Upper Tribunal
(Immigration and Asylum Chamber)

AB (preserved FtT findings; *Wisniewski* principles) Iraq [2020] UKUT 00268 (IAC)

THE IMMIGRATION ACTS

Heard at Field House (Court 5) via *Skype for Business*	**Decision & Reasons Promulgated**
On 16 July 2020	
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Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE O'CONNOR

Between

AB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr H Blaxland, QC and Mr R Toal, instructed by Wilson Solicitors LLP
For the respondent: Mr R Dunlop QC, instructed by the Government Legal Department

Preserving findings of fact
(1) Whether and, if so, when the Upper Tribunal should preserve findings of fact in a decision of the First-tier Tribunal that has been set aside has been considered by the Higher Courts in Sarkar v Secretary of State for the Home Department [2014] EWCA Civ 195, TA (Sri Lanka) v Secretary of State for the

Home Department [2018] EWCA Civ 260 and MS and YZ v Secretary of State for the Home Department [2017] CSIH 41.

(2) What this case law demonstrates is that, whilst it is relatively easy to articulate the principle that the findings of fact made by the First-tier Tribunal should be preserved, so far as those findings have not been "undermined" or "infected" by any "error or errors of law", there is no hard-edged answer to what this means in practice, in any particular case.

(3) At one end of the spectrum lies the protection and human rights appeal, where a fact-finding failure by the First-tier Tribunal in respect of risk of serious harm on return to an individual's country of nationality may have nothing to do with the Tribunal's fact-finding in respect of the individual's Article 8 ECHR private and family life in the United Kingdom (or vice versa). By contrast, a legal error in the task of assessing an individual's overall credibility is, in general, likely to infect the conclusions as to credibility reached by the First-tier Tribunal.

(4) The judgment of Lord Carnwath in HMRC v Pendragon plc [2015] UKSC 37 emphasises both the difficulty, in certain circumstances, of drawing a bright line around what a finding of fact actually is, and the position of the Upper Tribunal, as an expert body, in determining the scope of its functions under section 12 of the Tribunals, Courts and Enforcement Act 2007 in re-making a decision, following a set aside.

The "Wisniewski" Principles

(5) In Wisniewski v Central Manchester Health Authority [1998] LI Rep Med 223, Brooke LJ set out a number of principles on the issue of when it is appropriate in the civil context to draw adverse inferences from a party's absence or silence. These principles are not to be confused with the situation where a party who bears the legal burden of proving something adduces sufficient evidence, so as to place an evidential burden on the other party. The invocation of the principles depends upon there being a prima facie case; but what this means will depend on the nature of the case the party in question has to meet.

DECISION AND REASONS

A. THE ISSUE

1. The issue in this case is whether the appellant, a doctor and a citizen of Iraq, is entitled to be recognised as a refugee for the purposes of the 1951 Convention. It is common ground that the appellant would be so entitled but for the operation of Article 1F(a), which provides as follows:-

> "F. The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes …"

B. THE APPELLANT'S ACTIVITIES AND THE UK'S REACTIONS TO THEM

2. It is common ground that, between 1992 and 1994, the appellant worked at the headquarters of Saddam Hussein's military intelligence agency, Al-Istikhbarat, in Iraq. The appellant was performing his compulsory military service there, as a doctor. He worked at a clinic in the headquarters, treating both military intelligence officers and their prisoners. On occasion, the appellant was also taken to visit camps, where he treated prisoners. The appellant did not seek to leave the Al-Istikhbarat HQ during the term of his military service.

3. The appellant left Iraq in December 1995, travelling to Libya, where he worked as a doctor for some four years. He arrived in the United Kingdom in January 2000, having been given entry clearance as a visitor. His leave was subsequently extended. In February 2007, the appellant claimed asylum.

4. In January 2011, the respondent's War Crimes Unit informed the appellant that he had been excluded from the Convention by reason of article 1F(a).

5. In March 2013, proceedings were initiated before a panel of the Medical Practitioner Tribunal ("MPT"). The MPT found that the appellant's fitness to practise as a doctor was impaired by reason of having been an accessory to torture in Iraq. The appellant was suspended from such practice for one year.

6. In March 2014, the MPT found that the appellant's fitness to practise was no longer impaired and his practicing certificate was reinstated. In August of that year, the appellant again applied for leave to remain on the basis of asylum. That application was refused by the respondent in April 2014, with the respondent again concluding that the appellant was excluded from the Refugee Convention by reason of Article 1F(a). The specific basis given for the respondent's decision was that there were "serious reasons for considering that you have committed crimes against humanity".

7. The respondent, however, granted the appellant limited leave to remain, which led to the appellant being able to appeal against the April 2014 refusal under section 83 of the Nationality, Immigration and Asylum Act 2002, as it then stood.

C. THE APPEAL PROCEEDINGS

8. The appeal proceedings have been protracted. This is the third occasion on which the appellant's case has been considered by the Upper Tribunal.

9. In April 2015, the First-tier Tribunal found that the appellant was complicit in a crime against humanity (namely, the torturing of prisoners by Al-Istikhbarat), but that the appellant had a defence of duress. The First-tier Tribunal, accordingly, allowed the appellant's appeal.

10. The respondent appealed to the Upper Tribunal against that decision and in April 2016, the Upper Tribunal allowed the respondent's appeal and remitted the matter to the First-tier Tribunal.

11. A further hearing took place before a differently constituted First-tier Tribunal ("the 2017 First-tier Tribunal") in February 2017. That Tribunal found there were serious reasons for considering that the appellant had committed crimes against humanity, in that, although the appellant had not tortured anyone, he had provided medical aid to the perpetrators of torture and had treated prisoners in circumstances where, if he not done so, the torture of those prisoners might have ceased. Once again, however, the First-tier Tribunal found that the appellant had a defence of duress and so allowed his appeal.

12. The respondent appealed to the Upper Tribunal against that decision. Meanwhile, the appellant brought a cross-appeal. In December 2017, the Upper Tribunal allowed the respondent's appeal because the defence of duress was not available to the appellant. The Upper Tribunal also found that the appellant's cross-appeal failed.

13. The appellant appealed to the Court of Appeal. He did so on four grounds. The judgment of the Court was given by Hamblen LJ (as he then was): MAB (Iraq) v Secretary of State for the Home Department [2019] EWCA Civ 1253.

14. The Court dismissed the appellant's challenge on grounds 1 to 3. The appellant was, however, successful on ground 4, which Hamblen LJ articulated as follows:-

> "(4) **Ground 4:** The facts found by the 2017 FTT were not capable of establishing A's liability for crimes against humanity: (i) they did not show that he had aided, abetted, otherwise assisted in or contributed to crimes against humanity; or (ii) in any event, A's contribution was not of a kind that the drafters of the applicable instruments of international criminal law intended should be criminalised."

15. At paragraph 53 of his judgment, Hamblen LJ noted the evidence that was before the First-tier Tribunal. This comprised the appellant's screening interview of 2 February 2007; a statement of 22 February 2007; a full asylum interview of 23 March 2007; a further interview of 31 March 2010; a statement of 20 July 2013; and a statement of 15 January 2017 prepared for the appeal hearing. The appellant gave oral evidence at that hearing.

16. At paragraph 54, Hamblen LJ recorded the self-direction of the 2017 First-tier Tribunal:-

> "54. In relation to the law, the FTT referred to [R (JS (Sri Lanka)) v Secretary of State for the Home Department [2010] UKSC 15] and [Al-Sirri v Secretary of State for the Home Department [2012] UKSC 54]. The FTT directed themselves in accordance with the principles set out in the headnote in Al Sirri (Asylum – Exclusion – Article 1F(c)) [2016] UKUT 448 (IAC), namely:
>
> > "In every case involving exclusion of protection under Article 1F of the Refugee Convention, the onus of proof is on the Secretary of State, a detailed and individualised examination of the facts is required, there must be clear and credible evidence of the offending conduct, and the overall evaluative judgment involves the application of a standard higher than suspicion or belief.""

17. Beginning at paragraph 56, Hamblen LJ described the main findings made by the 2017 First-tier Tribunal. The panel had serious reasons for considering that, as part of his duties, the appellant encountered prisoners whom he suspected had been tortured. There were serious reasons for considering the appellant was aware that some of the prisoners he treated had suffered torture. He was a medical professional and would have the specialist knowledge needed to make such an assessment. The appellant had admitted he knew it was likely that some of the prisoners he treated would suffer further torture. The appellant consistently claimed he never tortured anyone and the respondent had produced no evidence to the contrary. There were serious reasons for considering the appellant saw the bodies of prisoners who had been hanged.

18. At paragraph 57, Hamblen LJ recorded the 2017 First-tier Tribunal's findings on the issue of complicity. The Tribunal found that the appellant worked for Al-Istikhbarat and knew that it committed torture. The appellant suspected some of the prisoners he treated would face further torture.

19. The 2017 First-tier Tribunal found that there were, as a result, serious reasons for considering the appellant was involved in torture. He assisted those who committed such torture, by providing medical aid to them. He also provided medical aid to victims in the knowledge that in the ordinary course of events some of them would suffer further torture. This led the 2017 First-tier Tribunal to find that the appellant intended to treat the prisoners irrespective of what happened to them and what might happen to them.

20. Paragraph 44 of the 2017 First-tier Tribunal's decision reads as follows:-

> "44. We find there is nothing in the law that enables the appellant to distance himself from his involvement in these atrocities. It is irrelevant whether he intended only to make the prisoners he treated better and did not think about what might happen to them afterwards. In simple terms, if he had not treated the prisoners, their torture may have ceased. The fact he treated the prisoners knowing what the organisation did and would do means he is linked to the torture of those prisoners.
>
> 45. Having reached this conclusion on the evidence of the appellant that remains unchanged, we need not spell out our findings on all the issues identified by the Upper Tribunal. But since there are matters that have caused concern in the past, for the sake of clarity we confirm that we do not accept any other part of the appellant's evidence as being reliable because of the inconsistent accounts he has given, which we discuss in more detail in paragraphs 51 to 54 below. We find the respondent has failed to show there are serious reasons for considering the appellant would have been able to consult with prisoner-patients or to provide pain relief or that he signed death certificates."

21. In the light of its conclusions, the 2017 First-tier Tribunal found that the appellant "will have committed a crime against humanity unless he can raise a ground for excluding criminal responsibility, such as duress" (paragraph 46). As we have seen, the Tribunal held that the appellant had

made good the defence of duress; but, before the Court of Appeal, that issue fell away. Instead, the sole issue, under ground 4, was whether the findings of fact of the 2017 First-tier Tribunal justified its conclusion that the appellant had made a significant contribution to the crime of torture (paragraph 58).

D. THE APPELLANT'S POSITION AS A DOCTOR

22. Beginning at paragraph 59, Hamblen LJ addressed the submission of Mr Blaxland QC, on behalf of the appellant, that the issue of whether the appellant had made a significant contribution to the crime of torture had to be considered against the background of the appellant's duty of care as a medical professional. As a doctor involved in the treatment of prisoners, the appellant was bound by the *Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UN General Assembly Resolution 37/194 (18 December 1982).

23. The Preamble to these Principles includes the following:-

> "Convinced that under no circumstances a person shall be punished for carrying out medical activities compatible with medical ethics regardless of the person benefitting therefrom, or shall be compelled to perform acts or to carry out work in contravention of the medical ethics, but that at the same time, contravention of medical ethics for which health personnel, particularly physicians, can be held responsible should entail accountability."

24. Principle 1 reads as follows:-

> "Principle 1:
>
> Health personnel, particularly physicians, charged with the medical care of prisoners and detainees, have a duty to provide them with protection of their physical and mental health and treatment of disease <u>of the same quality and standard as is afforded to those who are not imprisoned or detained</u>."

25. The underlining in Principle 1 reflects the emphasis placed on those closing words by Mr Dunlop QC in his written and oral submissions to us (of which more later).

26. Principle 2 reads as follows:-

> "Principle 2:
>
> It is a gross contravention of medical ethics, as well as an offence under applicable international instruments, for health personnel, particularly physicians, to engage, actively or passively, in acts which constitute participation in, complicity in, incitement to or attempts to commit torture or other cruel, inhuman or degrading treatment or punishment."

27. In <u>MH (Syria) v Secretary of State for the Home Department</u> [2009] EWCA Civ 226, the Court of Appeal was concerned with Article 1F(c) of the

Refugee Convention, which mandates exclusion from refugee status of a person who "has been guilty of acts contrary to the purposes and principles of the United Nations". MH was a Kurdish nurse in Syria who joined the PKK. That organisation required her to become an assistant nurse in a hospital in a PKK camp. Richards LJ, with whom the other members of the Court agreed, said that:-

> "In the ordinary course I would not expect the provision of medical or nursing services to bring a person within Article 1F(c) on the basis that they form part of the infrastructure of support for a terrorist organisation; but in each case the point will have to be taken into account with other relevant factors in reaching an overall assessment as to the application of Article 1F(c)." (paragraph 31)

28. Richards LJ concluded that MH's case fell well short of engaging Article 1F(c), having regard to her young age when she joined the PKK; the fact that the PKK was not at the "extreme" end of the continuum of terrorist organisations; and what MH did for them was "relatively minor in nature" albeit that she gave first aid assistance to injured PKK combatants.

29. At paragraph 39 of his judgment, Richards LJ stated that:-

> "My view is reinforced if regard is had to the special position of nursing under international humanitarian law. MH's role as an assistant nurse in the refugee camp is in one sense the most significant of her activities, since it included the care of injured guerrillas; but it seems to me that the humanitarian nature of the work she was doing, and the context in which she was doing it, weigh against rather than in favour of a finding of complicity in the terrorist acts of the PKK."

30. In the present case, Hamblen LJ noted the submissions of Mr Blaxland QC that the humanitarian nature of the work the appellant was doing, and the context in which he was doing it, weighed against rather in favour of a finding of complicity in the Iraqi regime's crimes of torture. He also recorded the acceptance of Mr Dunlop QC, for the respondent, that humanitarian law considerations provide the relevant context; and that when addressing the issue of significant contribution, regard should be had to medical ethics and what these require.

E. THE OUTCOME IN THE COURT OF APPEAL

31. At paragraph 66, Hamblen LJ stated that, ultimately, "the outcome of this appeal depends on the more granular question of whether the FTT's findings are sufficient to support their conclusion of complicity". The following paragraphs of the judgment need to be set out in full:-

> "67. Mr Blaxland QC did not seek to challenge or go behind the findings made by the FTT, save in relation to para. 45 and the statement that "if he had not treated the prisoners, their torture may have ceased". It was submitted that this was an inferential conclusion rather than a finding of fact, that there was no proper basis for such an inference to be drawn and that it was a perverse conclusion.

68. It was submitted that the only instances in which it is self-evident that refraining from treating prisoners would have resulted in their not being tortured would have been those in which the want of treatment would have resulted in the prisoners' deaths since there was nothing to indicate that the torturers would have been unable and unwilling to torture a living but sick or wounded prisoner. It would, however, be perverse to conclude that a doctor was complicit in torture by performing his duty as a medical professional of saving a patient from death. Moreover, that the logic of the FTT's conclusion is that A should have deprived all those whom he suspected were the victims of torture of any medical assistance.

69. If this finding or conclusion falls away then it was submitted that there were no or no sufficient findings to support a conclusion of significant contribution to torture. This was the only "finding" which went to the consequences of the medical treatment given by A and how it may have assisted torture. Without such a "finding" there was no basis for concluding that A's acts had contributed to the torture, still less significantly so.

70. Mr Dunlop QC for the SSHD accepted that this "finding" was critical to the sustainability of the conclusion of the FTT on significant contribution and consequent complicity and therefore to the outcome of the appeal.

71. The first point to be made about this "finding" is that, in my judgment, it is not a finding of fact. The FTT have not found that the prisoners' torture would have ceased but merely that it "may" have done. That is a speculative conclusion rather than a determinative finding of fact.

72. Secondly, it is at most an inferential conclusion but there is no explanation of the factual basis and reasoning to support the inference drawn. Mr Dunlop QC suggested a line of reasoning which could have supported that conclusion, namely that it may properly be inferred that the reason that a regime that tortures its prisoners would take a sick or injured prisoner, that it has tortured in the past and intends to torture again, to see a doctor, is that his sickness or injury is getting in the way of the regime's aims: e.g. by preventing them from torturing the prisoner further and/or preventing the prisoner from speaking to them. In other words, the reason for asking A to treat such prisoners was that, without such treatment, the torture could not continue. I agree that this is a possible line of reasoning, but it is not the only possible one and it does not take account of the findings that A was not being asked to treat only those prisoners who were to be tortured again and that he did not know which prisoners were to be subject to further torture. In any event, there is no means of knowing whether the FTT adopted such a line of reasoning. They did not address the facts in sufficient detail for it to be known what their underlying reasoning was, and, without such detail, Mr Dunlop QC's argument is no more than speculation.

73. Thirdly, if it is sufficient to be complicit in torture that the torture of some patients "may" have ceased if treatment had not been given then the logical consequence is that no patients should have been treated. On the FTT's findings A did not know whether the torture of any particular patient would cease but simply that it "may" do so. On the FTT's approach the only way to avoid complicity in such

circumstances would be to refuse all treatment. That would be a perverse conclusion and in clear contravention of a doctor's duty of care.

74. For any or all of these reasons in my judgment this "finding" cannot be relied upon to support a conclusion of significant contribution to torture and, without that finding, it is common ground that the appeal must be allowed.

75. The FTT recognised the importance of carrying out a "detailed and individualised examination of the facts" but did not do so sufficiently to support the conclusion that they reached. The requirements of medical ethics made it all the more important that such an examination was carried out, as the *MH (Syria)* case illustrates.

76. For completeness, I should record that Mr Dunlop QC did not seek to support that part of the FTT's reasoning which relied on A's medical aid to those who committed torture. It was accepted that this was too remote from the crime to found a significant contribution on the facts of the present case.

Conclusion

77. Article 1F of the Convention has to be applied with caution. It requires "a close examination of the facts" and "a carefully reasoned decision as to precisely why the person is excluded from protection under the Convention". For the reasons outlined above, the FTT did not carry out a sufficiently "detailed and individualised examination of the facts" to support the conclusion of complicity which they reached. I would accordingly allow the appeal."

F. THE EXERCISE FOR THE UPPER TRIBUNAL

32. Our first task is to determine the scope of the exercise that the Court of Appeal envisaged the Upper Tribunal undertaking. Although Hamblen LJ's judgment does not say so, the appellant's appeal was, in fact, allowed only to the extent that it was "remitted to the Upper Tribunal to re-make the First-tier Tribunal's decision" (paragraph 2 of the order of 17 July 2019). For that purpose, the Court of Appeal considered "that the documentary evidence should be the same as that put before the First-tier Tribunal" (paragraph 3).

33. Upon the handing down by the Court of the embargoed draft judgment, a dispute arose between the parties as to what the order should contain. The appellant submitted that the appellant's appeal should, in effect, be allowed outright, rather than by remitting it. According to the note submitted to the Court on 11 July 2019 by Mr Blaxland QC and Mr Toal, this was "because the Court of Appeal's decision is to the effect that the evidence before the tribunal is incapable of establishing that the exclusion clause applies". The note said that it would be "appropriate to remit the case … only if there were evidence before the tribunal on the basis on

which it might find facts warranting" the conclusion that there were serious reasons for considering the appellant to be complicit in crimes against humanity. According to the appellant's counsel, there "is no such evidence".

34. By contrast, Mr Dunlop QC pointed out that the Court did not hold that the evidence before the 2017 First-tier Tribunal was incapable of establishing that the exclusion clause applied. On the contrary, it allowed the appeal on the basis that the Tribunal "did not address the facts in sufficient detail for it to be known what their underlying reasoning was" and did not carry out a sufficiently "detailed and individualised examination of the facts" (paragraphs 72 and 75 of the judgment). According to Mr Dunlop QC, the Court accepted at paragraph 72 that there was a line of reasoning which might have supported the conclusion that the appellant contributed significantly to the use of torture, but it was not satisfied that this was, in fact, the line of reasoning of the Tribunal. Thus, the implication of the judgment was that the appeal should be remitted for another tribunal to carry out the necessary fact-finding in the necessary detail, with more explicit reasoning.

35. We agree with Mr Dunlop that the subsequent order, remitting the matter to the Upper Tribunal, means that the Court of Appeal agreed with Mr Dunlop QC's submissions, as recorded in his note. We are expressly required to consider the documentary evidence in order to determine whether there are serious reasons for concluding that the appellant was complicit in crimes against humanity, consisting in the torture of prisoners by the Iraqi regime.

36. In our view, the Court of Appeal intended to require the Upper Tribunal, on remittal, to analyse, and reach its own conclusions on, the documentary evidence bearing upon that overall question. Mr Blaxland QC, however, submitted that the fact-finding exercise for the Upper Tribunal was, in fact, more circumscribed, being limited to the finding articulated by the 2017 First-tier Tribunal at paragraph 44 of its decision; that is to say, whether, if the appellant had not treated the prisoners, their torture may have ceased. We are not, he says, entitled to make our own finding of fact on the Tribunal's conclusion, at paragraph 45, that the respondent had failed to show there are serious reasons for considering the appellant would have been able to consult with prisoner-patients.

37. In Sarkar v Secretary of State for the Home Department [2014] EWCA Civ 195, the Court of Appeal was faced with the submission that, once it had embarked upon the task under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal had, in effect, to start again and should, therefore, make its own findings on all matters that had been before the First-tier Tribunal, whether or not those matters had been infected by legal error. Giving the judgment of the Court, Moore-Bick LJ regarded that submission as going too far:-

> "14. … Of course, the Upper Tribunal may hear the appeal afresh, if it considers that appropriate, and for that purpose may hear such evidence and argument as it considers necessary, but it is not bound to

do so and can (and often does) decide the disputed question of law on the basis of the findings of fact made by the First-tier Tribunal."

15. If it finds that the First-tier Tribunal has made a material error of law the Upper Tribunal may (but need not) set aside its decision. If it decides to do so, it has only two options: to remit the case with directions for its reconsideration or to re-make the decision itself. Remission, however, does not necessarily require the First-tier Tribunal to start all over again; the Upper Tribunal has power to give directions which limit the scope of the reconsideration. It would be surprising, therefore, if, when re-making the decision itself, the Upper Tribunal were required in every case to carry out a complete re-hearing of the original appeal. In my view that is not what Parliament intended. In this context re-making the decision, by contrast with remitting the case to the First-tier Tribunal, involves no more than substituting the tribunal's own decision for that of the tribunal below. It is for the Upper Tribunal to decide the nature and scope of the hearing that is required for that purpose. The purpose of section 12(4)(a) is simply to ensure that, when re-making the decision, the Upper Tribunal has at its disposal the full range of powers available to the First-Tier Tribunal. Nor do I think that the appellants obtain any assistance from the decision in *Kizhakudan v Secretary of State for the Home Department* [2012] EWCA Civ 566, to which Mr. Malik drew our attention. That case decided no more than that one error of law on the part of the First-tier Tribunal is sufficient to give the Upper Tribunal jurisdiction to re-make the decision and deal with all live issues. The court in that case held that the Upper Tribunal had a *discretion* to consider an article 8 claim, even though it might not have been properly raised before the First-tier Tribunal. It did not decide, however, that the Upper Tribunal, having refused permission to appeal on a particular ground, is obliged to consider that ground if it decides to re-make the decision."

38. In TA (Sri Lanka) v Secretary of State for the Home Department [2018] EWCA Civ 260, the Court of Appeal articulated the circumstances in which the Upper Tribunal, when re-making a decision pursuant to section 12, should do so by reference to findings of fact made by the First-tier Tribunal, notwithstanding that the latter's decision was being disturbed:-

"7. Where the Upper Tribunal finds an error of law then it may (but need not) set aside the decision of the First-tier Tribunal. If it does set aside the decision of the First-tier Tribunal then it must either remit the case to the First-tier Tribunal with directions for its reconsideration or re-make the decision: see s.12 of the Tribunals, Courts and Enforcement Act 2007. When permission to appeal to the Upper Tribunal has been granted, the parties should assume that the Upper Tribunal will, if it identifies an error on a point of law and is satisfied that the original decision should be set aside, proceed to remake the decision. In that event, the Upper Tribunal will consider whether to remake the decision by reference to the First-tier Tribunal's findings of fact, and it will generally do so save and in so far as those findings have been infected by any identified error or errors of law." (Kitchin LJ)

39. Also of relevance is the judgment of the Inner House of the Court of Session (Lord Glennie) in MS and YZ v Secretary of State for the Home Department [2017] CSIH 41:-

"42. Mr Webster accepted before us that the UT was only entitled to interfere with findings in fact made by the FTT if those findings were infected by some error of law or where the FTT made an error of law in reaching those findings in fact. He was correct to make this concession. An appeal from the FTT to the UT lies on a point of law: section 11(1) of the 2007 Act. There is no appeal against the FTT's findings in fact. It is important to understand this point. Of course, it may not always be possible to identify where the line is to be drawn between findings of "pure" fact, where the appellate body cannot usually intervene, and findings which are in truth findings of mixed fact and law or are what is sometimes called "evaluative" findings, where the approach to the fact finding task is determined by the legal framework within which factual assessments have to be made. Thus, there will be cases where, before making its findings in fact, the FTT has first to identify the legal test it is seeking to apply. It may, for example, be required to make a finding as to whether certain conduct is reasonable or proportionate, a question which may depend on the context in which or the purposes for which such an assessment is relevant or necessary; and in approaching these questions it may have to identify what, as a matter of law, requires to be taken into account. In such cases an error of law in identifying what factors are or are not relevant may open up the whole of its decision for reconsideration, including what appear to be findings of "pure" fact, though it will not always do so. If the FTT has erred in law by failing to take relevant matters into account in reaching its decision on the facts, or in taking into account irrelevant matters, or has reached a decision which no reasonable tribunal presented with the evidence and correctly applying the law could have arrived at, that too may entitle the UT to interfere. Another situation, perhaps closer to this case, is where the FTT has erred in law, and the UT takes it upon itself to re-make the decision, as it is entitled to do under section 12(2)(b)(ii) of the 2007 Act. It may in so doing "make such findings of fact as it considers appropriate": section 12(4)(b). But while in that situation the UT has the power to make additional supplementary findings, it does not have the power to overturn findings of "pure" fact made by the FTT which are not undermined or otherwise infected by that or any other error of law. Nothing in the cases cited to us, in particular *Kizhakudan* and *EK*, suggests otherwise. Our conclusion on this point is, in our opinion, consistent with the remarks of Lord Carnwath in *HMRC* v *Pendragon plc* [2015] 1 WLR 2838 at paragraphs 49-51."

40. In HMRC v Pendragon plc [2015] UKSC 37; [2015] 1 WLR 2838, Lord Carnwath said this:-

"49. In *R (Jones) v First Tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 (in a judgment agreed by the majority of the court), I spoke of the role of the Upper Tribunal in the new system:

> "Where, as here, the interpretation and application of a specialised statutory scheme has been entrusted by Parliament to the new tribunal system, an important function of the Upper Tribunal is to develop structured guidance on the use of expressions which are central to the scheme, and so as to reduce the risk of inconsistent results by different panels at the First Tier level." (para 41)

This was consistent with the approach of the preceding White Paper (paras 7.14-21), which had spoken of the intended role of the new appellate tier in achieving consistency in the application of the law, "law" for this purpose being widely interpreted to include issues of general principle affecting the jurisdiction in question. Such a flexible approach was supported also by recent statements in the House of Lords, in cases such as *Moyna v Secretary of State for Work and Pensions* [2003] 1 WLR 1929 and *Lawson v Serco* [2006] ICR 250. In the latter case (para 34), Lord Hoffmann had contrasted findings of primary facts with the "an evaluation of those facts" to decide a question posed by the interpretation of the legislation in question:

> "Whether one characterises this as a question of fact depends ... upon whether as a matter of policy one thinks that it is a decision which an appellate body with jurisdiction limited to errors of law should be able to review."

50. The difficult concept of "abuse of law" as developed by the European court, though not strictly one of statutory construction, is a general principle of central importance to the operation of the VAT scheme. It matters little whether it is described as involving an issue of mixed law and fact, or of the evaluation of facts in accordance with legal principle. However it is described, it was clearly one which was particularly well suited to detailed consideration by the Upper Tribunal, with a view to giving guidance for future cases. Having found errors of approach in the consideration by the First Tier Tribunal, it was appropriate for them to exercise their power to remake the decision, making such factual and legal judgments as were necessary for the purpose, thereby giving full scope for detailed discussion of the principle and its practical application. Although no doubt paying respect to the factual findings of the First Tier Tribunal, they were not bound by them. They had all the documentation before the First Tier Tribunal, including witness statements, and transcripts of the evidence and submissions, and detailed written and oral submissions. It is clear that they undertook a thorough exercise involving a hearing lasting six days.

51. Against this background, it was unhelpful, in my view for the Court of Appeal to identify the main issue as to whether the Upper Tribunal went beyond its proper appellate role. The appeal to the Court of Appeal (under section 13) was from the decision of the Upper Tribunal, not from the First Tier, and their function was to determine whether the Upper Tribunal had erred in law. That was best approached by looking primarily at the merits of the Upper Tribunal's reasoning in its own terms, rather than by reference to their evaluation of the First Tier's decision. True it is that the Upper Tribunal's jurisdiction to intervene had to begin from a finding of an error of "law". But that was not the main issue in the appeal, which was one of more general principle. Indeed, given the difficulties of drawing a clear division between fact and law, discussed by Lord Hoffmann, it may not be productive for the higher courts to spend time inquiring whether a difference between the two tribunals was one of law or fact, or a mixture of the two. There may in theory be a case, where it can be shown that the sole disagreement between the two tribunals related to an issue of pure fact, but such a case is likely to be exceptional. In the present case, as Lord Sumption has shown, there were no significant issues of primary fact. The differences between the two tribunals related to the understanding of the "abuse of law" principle, and their evaluation of

> the facts in the light of that understanding. The Upper Tribunal reached a carefully reasoned conclusion on law and fact. The task of the Court of Appeal was to determine whether that conclusion disclosed any error of law."

41. What the case law demonstrates is that, whilst it is relatively easy to articulate the principle that the findings of fact made by the First-tier Tribunal should be preserved, so far as those findings have not been "undermined" or "infected" by any "error or errors of law", there is no hard-edged answer to what that means in practice, in any particular case. At one end of the spectrum lies the protection and human rights appeal, where a fact-finding failure by the First-tier Tribunal in respect of risk of serious harm on return to an individual's country of nationality may have nothing to do with the Tribunal's fact-finding in respect of the individual's Article 8 ECHR private and family life in the United Kingdom (or vice versa). By contrast, a legal error in the task of assessing an individual's overall credibility is, in general, likely to infect the conclusions as to credibility reached by the First-tier Tribunal.

42. The judgment of Lord Carnwath in Pendragon emphasises both the difficulty, in certain circumstances, of drawing a bright line around what a finding of fact actually is; and the position of the Upper Tribunal, as an expert body, in determining the scope of its re-making functions.

43. In the light of these observations, the judgment of Hamblen LJ appears to us to recognise the indivisibility of the 2017 First-tier Tribunal's findings of fact. At paragraph 66, Hamblen LJ specifically acknowledged that the outcome of the appeal depended on whether the Tribunal's "findings are sufficient to support their conclusion of complicity". By the same token, paragraph 75 describes the 2017 First-tier Tribunal as not carrying out a sufficient "detailed and individualised examination of the facts", such as "to support the conclusion they reached".

44. We also agree with Mr Dunlop QC that the 2017 First-tier Tribunal allowed itself to be led astray by its repeated comparisons between, on the one hand, the task facing it in deciding if an exclusion clause applies and, on the other hand, what the Tribunal's task would be, if it were assessing the credibility of the appellant where the burden of proof is on him to show he is at real risk of serious harm, if returned to Iraq.

45. Accordingly, we shall examine the documentary evidence in order to reach our own conclusion on whether the respondent has shown, by reference to a detailed and individualised examination of the facts, that there is clear and credible evidence of the relevant offending conduct; here, complicity in the torture of those in detention by the military intelligence agency known as Al-Istikhbarat.

G. THE EVIDENCE

(a) First interview

46. In his 2007 asylum interview, the appellant stated that he was required to work at a clinic at the Al-Istikhbarat headquarters where he treated

military intelligence officers and prisoners. On occasion, he was taken to visit camps, where he treated people he believed to be Kurds. He never sought to leave the headquarters through his military service.

47. In this interview he said his work was as follows:-

> "Treating all the officers and soldiers who belong to that agency … only emergency treatment for prisoners held inside the HQ and the agency prisons. This included the emergency treatment and also treatment after torture. Sometimes they would take me to camps to treat people who had skin problems, scabies, etc. The camps not always at the same place, we would have a special car to take us with a guard."

48. In answer to the question "Who were the prisoners?", the appellant said:-

> "To be honest we can't identify them, we only know the faces, sometimes faces. They were mostly Shia people in the camps it was mostly Kurdish, I know this as I would require an interpreter to speak to them."

49. Asked if he ever witnessed any of the torture, the appellant said:-

> "No, it was not going to happen in front of us. We would only pick up the loose ends. We would only apply first aid, we didn't want to loose [sic] anyone. They would be taken to military hospital."

50. The appellant was asked, once he had provided first aid, "Did the patients go back for more torture?". He replied:-

> "Yes, I … witnessed 2 or 3 hangings. Just to make sure they dead."

51. The appellant was asked "Were you aware at the time that people you had treated would go back for more torture?", to which he responded:-

> "Yes, but I couldn't do anything about it."

52. The appellant confirmed that the people in the camps he visited were also tortured. He had not tried to get posted elsewhere because "Nobody can argue with the military". The appellant said that he was not asked to torture anyone himself.

(b) Second interview

53. The appellant underwent a second interview in March 2010. This interview, like its predecessor, was very detailed. For present purposes, it is necessary to note that the appellant said there were no surgical facilities at the clinic. Any patient that needed surgical intervention, such as for appendicitis, was given analgesics and transferred to Rashid Hospital. Asked whether any of the prisoners told the appellant they had been tortured, the appellant replied that they could not; the guards would keep them quiet, although the prisoners were normally quiet. Asked about why he needed an interpreter if he did not speak to the Kurdish patients, the appellant said there was no dialogue, just "examine and treat".

(c) MPT proceedings

54. Before the MPT, the appellant gave extensive oral testimony about treating prisoners that he believed to have been victims of torture, as follows:-

> "So when they come to you, give you the order, "Come with us, Doctor, to see a patient" so we go with them without arguing. You cannot even say "Where I am going; what I am going to do", escort you, which somebody is imposing. I think they send them deliberately like this, somebody with tall guy, muscle, just to intimidate you and then we will go to the prison. This is a room there with a couch and we have to bring with us the stethoscope and the aurascope with us and the tongue depressor. That is the only thing we get with us. Then they will put the patient on. These prisoner patient they do not even look to your eyes. They do not do eye communication. They always look to the ground and whenever you ask them "What is your complaint?" they have – I cannot see from my observation. They have all bruises. They have some cut wounds. There is a possibility of fracture. I am not saying it is a fracture because I cannot say without having an X-ray and everybody knows, without X-ray, without clear proof but it is a swelling and obviously the hand he cannot move with the wrist, wherever the place is, or even the nose, nobody told us about these things, mainly was something else like "I have got a chest – cough. I have got sore throat. I have got abdominal pain". Nothing mentioned about the thing I observed. It is from my honesty I have said that in the interview. Whenever you see that, with all the background we have we always assume this only could be torture. It is nothing – I mean, if it is civil hospital, I have seen this, I said probably it might be from fight, from accident, from many things, including even patient with diabetic, severe diarrhoea, hypertension, they can trip, they can fall over, they have a lot of injuries, but in my mind it is only one thing, that this is from – nobody told us these been tortured at all, nobody at all, and I swear to God on that, at all.
>
> So we are assuming you know, and we cannot ask too much, that is the problem. He did not complain, the patient did not complain about that arm, that nose, that bruise. We try to ask them once "What was that?" If the patient tried to answer the escort always shush him. He does not want – and that shush I know for myself it is for me as well to respect myself, but they do not do it with me, that is, they do it with the patient because they are in power for them and in power on me as well but they are just giving me warning, "Don't do it again". I simply, whenever I see something I– the complaint, whatever the patient complain, I will try to, if I cannot do it I recommend the thing, only recommend it to them. They will write the comment, do that and that and that, including suspicion fracture, I said, "Possibly they need to go to hospital for X-ray and further treatment, further assessment". Nose, bruises, even the cut wounds when I say "we stitch them", we I mention – it is not I did not do, I recommend to do the stitching, it is as simple as that.
>
> After I leave, I finish my patient, after I leave I do not know where they going to go; is my recommendation going to be done? I do not – I have no idea so they put me back again to the clinic to go to the same thing. Sometime as well mentioned here is certified death. I never certified or issued a death certificate for anybody because if – I am sorry to say that – if anybody thinks that Saddam Hussein needs me to certify death it is completely wrong, and everybody knows about the mass graves; he does not need me to do that, but they ask somebody, which can happen to any hospital, any hospital, "This person is dead or not?" "Yes, he is dead, from the vital signs he is dead", and again from my honestly, I have seen marking which possibly all

my mind is whenever there is a place is going to be hanging, but – and in the witness statement here and I can mention it later. I have never seen torture. I have never seen somebody hanged at all; never did that or never been asked to do anything like that. I have not see something with a fresh injury. There is all bruises – yes, there is cut wounds, there is possible, as I said fractures of wrist, arms, yes, but I cannot – I am house officer, what can I do more than possible there, refer to the hospital? And, you know, I tried to do that. I went there only five or six times to the prisons, two times to the camps, each time probably I see two or three, it depend on whether - two or three, not more. Each time I usually refer them to the hospital. I want to just to probably leave me. Do not come to me to – because I am terrified. When I go there with that environment, I have been gong through mental torture as well, because I do not know if I am going to leave the place or not; as simple as that.

I have no power to do anything. If they decide to do anything to me, and there is no complaint also from the patient themselves that "Can you help us?" Nothing like that., "I've been tortured". Nothing been said to me.

…

That is what I did simply in all the thing. All the period was like this. I mentioned that about the certificate I mentioned. As I said, we do not know the outcome of what is going to happen for the patient after we leave. Are thy going to go back? Are they going to … I can only assume, I said when they ask me, "Do you know if they are going to go back …" I said, "Yes" because I know for sure if they torture them once who is going to prevent them from doing once, twice, three times, again until they die probably or they release them. Nobody knows the outcome. I do not know definitely what the outcome … So, again is all in my assumption, that is the only possible assumption I know. It is not knowing, the fact know. It is my assumption. Nobody told me that, but it is a prison with Saddam regime that is what you expect, that is from our culture and the culture extend not to Saddam Hussein, if anybody of the respect Panel here know what is happening in Iraq now, even after toppling Saddam Hussein, until now the sectarian problem, people can kill because they do not like your name; as simple as that."

(d) UKBA's Special Cases War Crimes Case Research Analysis Report

55. The evidence from the appellant requires to be considered by reference to the UK Border Agency's Special Cases War Crimes Case Research Analysis Report on the appellant, dated January 2011. This describes in detail the brutal practices of the regime over which Saddam Hussein presided at the time the appellant was undertaking his military service as a doctor. It also describes mass executions of those regarded as hostile to the regime.

56. A survey of junior doctors in Southern Iraq undertaken in 2003 revealed levels of participation by doctors in amputations on hands and ears of those regarded as deserters. There was also evidence of doctors falsifying medical reports and death certificates, removing organs from patients whether alive or dead without their consent, participation in torture by doctors and mercy killing of tortured victims.

57. Mr Blaxland QC and Mr Toal, in their written submissions, point out that, despite the detailed nature of this report, there is no reference in it to an

individual having to have some minimum level of physical health in order to be tortured; and no reference to evidence of torturers requiring or even preferring their victims to receive medical treatment before they could continue to torture them. On behalf of the appellant, counsel submit that if there was any evidence to support what is described as the central premise upon which the respondent's case depends, then her own Specialist War Crimes Unit would have produced it.

H. THE RESPONDENT'S CASE

58. The respondent's case, as advanced before us, is as follows. The evidence is sufficient to establish at least a *prima facie* case that there are serious reasons for considering that the appellant significantly contributed to Al-Istikhbarat's commission of crimes against humanity. Either the appellant was telling the truth in the first part of his second SEF interview, when he claimed not to have had any dialogue with prisoners and to treat them in silence or, at least, without any discussion of the circumstances that led to their injuries; or he was lying about that because he wished to conceal the fact that some prisoners had, in fact, told him enough about their circumstances for him to know that he was being asked to treat them, so as to facilitate their further torture.

59. On the first alternative, Mr Dunlop QC submits that the appellant failed to take an adequate medical history from the prisoners he treated. That was a breach of Principle 1 of the UN Principles of Medical Ethics, to which we have earlier referred and, in particular, of the duty (marked by underlining in the above passage), to provide treatment of the same quality and standard as is afforded to those who are not imprisoned or detained. By failing to take an adequate history of prisoners' injuries, the appellant provided those prisoners with treatment of a lower quality and standard, compared with what he did for non-prisoners. Taking a patient's history is a prerequisite of providing adequate care and there is, according to the respondent, no reason to doubt that the appellant would have asked such questions of his non-prisoner patients.

60. Furthermore, if the appellant failed to have any dialogue with prisoners, such as about what caused their injuries and whether they actually wanted treatment from him, then he knowingly made it more difficult for him to identify those prisoners, in whose cases any treatment he did provide would facilitate their further torture.

61. On the first alternative, the appellant would have been aware that, in the ordinary course of events, treating every prisoner that he was taken to, without making any attempt to find out how they came by their injuries or why the authorities wanted to treat them, would, in the ordinary course of events, lead to at least some of the prisoners being tortured further.

62. If, however, the view is reached that the appellant has lied about conversations that he did, in fact, have with prisoners, then, Mr Dunlop QC submits, the most likely reason for his lying was to conceal the fact that some prisoners had in fact told him they had been tortured and would be tortured again if he treated them. On this alternative, the appellant

significantly contributed to the commission of torture by facilitating further torture of the relevant prisoners.

63. On either alternative, there must, according to the respondent, be serious reasons for considering that the appellant was aware that "in the ordinary course of events" torture would be the consequence of his actions. In either event, there were no orders upon which the appellant could rely to excuse his commission of war crimes.

64. If the Upper Tribunal were to conclude that this evidence did not, of itself, constitute the requisite serious grounds to justify the application of the exclusion in Article 1F(a), the respondent's case is that it would, at least, amount to a *prima facie* case for such a finding. In that eventuality, the respondent submits that the fact the appellant has chosen not to give oral evidence to the Upper Tribunal means that we should draw adverse inferences from the appellant's decision. The effect of those adverse inferences would, Mr Dunlop QC submits, be such as to require the Upper Tribunal to make a finding in the respondent's favour.

I. DRAWING ADVERSE INFERENCES FROM ABSENCE OR SILENCE

65. The leading authority in the drawing of adverse inferences in the civil context is Wisniewski v Central Manchester Health Authority [1998] Ll Rep Med 223; [1998] PIQR P324. Having considered the authorities on the question, Brooke LJ set out the following principles in the context of the present case:-

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

66. Although Brooke LJ's Principle (3) does not refer to the need for there to be a *prima facie* case, that was the expression used by the Court in McQueen v Great Western Railway Company (1875) L.R. 10 Q.B. 569, one of the authorities considered by him in arriving at his five principles. Similarly, in O'Donnell v Reichard [1975] V.R. 916, another such authority, Gillard J, conducting a review of earlier English and Australian cases, spoke of "any party upon whom the burden of proof on any issue is imposed must always

adduce a prima facie case on such issue to go to the jury". Furthermore, in Wisniewski itself, Brooke LJ found that the plaintiff "had established a *prima facie*, if weak, case".

67. Applying Wisniewski, the Court of Appeal in Jaffray v Society of Lloyds [2002] EWCA Civ 1101 said:-

> "It seems to us that on aspects where the evidence points in a direction against Lloyd's in an area which could have been dealt with by Mr Randall the judge should have drawn an adverse inference from Lloyd's failure to call Mr Randall to deal with it. This does not mean that any allegation that the names make against Mr Randall must be accepted because he did not give evidence. It simply means that where the evidence points in a certain direction an adverse inference can be drawn from a failure to call the witness to deal with it." (paragraph 406) – Waller LJ

The requirement that "the evidence points in a certain direction" is, we consider, another way of saying that there needs to be a *prima faci*e case.

68. In Magdeev v Tsvetkov [2020] EWHC 887 (Comm), Cockerill J dealt with the matter as follows:-

> "151. … it was suggested for Mr Magdeev in reliance upon *Jaffray v Society of Lloyd's* [2002] EWCA Civ 1101 that I was effectively bound to draw such inferences, at the risk of perpetrating a legal wrong.
>
> 152. As I noted in the course of legal submissions, this line of argument neglects to take account of the recent Court of Appeal decision in *Manzi v King's College Hospital NHS Foundation Trust* [2018] EWCA Civ 1882, where Sir Ernest Ryder SPT said:
>
> > "*Wisniewski* is not authority for the proposition that there is an obligation to draw an adverse inference where the four principles are engaged. As the first principle adequately makes plain, there is a discretion i.e. "the court is entitled [emphasis added] to draw adverse inferences"
>
> 153. He also made clear that such matters as proportionality may give rise to a valid reason for a witness's absence.
>
> 154. In my judgment the point can be dealt with relatively briefly thus:
>
> i) This evidential "rule" is, as I have indicated above, a fairly narrow one. As I have noted previously ([2018] EWHC 1768 (Comm) at [115]), the drawing of such inferences is not something to be lightly undertaken.
>
> ii) Where a party relies on it, it is necessary for it to set out clearly (i) the point on which the inference is sought (ii) the reason why it is said that the "missing" witness would have material evidence to give on that issue and (iii) why it is said that the party seeking to have the inference drawn has itself adduced relevant evidence on that issue.

iii) The Court then has a discretion and will exercise it not just in the light of those principles, but also in the light of:

a) the overriding objective; and

b) an understanding that it arises against the background of an evidential world which shifts - both as to burden and as to the development of the case - during trial.

iv) In this case, save as to one very narrow issue with which I will deal at the appropriate point below, the exercise required of the parties relying on this principle has not really been done.

…"

69. There are several points to make about the Wisniewski principles. The first is the obvious but nonetheless important fact that they are not to be confused with the situation where a party who bears the legal burden of proving something adduces sufficient evidence, so as to place an evidential burden on the other party. In such a situation, the other party has to adduce some evidence; otherwise, he will lose.

70. The second point is that the question of what amounts to a *prima facie* case sufficient to bring the principles into play depends upon the nature of the case that the party in question has to meet. The present proceedings are not analogous to an "ordinary" civil claim, where a matter needs to be established on the balance of probabilities. We are concerned with an evaluative assessment of whether there are "serious reasons for considering that" the appellant is complicit in a crime against humanity, falling within Article 1F(a) of the Refugee Convention. As the Supreme Court held in Al-Sirri v Secretary of State for the Home Department [2012] UKSC 54, this "requires an individualised consideration of the facts of the case, which will include an assessment of the person's involvement in the act concerned, his mental state and possible grounds for rejecting individual responsibility". Article 1F requires "clear and credible evidence of the offending conduct and the overall evaluative judgement involved the application of a standard higher than suspicion or belief" (Al-Sirri [2016] UKUT 00448 (IAC). Whether a *prima facie* case is established in Article 1F proceedings needs to be considered with these statements in mind.

71. Third, even where a *prima facie* case exists, it does not automatically follow that the failure of a person to give evidence will result in material weight being given to that failure, in favour of the other party: see Brooke LJ's Principle (4) at paragraph 65 above. As Hickinbottom LJ held more recently in R (Kuzmin) v GMC [2019] EWHC 2129 (Admin), there may be a reasonable explanation for the fact that the individual has not given evidence; and there may be other circumstances which would make it unfair to draw such an inference. Although Cockerill J in Magdeev expressed the court's role in terms of its discretion, it is perhaps more a matter of the court having to apply the "rule" unless it is satisfied there is a reason not to do so.

J. DISCUSSION

72. We can now return to the appellant's case. We find that the respondent is wrong to invite us to adopt a binary view of the appellant's evidence as to whether he did or did not have any dialogue with the prisoners that he was treating. In the light of the circumstances under which the appellant was required to operate, which are well documented, we find the appellant has not, in fact, given two contrasting scenarios, in one of which he was free to ask the clinical questions that, in ordinary circumstances, would be required of a doctor; and in the other of which he was completely unable to have any communication with the prisoners. On the contrary, we find the evidence points overwhelmingly to the appellant being compelled to operate in an extremely constrained environment, in which he was allowed by the guards to ask basic diagnostic questions but not anything that would come close to enabling him to ascertain whether the person being treated wanted to receive treatment and/or whether the treatment was being provided by those in charge in order to facilitate further torture.

73. In this regard, we agree with the submissions made on behalf of the appellant that the respondent has not put forward any evidence to suggest the Iraqi regime considered someone had to have some minimum level of physical health in order for them to be tortured; or that Saddam Hussein's torturers required or preferred their victims to receive medical treatment before continuing to torture them. It is a commonplace of repressive regimes that they tend to act irrationally. The respondent's case presupposes an approach by those torturing the prisoners that cannot, in all the circumstances, be categorised as anything more than speculation. There is, furthermore, no sound reason to assume that, even if such considerations were the motivation for the appellant being allowed to treat some of the prisoners, he could or should have acted differently than he did, by treating them.

74. Having considered the evidence on this matter for ourselves, we have, therefore, independently reached the point articulated by Hamblen LJ at paragraph 73 of his judgment; namely, that the only way to avoid complicity in torture in such circumstances would have been for the appellant to have refused to treat any and all of the prisoners. That would have been a clear contravention of his professional duty of care.

75. There is, therefore, no *prima facie* case on this aspect of the respondent's submissions. There is also no *prima facie* case that the appellant breached Principle 1 by failing to treat the prisoners to the same standard as those who were not imprisoned or detained. On the evidence, he was simply not given the opportunity of taking an adequate medical history, or of enquiring whether the prisoners in reality wished to be treated.

76. Even if a *prima facie* case could be established, we do not find that, in all the circumstances, it would be appropriate to accord any material weight to the appellant's failure to give evidence. He has already given a great deal of evidence, both written and oral. Having regard to that evidence and to the questions he has been asked, both on behalf of the respondent and at the MPT hearings, it is entirely unrealistic to think that he would be likely to say anything – whether in cross-examination or otherwise – that

would throw any fresh light on a matter that has been the subject of forensic inquiry for well over a decade. This is particularly so, given that the respondent's case depends upon aspects of the regime of Saddam Hussein, about which the appellant is unlikely to be able to give relevant evidence.

77. Thus, even if there were a *prima facie* case, the evidence before us falls short of the requirements described in paragraph 70 above for excluding the appellant from the protection of the Refugee Convention. The respondent has not shown serious grounds for considering that the provisions of the Refugee Convention should not apply to the appellant, by reason of his having committed a crime within the scope of Article 1F(a) of that Convention.

78. The appellant's appeal is, accordingly, allowed.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their 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.

Signed
Mr Justice Lane Date: 3 August 2020

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber