IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005013
First-tier Tribunal No:
PA/52160/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 April 2024

Before
DEPUTY UPPER TRIBUNAL JUDGE COTTON

Between

HMI
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE
FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs H Masih, Counsel instructed by Braitch Solicitors
For the Respondent: Mrs S Simbi, Senior Home Office Presenting Officer

Heard at Field House on 15 March 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 appellant is a national of Iraq of Kurdish ethnicity. He arrived in the United Kingdom on the 28 November 2018 without leave and claimed asylum. The respondent refused his claim in a decision under cover dated 27 May 2022. The appellant appealed to the First-tier Tribunal (FtT) where is the case was heard on 22 September 2023 by Judge Row (the Judge).

2. The appellant's case in the FtT was that he qualifies as a refugee, that he faces an art 3 ECHR risk were he to be returned to Iraq because he does not have a CSID, that he should succeed under paragraph 276AD (1)(vi) of the immigration rules, and that he should succeed under art 8 ECHR outside the Rules on the basis of his private life.

3. The FtT made findings that the appellant had not come to the adverse attention of the PMF or the PUK in Kirkuk. The Judge found that the appellant's account of being arrested and mistreated was fabricated and determined that his asylum claim failed. The Judge went on to consider the appellants art 3 ECHR claim and concluded that the appellant had not established that he does not have a CSID card and could not obtain one. The Judge found that he was an unreliable witness of fact. The Judge also found that his account was inconsistent with the Country Guidance and expert opinion. The Judge found that the appellant did not face an art 3 ECHR risk as claimed, and also found against the appellant under the Immigration Rules. With regards to the appellant's art 8 ECHR claim, the Judge took into account various matters and concluded that the public interest in removing the appellant from the UK "far outweighs" any interference with his private life.

4. The appellant was granted permission to appeal by the Upper Tribunal on grounds which can be summarised as follows:

    a. In considering the application of s8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (the 2004 Act), the Judge failed to give proper consideration to the concession made by the respondent in the Reasons for Refusal Letter (RFRL) that the appellant had reasonably not sought asylum in a safe country he passed through before arriving in the UK;

    b. The Judge had erred in relation to the approach to photographs of the appellants injuries, by holding against the appellant that he had not provided evidence of when the photographs were taken. The Judge considered it would have been reasonable for the appellant to obtain given they were digital photos;

    c. The Judge erred by failing to look at the evidence of injuries in the round, and instead looking at the evidence individually. The Judge used language indicating the application of another standard of proof than the proper one;

    d. The Judge erred in failing to give sufficient reasons for rejecting that the appellant is a supporter of PUK, the activities he claims to have undertaken in Iraq, and his subsequent arrest;

    e. The Judge erred by failing to take into account the appellant's evidence that he left Iraq through an illegal route, which was material evidence.

Submissions – Error of Law

5. I had the benefit of submissions on behalf of both parties.

6. With regards to the first ground of appeal, the appellant submitted that the concession by the respondent was in effect binding on the FtT and the tribunal departed from it without good reason.

7. On the second ground, the appellant stated that dependence was not asked to give an explanation of why this information was not in evidence before the FtT. Mrs Masih submitted that it was "poignant" that the Judge noted the appellant's account that the photos were uploaded onto a cloud account (although I was not provided with any evidence as to why this would – or would not – make a difference). The Judge, says the appellant, made an assumption as to how the photos were reproduced and held this against the appellant.

8. On the third ground of appeal, the appellant submitted that the Judge had available both expert evidence on the injuries and the photographic evidence. It was submitted to the Judge erred by failing to assess the medical evidence alongside the photographic evidence. It is said that the Judge did not look at all of the features of the evidence before assessing this point. The appellant notes that the Judge refers to the evidence as "not conclusive" and "could not definitely confirm it" at [43]. The appellant submits that this is indicative of the Judge applying the wrong standard of proof.

9. On the fourth ground of appeal, the appellant submits that the Judge fails to make recent findings on core aspects of the appellant's claim, and the Judge considered the medical evidence and photographic evidence at the outset, thereby arguably "putting the cart before the horse" rather than considering the evidence on the appellant claimed arrest and ill-treatment at first. The Judge therefore gave nothing more than a blad statement of rejection on the appellant's claim to be a supporter of the PUK comedy activities he engaged in in Iraq in support and his subsequent arrest.

10. Finally, the Judge failed to take into account the appellant's evidence that he travelled an illegal route out of Iraq when assessing the credibility of his claim not to have fallen foul of checkpoints when journeying within (given that the appellant had lost his CSID). At the end of submissions for the appellant I asked where I could find in the evidence that the appellant claims to have travelled an illegal route out of Iraq. I was given the answer that this having been in oral evidence is noted in a footnote in Counsel's skeleton argument, but does not appear in the written evidence. The appellant has chosen not to apply for a transcript of the evidence before the FtT.

11. In response, the Home Office submitted that s8 is a mandatory provision and the Judge gave reasons as to why he did not find the appellant's account reasonable.

12. The appellant was represented in the FtT and the Judge's approach to the evidence on the photographs is reasonable in light of this. The Judge did

not err in law in relation to the date stamp on the photographs and it was reasonable for the Judge to look into the information around the photographs. With regards to the treatment of the medical evidence, the Judge correctly notes the expert report identifies consistency of the injuries with the appellant's case and also correctly notes that the expert states that there could be other causes that could have led to the injuries.

13. With regards to the appellant's claimed membership of the PUK, the Home Office submitted that the Judge did not need to make a clear finding on this because the claim was that the appellant was attacked and arrested by the PKF. The respondent's position is that it was not relevant to the appellant's claim whether he left Iraq legally or illegally.

14. The respondent also submitted that the appellant can't say the Judge was in favour of the appellant in some places and say that he hasn't considered evidence in the round elsewhere. This is not a case where the Judge has rejected everything and he has provided adequate reasons on several occasions.

Analysis and conclusions – Error of law

15. One of the central issues in the case was the appellant's credibility. In assessing the appellant's credibility, the Judge was required by the prescriptive wording of s8 of the 2004 Act to take into account whether the appellant had failed to take advantage of a reasonable opportunity to make an asylum claim or human rights claim whilst in a safe country.

16. The appellant contends that the Judge was bound by the approach taken by the respondent in the reasons for refusal letter, in that the respondent accepted it was reasonable for the appellant not to have claimed asylum in a safe country. The appellant styled this as a 'concession' by the respondent. It seems to me that this was not so much a concession made by the respondent as a party to litigation, but a judgment made by the respondent as a 'deciding authority' (as defined by the 2004 Act) in assessing the appellant's asylum claim.

17. I find that the terms of section 8(1) and (4) and the definition of 'deciding authority' in s8(7) make it clear that the FtT is required to take into account any failure by the appellant to take advantage of a reasonable opportunity to make an asylum claim in a safe country. Each deciding authority is required to take this into account separately. In my judgement, this means that each deciding authority must assess afresh whether the appellant has failed to take advantage of a reasonable opportunity to make an asylum claim while in a safe country.

18. The Judge was under a requirement to take into account the parties' positions on this point in coming to their judgment. The Judge did this in [63] and [64], which address the respondent's and appellant's positions respectively. Because the Judge is required to make this assessment independently from any other deciding authority, the Judge cannot be bound by the respondent's own assessment of this question. This

requirement for the Judge to apply their own judgement to the facts in the case can be distinguished from the expectation that a judge will not normally depart from "agreed facts" that are presented to a judge by the litigating parties.

19. Having outlined the parties' positions on s8 of the 2004 Act, and highlighting relevant facts at [62], the Judge concludes at [65] that the appellant did not have a reasonable explanation, and considers that this damages his credibility. This analysis is one part of the Judge assessing the appellant's credibility and is, in my judgment, in line with the 2004 Act and the interpretation of it in JT (Cameroon) v Secretary of State for the Home Department [2008] EWCA Civ 878 at [20] where the court of Appeal decided that the explanatory clause in s8(1) which states that "the deciding authority shall take account, as damaging the claimants credibility, of any behaviour to which the section applies" is to be read as either "as potentially damaging the claimants credibility", or "when assessing any damage to the claimants credibility".

20. I therefore find no error in law by the Judge in assessing the application of s8.

21. On the second ground, at [60] the Judge states "photographs taken on modern telephones will usually provide the data, time, and location where the photograph was taken. It would have been straightforward to demonstrate this. It might not have been possible to get this information but it would have been reasonable to attempt to". That failure to attempt to obtain the information seems to me to be what the Judge takes into account when assessing the appellant's credibility. The appellants case on appeal is, essentially, that the Judge should have raised this lack of evidence in the hearing to enable the appellant to comment on it.

22. I am invited to consider AM (fair hearing) Sudan [2015] UKUT 00656 (IAC). Although reported, this is neither a starred decision nor a country guidance case. I note the Judicial headnote which states (as far as is relevant) that "If a judge is cognisant of something conceivably material which does not form part of either party's case, this must be brought to the attention of the parties at the earliest possible stage, which duty could in principle extend beyond the hearing date." Further, that "Fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, in fulfilment of each party's right to a fair hearing". As noted in that decision, the obligation that arises is one to ensure that each party has a reasonable opportunity to put its case fully.

23. I also take into account TK (Burundi) v Secretary of State for the Home Department [2009] EWCA Civ 40 and the principle outlined at [21] of that judgment that "…independent supporting evidence which is available from persons subject to this jurisdiction be provided wherever possible and the need for an Immigration Judge to adopt a cautious approach to the evidence of an appellant where independent supporting evidence, as it was in this case, is readily available within this jurisdiction, but not provided. It follows that where a Judge in assessing credibility relies on the

fact that there is no independent supporting evidence where there should be supporting evidence and there is no credible account for its absence commits no error of law when he relies on that fact for rejecting the account of an appellant."

24. In my judgment, the FtT in the instant case was not failing to canvass a new issue. The issue was when and how the appellant was injured, which was argued by the parties and which the photos were said to be probative of. More broadly, the appellant's credibility was something that the Judge was required to assess. I find that the FtT was assessing the credibility of the appellant's evidence on the topic of his injuries by assessing the evidence, or lack of it, as a whole and in the way foreseen in TK (Burundi) as being legitimate. The judge also took into consideration as damaging to his credibility that the appellant had not asked the Iraqi hospital for a copy of his records. The appellant does not seek to appeal that approach, but I note that this falls into the same legitimate assessment of the absence of easily obtainable (or easily requested) evidence.

25. I find that on the second ground of appeal, the obligation to allow parties to put their cases fairly was fulfilled by the Judge. I find no error of law on this ground of appeal.

26. If I am wrong with regards to the second ground of appeal not showing an error in law, I am satisfied that any error would not be material. This is because the information surrounding the photographs is but one of the factors that the Judge lists as damaging to the appellant's credibility. I find that it is plain that the same conclusion would have resulted were the Judge not to have taken into account the absence of evidence on the date of the photographs.

27. I turn to the third ground of appeal. The appellant submits that the Judge put the cart before the horse in assessing the credibility of the medical and photographic evidence. The judge was, I find, required to assess how much evidential weight should be given to those pieces of evidence. However, they (or any other piece of evidence) cannot be viewed in isolation and, as the appellant submits, should be viewed in the round with all the evidence.

28. The determination of the FtT is structured clearly. The Judge outlines the evidence the Tribunal received. He then analyses the evidence relevant to the appellant's claimed events in Iraq before drawing conclusions on that part of the appellant's case, thereafter turning to the claimed sur place activities.

29. The Judge groups together, as might be done on a balance sheet, the evidence which supports the credibility of the appellant's case [50-55], including elements of the expert's report, noting the limits of the support at [56]. The Judge then groups together matters damaging to the appellant's credibility at [57-65]. The Judge then draws conclusions on the events in Iraq. I consider it reasonable for the Judge to draw conclusions on the claimed events in Iraq before considering the sur place activities. In

this case (it may not be so in every case) the in-country and sur place activities are sufficiently distinct in evidential terms as to allow the judge to separate them out to a certain extent. I say 'to a certain extant' because there is evidence of Dr Fatah is something deserving of consideration in relation to both in-country and sur place activities. The Judge has done this.

30. I find that the Judge has brought all the relevant evidence to mind when making conclusions and has not fallen into the trap of 'putting the cart before the horse'.

31. The appellant submitted before me that at [43] the Judge applied the test that the appellant's presentation 'could not definitely' confirm his account. This was, in fact, not a conclusion of the Judge, but a plain language summary of the findings of Dr Bates in relation to the appellant's injuries and Dr Bates' opinion on their consistency with the appellant's account. The appellant further submitted that the Judge applied the wrong standard of proof at [49] in stating that "It remains the case however that apart from the evidence set out above, which is not conclusive, the core of the appellant's account, that of being a PUK member and supporter and of his arrest and mistreatment because of that, is not supported by documentary or other evidence." I find that this is not indicative of applying the wrong standard of proof. Evidence can be conclusive (or not) on any standard of proof: conclusive of a reasonable degree of likelihood, or conclusive on the balance of probabilities are both 'conclusive'. The judge has directed himself on the standard of proof correctly elsewhere and the use of 'conclusive' makes no difference to this in my judgment.

32. I am not persuaded that the Judge erred in failing to give sufficient reasons for rejecting that the appellant is a supporter of PUK, the activities he claims to have undertaken in Iraq, and his subsequent arrest. The Judge's conclusion on this is a neat single paragraph at [72]. However, this is a conclusion that is reached after considering the evidence, and explaining what weight the judge gives to parts of the evidence from [49-65]. The Judge is not expected to repeat his analysis of the evidence before giving each conclusion.

33. Finally, I consider the ground of appeal that the Judge erred by failing to take into account the appellant's oral evidence that he left Iraq through an illegal route. When I raised the lack of a transcript of the hearing in the FtT in relation to this, the appellant agreed that a record of the oral evidence did not appear in the court documents before me, and that no transcript had been sought. Although the claim that it was in evidence is in the appellant's skeleton argument, Mrs Masih did not suggest that she is both counsel and a witness to facts central to this ground of appeal. The respondent did not concede that the appellant had made that statement in oral evidence.

34. I have considered whether fairness dictates I should seek a transcript, although no request for an adjournment for a transcript was made to me, and I take into account that the appellant is represented by the same

experienced counsel before me as before the FtT. Taking into account the overriding objective, I conclude that fairness does not require me to do this, not least because the (legally represented) appellant has had sufficient time and opportunity to seek a transcript to substantiate this ground and has not sought to do so.

35. I conclude that this ground of appeal is not made out.

Notice of Decision

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

2. I do not set aside the decision.

D Cotton

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 April 2024