



**Upper Tribunal
(Immigration and Asylum Chamber)
PA/11364/2016**

Appeal Number:

THE IMMIGRATION ACTS

Heard at North Shields

**Decision and
Promulgated**

Reasons

On 26 January 2018

On 02 February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

[S Q]

(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Brackaj, Iris Law Firm

For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge O'Hanlon promulgated on 28/02/2017, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 01/01/1989 and is a national of Iran. On 07/10/2016 the Secretary of State refused the Appellant's protection claim.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge O'Hanlon ("the Judge") dismissed the appeal against the Respondent's decision. Grounds of appeal were lodged and on 13/09/2017 Upper Tribunal Judge Hanson gave permission to appeal stating

On 28 February 2017 First-tier Tribunal Judge O'Hanlon dismissed the appellant's appeal on protection and human rights grounds. Permission to appeal has been refused by another Judge of the First-tier Tribunal and renewed to the Upper Tribunal.

The appellant asserts the Judge erred in finding it relevant the appellant had not returned to Iran after his initial asylum claim failed and failed to place reliance upon the evidence from the church and to apply relevant country guidance case law.

The Judge considered the evidence provided which is noted in the decision under challenge including at [22 -23] submissions made. The Judge did not find the appellant to be a credible witness for the reasons set out at [26]. The appellant previously made a claim for asylum based on political beliefs which was found to lack credibility. The Judge refers to the appellant's failure to leave the United Kingdom but also from [31] to two witnesses who attended to give oral evidence and letters of support from other church members who gave evidence to the effect the appellant was a genuine convert to Christianity. The Judge finds at [32] that although the witnesses were supportive of the appellant their evidence was not sufficient to overcome the concerns about the appellant's overall credibility for the reasons referred to, resulting in finding the appellant has not shown he is a genuine Christian convert. The issue the grounds raise is whether the reasoning given by the Judge relating to a past adverse credibility finding and the lack of compliance with immigration protocol through a period of residence are sufficient reasons for why evidence concerning what has occurred since the previous determination was rejected, warranting the weight been attached to it that the Judge did.

Out of an abundance of caution permission to appeal is granted on all grounds.

The Hearing

5. (a) Ms Brakaj, for the appellant moved the grounds of appeal. She told me that the Judge's assessment of credibility is flawed and that his analysis of the appellant's witness's evidence was inadequate. Ms Brakaj took me to [27] of the decision, & told me that the Judge's starting position is that the appellant's credibility is damaged because of the finding of a separate tribunal in 2008. She told me that although the Judge relied on Devaseelan [2002] UKIAT 00702, the Judge did not make allowance for the subject matter of this appeal - which is consideration of a sur place claim. She took me to [29] where the judge relies on the appellant's "... level of non-compliance with the immigration protocol..." And told me that the Judge's findings there are not relevant to the central issues in the appellant's case. She told me that from [27] to [30] the Judge placed undue weight on peripheral factors and wrongly used those factors as matters which undermined the new (sur place) claim for asylum.

(b) Ms Brakaj told me that at [31] and [32] the Judge misinterprets the evidence of the appellant's witnesses. The appellant's bundle contains letters of support as well as statements from the appellant's two witnesses. The Judge does not deal with the letters of support, and is dismissive of the evidence of the two witnesses - suggesting that they have accepted the appellant's claim at face value - yet the letters and witness statements say that enquiry has been carried out, and witnesses have not simply accepted the appellant's declarations at face value. She told me that there is inadequate analysis of the supporting evidence.

(c) Ms Brakaj urged me to allow the appeal, and to set the decision aside.

6. Mr Diwnycz for the respondent referred me to Danian v SSHD (2002) IMM AR 96. He told me that the decision contains an inherent error and that he cannot defend the decision. He asked me to remit this case to the first-tier to be determined afresh.

Analysis

7. The Judge's findings of fact lie between [26] and [33] of the decision. The Judge starts [26] by saying that he does not find the appellant to be credible. The reasons that he gives are that the appellant was found to be an untruthful witness in 2008; that the appellant has, on occasion, failed to adhere to reporting conditions; that the appellant had not left the UK when his appeal rights were exhausted in June 2008.

8. In Danian v SSHD (2002) IMM AR 96 the Court of Appeal said that there is no express limitation in the Convention in relation to persons acting in bad faith, despite Counsel's attempt in Danian to have one implied. In the court's opinion the answer to the 'riddle' lay in the judgement of Millet J in Mbanza (1996) Imm AR 136. Millet J said "The solution does not lie in propounding some broad principle of abuse of the system....but in bearing in mind the cardinal principle that it is for the applicant to satisfy the

SSHD that he has a well founded fear of persecution for a Convention reason. Whether he can do so will largely turn on credibility and an applicant who has put forward a fraudulent and baseless claim for asylum is unlikely to have much credibility left.” The court referred to a letter from the UNHCR which stated that regard should be had to whether the person’s actions had actually come to the notice of the authorities in his home country and how they would view such actions. It does not matter whether an appellant has cynically sought to enhance his asylum prospects by creating the very risk he then seeks to rely on, although bad faith is relevant when evaluating the merits/credibility of the claim, as explained in Danian. However, as Bingham J also said in Danian - the actual fear has to be shown to be genuine and not one that was manufactured by conduct designed to give plausibility.

9. In YB (Eritrea) v SSHD [2008] EWCA Civ 360 the Court of Appeal sounded a note of caution in relation to the argument that, if an appellant was found to have been opportunistic in his sur place activities, his credibility was in consequence low. Credibility about what, said the Court of Appeal. If he had already been believed ex hypothesi about his sur place activity, his motives might be disbelieved, but the consequent risk on return from his activity sur place was essentially an objective question.

10. What is absent from the Judge’s findings of fact is an analysis of the appellant’s claim to have converted from Islam to Christianity. The appellant produced a certificate dated March 2016 to confirm that he is completed an 11-week Christian study course. He produced a baptismal certificate. He produced a video of his baptism together with numerous letters of support from friends, church members and church leaders. The appellant lead evidence from members of his church. There is no meaningful analysis of that evidence in the decision.

11. At [31] and [32] the Judge records that he heard from two witnesses and that there were several letters of support before him. He said that both witnesses took the appellant at face value. The letter from Rev Bunce declares that he is aware of the possibility of asylum seekers seeking conversion to Christianity to bolster their claim, and that that is not the situation in the appellant’s case. The letter from Mr Blackburn speaks of many meetings and conversations with the appellant and says that the appellant has demonstrated Christian virtues and attitudes. The Judge does not explain why he rejects the evidence of the appellant’s two witnesses.

12. In MA v UT 2014 CSIH 111 it was said that a proper approach to credibility required an assessment of the evidence and of the general claim. In asylum claims, relevant factors were, first the internal consistency of the claim; secondly the inherent plausibility of the claim; and thirdly the consistency of the claim with external factors of the sort typically found in country guidance.

13. The general approach to be followed has been set out by the Upper Tribunal in KB & AH (credibility-structured approach) Pakistan [2017] UKUT 00491 (IAC)

(i) The 'Credibility Indicators' identified in the Home Office Asylum Policy Instruction, Assessing credibility and refugee status Version 9.0, 6 January 2015 (which can be summarised as comprising sufficiency of detail; internal consistency; external consistency; and plausibility), provide a helpful framework within which to conduct a credibility assessment. They facilitate a more structured approach apt to help judges avoid the temptation to look at the evidence in a one-dimensional way or to focus in an ad hoc way solely on whichever indicator or factor appears foremost or opportune;

(ii) However, any reference to a structured approach in relation to the subject matter of credibility assessment must carry a number of important (interrelated) caveats, among which are the following:

- the aforementioned indicators are merely indicators, not necessary conditions;
- they are not an exhaustive list;
- assessment of credibility being a highly fact-sensitive affair, their main role is to help make sure, where relevant, that the evidence is considered in a number of well-recognised respects;
- making use of these indicators is not a substitute for the requirement to consider the evidence as a whole or 'in the round';
- it remains that credibility assessment is only part of evidence assessment and, as Lord Dyson reminded decision-makers in MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49 at [33], 'the significance of lies will vary from case to case';
- in the UK context, use of such a structured approach must take place within the framework of EU law governing credibility assessment, Article 4 of the Qualification Directive in particular; and,
- also in the context of UK law, decision-makers (including judges) by s. 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 are statutorily obliged to consider certain types of behaviour as damaging to credibility.

(iii) consideration of credibility in the light of such indicators, if approached subject to the aforementioned caveats, is a valid and useful exercise, based squarely on existing learning.

14. I have to find that the decision is tainted by material errors of law because of inadequacy in reasoning and fact-finding. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed

or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

15. As the decision is tainted by material error of law I must set it aside. I am asked to remit this case to the First -tier. I consider whether or not I can substitute my own decision, but find that I cannot do so because of the extent of the fact-finding exercise necessary.

Remittal to First-Tier Tribunal

16. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of 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.

17. In this case 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.

18. I remit this case to the First-tier Tribunal sitting at Bradford to be heard before any First-tier Judge other than Judge O'Hanlon.

Decision

19. The decision of the First-tier Tribunal is tainted by material errors of law.

20. I set aside the Judge's decision promulgated on 28 February 2017. The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed
2018

Paul Doyle

Date 31 January

Deputy Upper Tribunal Judge Doyle

