal relocation alternative), and having regard to the relatively narrow focus of the legal challenge and the written submissions from the appellant's representatives, and having satisfied itself that both parties have been given a fair opportunity of fully advancing their cases, and having regard to the judgment in **JCWI v President of the Upper Tribunal** [2020] EWHC 3103 (Admin), the Upper Tribunal considers it appropriate, in light of the Covid-19 pandemic, to determine questions (i) and (ii) without a hearing pursuant to rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Background

6. The appellant is a female national of Iraq. She was born in Baghdad and is an Arab Shi'ite. Her husband is a Sunni Kurd and is said to have

been born in Jalawla. The appellant and her husband married in 2007. They have three children, two born in Iraq, the third born after the appellant and her husband arrived in the UK in December 2016.

7. I summarise the basis of the appellant's protection claim. She fears persecution in Iraq from her cousins, who disapproved of her marriage, which was conducted in secret with the aid of the appellant's mother. After their marriage the appellant and her husband left Baghdad and went to live in Jalawla, which is in the Diyala Governorate. Following an offence by ISIS the appellant returned to Baghdad with her children. She pretended that her husband had been killed. He however visited her in secret. Their third child was conceived. The appellant was fearful of informing her cousins that her husband was still alive and that she had been impregnated by him, and, in the absence of any explanation for the pregnancy, the appellant's cousins believed that she had acted contrary to Sharia law and had brought dishonour on the family. Fearing that she would be killed by her cousins the appellant informed her husband who arranged for an agent to take the whole family out of Iraq and, eventually, to the UK.

8. The appellant's claim was disbelieved by the respondent and, in a decision promulgated on 18 October 2017, Judge of the First-tier Tribunal M Davies dismissed her appeal. Judge Davies found the appellant's account to be incredible based on discrepant evidence given by her and her husband.

9. The appellant made further representations relying on medical evidence indicating that she was being treated for PTSD and associated depressive symptoms, documents purportedly issued by the police in Iraq relating to an assault on the appellant's mother by her cousins and a hospital letter, and an expert country report. The respondent treated the further submissions as amounting to a fresh protection and human rights claim but refused the claim. The appellant appealed to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The decision of the First-tier Tribunal

10. The respondent was not represented at the First-tier Tribunal hearing. The judge heard oral evidence from the appellant and from KE, a neighbour who had witnessed an alleged threatening telephone call taken by the appellant's husband from one of the appellant's cousins. In her decision the judge summarised the appellant's claim and the respondent's decision. The judge reminded herself of the principles enunciated in **Devaseelan v SSHD** [2002] UKIAT 00702 to treat the first determination as her starting point. The judge properly directed herself in accordance with the appropriate standard and burden of proof and indicated that she treated the appellant as a vulnerable

witness in accordance with the Joint Presidential Guidance Note No 2 of 2010.

11. In the part of her decision containing her findings the judge set out what she described as a "number of conflicts between the evidence of the Appellant and her husband" that were identified in the decision of Judge Davies. The judge referred to inconsistent evidence relating to where their marriage occurred [40], and the duration of the husband's visits to see the appellant after she moved to Baghdad [41].

12. At [43] and [44] the judge considered the expert country report prepared by Alison Pargeter dated 9 August 2019 and found that this report did not assist the appellant. At [45] the judge stated:

> "At 3.1 of the experts report the expert noted that if [the appellant's] cousins were still angry that she had defied them by marrying against their instructions then she could well be at risk from them were she to return although if they were still upset about the fact that she had married the expert would have expected them to have taken action against her immediately when she returned to live with her mother in October 2015. They did not. I find this point materially damages the Appellant's credibility."

13. Then at [46] the judge stated:

> "There is also no reasonable explanation for the delayed attack on her mother. The purported medical report of her mother's injuries allegedly sustained because of an attack are dated in December 2018. Why the Appellant's cousins would seek to harm the mother after such a delay, (nearly 2 years after the Appellant left the country) is not explained. I find that having regard to **Tanveer Ahmed** that I cannot safely rely upon the documents purportedly evidencing her mother's injuries."

14. At [48] the judge stated:

> "The Appellant claims to suffer from PTSD and associated depressive symptoms relating to past trauma and physical abuse (see page 32 of the Appellant's bundle). I have considered the corroborative weight of these i.e. the Appellant's disorder being caused by the abuse she alleges however given the fundamental conflicts and inconsistencies in her evidence, even allowing for her trauma, I do not find that she has demonstrated on the lower standard of proof that she has suffered from the abuse she claims. I do not find the Appellant has been truthful or credible. I find that rather it is the distress and anxiety caused by her uncertain immigration status as is highlighted in the Greater Manchester Mental Health letter of 2 March 2020."

15. At [49] the judge referred to the expert report in the context of the availability of internal relocation within Baghdad. The expert had observed that it was difficult to see how the appellant's cousins would be able to track her down or go after her outside of her own local area as militias tended to be localised. The expert also found it surprising if

the cousins tried to mobilise their militia as the issues that allegedly gave rise to the asylum claim were considered shameful and taboo and the cousins were more likely to try and conceal "the affair" then risk publicising it.

16. The judge concluded, at [50], that the appellant did not suffer from a well-founded fear of persecution on account of her mixed marriage or 3rd child from her cousins or society.

17. The judge then dealt with the medical evidence under the heading "Articles 3, 8 and Mental Health". The judge noted that the appellant had been under the care of the South Mersey Community Mental Health team since March 2018 with a diagnosis of PTSD and associative depressive symptoms, but indicated, for the reasons the judge had already numerated, that she did not find the appellant's claims to be credible or truthful. At [54] the judge noted that the information provided to all the medical practitioners was "predominantly subjective" being what the appellant had told them. The judge indicated that she had "considered and weighed very carefully" the medical practitioners' findings on examination of the appellant. The judge noted at [55] that it was unfortunate that none of the medical letters or reports refer to having considered the previous decision of the First-tier Tribunal, and that no practitioner had considered any alternative explanations for the psychological symptoms presented by the appellant.

18. At [59] the judge stated:

> "I also cannot safely rely upon the psychiatric report because it is premised on an account I have rejected. In the circumstances I cannot find that any suicide risk would increase to such an extent that it would breach the high threshold in Article 3, or Article 8 in removing her to Iraq."

19. The judge dismissed the appeal.

The challenge to the judge's decision

20. The 1st ground contends that the judge made a mistake of fact and/or failed to have proper regard to material evidence as she drew an adverse inference at [46] that the appellant's mother had only been attacked once, in December 2018. The evidence however in the appellant's witness statement was that her cousins had assaulted her mother twice; firstly in December 2017 and again in December 2018. To the extent that the judge relied on a delay of some 2 years in the attack as a factor undermining the appellant's credibility, she took into account an a relevant consideration. Mr Lindsay submits that even if the judge had made a mistake the error was not material. One had to read [45] in conjunction with [46]. The expert would have expected the cousins to have taken action immediately on the

appellant's return to live in Baghdad in October 2015. Based upon the expert evidence the respondent submits that it was the absence of any claimed attack immediately after October 2015 that was considered to materially damage the appellant's credibility.

21. The 2nd ground of appeal challenges the judge's approach to the medical evidence. The appellant had been diagnosed with PTSD and had received antidepressant and antipsychotic treatment including EMDR (for PTSD) and CBT Therapy (for PTSD) over a sustained period of time. At [48] and [59] the judge is said to have rejected the medical evidence on the basis that she had already found the appellant to be incredible, an approach that was legally flawed (**Mibanga v SSHD** [2005] EWCA Civ 367). Nor had the judge adequately engaged with the evidence of the clinical diagnosis and treatment which was corroborative of the appellant's account of events. Although the judge was entitled to note that the medical practitioners were reliant on information provided by the appellant, their diagnosis was also based on the appellant's presentation over a prolonged period. To the extent that the judge rejected the clinical diagnosis and opinion of various treating medical practitioners that the appellant suffered PTSD, instead finding that her poor mental health was due to distress and anxiety caused by her uncertain immigration status, the judge erred in law; she had exceeded her remit in displacing the clinical diagnosis of medical professionals with her own and failed to have any or any proper regard to the medical evidence.

22. In his written submissions Mr Lindsay submits that, at [48], the judge demonstrably considered "the corroborative weight" of the medical evidence but that "even allowing for her trauma" the evidence did not demonstrate on the lower standard of proof that the appellant had suffered the abuse she claimed. The decision read as a whole, in particular the judge's directions at [36] indicated that she had considered all of the documentary evidence before her. The judge was, in any event, entitled to rely on the absence of any indication that the medical practitioners had been made aware of the 2017 First-tier Tribunal decision which found the appellant's account to be incredible.

23. The 3rd ground of appeal challenges the judge's approach to the issue of internal relocation. Although the judge had regard to some aspects of the expert report relating to internal relocation (at [49]), there were other relevant factors that had not been taken into account that were highlighted in the expert report and on the appellant's behalf. These included the fact that the security situation in Baghdad remained precarious, the difficulties presented by the appellant being an Arab Shia and her husband being a Kurdish Sunni, the absence of any immediate accommodation or source of income for the family of 5, the fact that the appellant has no work experience and a husband,

due to a back injury, cannot now work, and the appellant's poor mental health (which is likely to further deteriorate and destabilise removed to Iraq).

24. In his written submissions Mr Lindsay submits that the judge's conclusions were legally adequate and there was no requirement for her to deal with every aspect of the evidence before her. The judge dealt with the expert report in some detail and in particular that part of the report dealing with internal relocation. The reasons given by the judge worse sufficient for the parties to understand the judge's decision.

Discussion

25. I am satisfied that ground one is made out. A natural reading of [46] suggests that there had only been one attack on the appellant's mother, which occurred in December 2018. The judge found there was no explanation as to why there have been a delay of nearly 2 years after the appellant left the country in attacking the mother and, as a consequence, the judge did not feel she could "safely rely upon the documents purportedly evidencing [the] mother's injuries." It is clear however from the appellant's statement, at paragraph 15, that the appellant claimed her mother had been attacked twice, in December 2017 and again in December 2018.

26. Mr Lindsay submits that any such mistake is immaterial given the content of [45]. I have considered [45] in detail. This relates to assaults on the appellant by her cousins, not to assaults on the appellant's mother. The expert had expected the appellant's cousins to have taken action against her immediately when she returned to live with her mother in October 2015 if they were still upset about her marriage. The expert was not commenting on any assault on the appellant's mother by the cousins. I note by way of observation that the appellant did claim that her cousins physically assaulted her when she returned and that her mother had to beg them not to kill her (see paragraph 9 of the statement).

27. I am satisfied that the judge placed material reliance on her mistake concerning the delay in the attacks on the appellant's mother. Whilst the judge was entitled to rely on the inconsistencies identified by Judge Davies in doubting the appellant's account, and on the aspects of the expert report upon which she relied at [43], I cannot say with certainty that, had the judge not erred in law as I have found, the decision would inevitably have been the same.

28. I am additionally persuaded that ground 2 is made out to a material extent. The appellant had been receiving professional medical treatment since April 2017 and had been in the care of the Greater Manchester Mental Health NHS Foundation Trust since March 2018.

She is under the care of a Consultant Psychiatrist and was assigned a Social Worker as her care coordinator in respect of support she received in the community due to her mental illness. She had been diagnosed with PTSD and associated depressive symptoms and was receiving both antidepressant and antipsychotic medication. She had also received EMDR therapy. Whilst the judge was undoubtedly entitled to take into account in her approach to the medical evidence the fact that the medical professionals had either not be made aware of or had not commented on the adverse credibility findings made by Judge Davies, and to note that the medical assessment was based on information provided by the appellant herself, the judge appears to have concluded at [48] that the symptoms assessed by the professionals were caused by "distress and anxiety" occasioned by the appellant's certain immigration status. I do not consider that the judge was lawfully entitled to ascribe the symptoms exhibited by the appellant, which had been professionally diagnosed as being caused by PTSD, to anxiety and distress. Whilst the judge was not obliged to accept the medical evidence there was no evidential basis entitling her to, in effect, substitute her own assessment of the cause of the particular symptoms presented by the appellant.

29. I am further satisfied that ground 3 is made out. I can deal with this point briefly. It was incumbent on the judge to have considered all relevant factors when determining whether internal relocation was a safe option and whether it was reasonably open to the appellant given her particular circumstances and those of her dependents. Whilst the judge did take into account a number of relevant factors, she failed to consider those identified at paragraph 23 above. These were relevant and material considerations that had been advanced on the appellant's behalf and which the judge was obliged to consider, even if only briefly. The failure to do so constitutes a material error of law.

30. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 a 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.

31. I have determined that the judge's conclusions relating to the appellant's credibility are unsafe. The appeal will be remitted to the First-tier Tribunal so that a new fact-finding exercise can be undertaken. It will be for the First-tier Tribunal to determine the most appropriate mode of hearing the appeal.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of errors on points of law and is set aside.

The case is remitted back to the First-tier Tribunal to be decided afresh by a judge other than judge of the First-tier Tribunal Chowdhury.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the respondent in this appeal is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

D.Blum

Signed

Upper Tribunal Judge Blum Date 19 January 2021