



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004934
First-tier Tribunal No:
HU/57460/2022
IA/10550/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 03 April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

ABM (Iraq)
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L. Mair, counsel, instructed by ASR Advantage Law Ltd
For the Respondent: Ms A. Everett, Senior Home Office Presenting Officer

Heard at Field House on 11 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

1. The Appellant is an Iraqi national of Kurdish origin. He appeals against the decision of First-tier Tribunal Judge Thapar (“the Judge”) dated 5 October 2023, by which he dismissed his appeal on asylum and human rights grounds against the decision of the Respondent dated 30 September 2022 to refuse his fresh claim. Permission to appeal and an extension of time for appealing were granted on 17 November 2023 by First-tier Tribunal Judge Pickering on all grounds.
2. The Appellant’s claim, in very short summary, was that he is at risk of persecution and ill treatment in Iraq as a result of his imputed political opinion and/or lack of relevant documentation and that his removal would breach Articles 3 and/or 8 on the grounds of his severe mental ill-health.
3. The Judge granted the Appellant anonymity “because the Appellant has made a protection claim”. I note that this is not, without more, a proper basis to derogate from the open justice principle: Kambadzi v SSHD [2011] UKSC 23. Nonetheless, I consider it appropriate to make an anonymity order in this appeal (in the terms set out above) by virtue of the nature of his claimed vulnerabilities and risk of their exacerbation if he is named in these proceedings.
4. The hearing took place via MS-teams. I was satisfied that there were no significant technical difficulties and that everyone could see and hear each other clearly.
5. The Judge’s essential reasoning was that in previous First-tier Tribunal Decisions, the Appellant had been found not to be credible and there were reasons to give little weight to the most recent new evidence, a further expert psychiatric report from Dr Galappathie, which was the basis on which the Appellant suggested those earlier findings should be revisited.
6. The Appellant’s grounds were three-fold: (i) that the Judge had failed to apply the Joint Presidential Guidance Note No 2 of 2010 on Child, vulnerable adult and sensitive appellant guidance (“the Guidance”); (ii) that he had erred in his approach to the medical Article 3 claim; and (iii) that he had failed to decide the Article 8 claim.
7. Having heard submissions from Ms Mair and Ms Everett, at the end of the hearing I indicated that I intended to allow the appeal on ground one for reasons to follow. These are those reasons. Both advocates agreed that in those circumstances it was unnecessary to decide the second and third ground, and I therefore do not do so.
8. As to Ground 1, the Judge accepted (at para. 3) that the Appellant was to be treated as a vulnerable witness in the appeal in accordance with the Guidance. He also stated that he had “had regard to” it. The Appellant’s criticism is that, notwithstanding this, the Judge did not properly apply it, and in particular the requirement in para. 15 to record the effect the Tribunal considered the identified vulnerability had in assessing the evidence before it.
9. It was common ground that having regard to the Guidance was insufficient; that it had to actually be applied. The Guidance is central to the fair administration of justice in the Immigration and Asylum Chamber, in which appellants and other witnesses who are vulnerable frequently appear and/or give evidence. Following

the Guidance ensures that fact-finders provide the best practicable conditions for a vulnerable person to give their evidence, and for their vulnerability to be taken into account when assessing their evidence: SB (vulnerable adult: credibility) Ghana [2019] UKUT 398 (IAC); [2020] Imm AR 427.

10. In AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123, the Senior President of Tribunals (with whom Underhill and Gross LJ agreed) held at [30], that a failure to follow the Guidance will “most likely be a material error of law”. In my judgment, the expression “most likely” in that phrase applies to the question of materiality, not whether it amounts to an error. A failure to follow the Guidance will, in my judgment, always amount to an error of law. There is then, as in all appeals, a question of materiality and the Senior President’s statement is to be read as no more than that he anticipated that in many cases such a failure would be material. This is unsurprising given the high threshold for finding that an error of law is immaterial, particularly when an error is relevant to a judge’s assessment of credibility. Materiality remains nonetheless a question for the Upper Tribunal to determine on the facts of each case.
11. As noted, the Judge found that the Appellant was vulnerable. However, he did not then go on to record, as required, how that vulnerability affected, if it did, his assessment of the evidence. In this case, that is particularly notable because the Appellant’s case was that in light of his diagnoses, the previous findings should be treated with caution on the basis that no or insufficient allowance had been made for the effects of the Appellant’s mental illness on his ability to give coherent and consistent and therefore credible evidence, which was unknown about at the time of the first appeal hearing. True it is that the Judge was not impressed with Dr Galappathie’s expert report, but it is not possible in my judgment to conclude that the Judge’s failure to record what effect the Appellant’s vulnerability had in his assessment of the evidence could not have derived from a failure to consider that question, particularly given the Judge’s erroneous self-direction as to what the Guidance required (i.e. that he was merely required to have regard to it), nor that, in considering the effect of the Appellant’s vulnerability, the result would inevitably been the same. I therefore allow the appeal on ground 1.
12. The parties were agreed that in the circumstances I should remit the appeal to the First-tier Tribunal for a fresh decision from another Judge.
13. I do not preserve any findings (including as to the Appellant’s vulnerability), which will be a matter for the Judge hearing the remitted appeal on the basis of the evidence before him or her, subject to Devaseelan principles.

Notice of Decision

The decision of First-tier Tribunal Judge Thapar dated 5 October 2023 involved the making of an error of law and is set aside. The appeal is remitted to the First-tier Tribunal to be determined de novo by a Judge other than Judge Thapar.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

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26 March 2024