Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02785/2014

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 22 September 2017	**On 11 December 2017**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M A B
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr R De Mello, instructed by Wornham & Co, Solicitors
For the Respondent: Mr R Dunlop, instructed by Government Legal Department (GLD)

DECISION AND REASONS

1. In this decision, I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant, MAB, was born in 1965 and is a male citizen of Iraq.

BACKGROUND

2. The appellant appealed to the First-tier Tribunal against a decision of the Secretary of State dated 14 April 2014 rejecting his claim for asylum. The Secretary of State granted the appellant limited leave to remain. Whilst the Secretary of State acknowledged that the appellant was at real risk of Article 3 ECHR ill-treatment if returned to Iraq, she considered that the appellant was excluded from refugee status by the provisions of Article 1F(a) of the Refugee Convention (see also the Qualification Directive 2004/83/EC, Article 12). The appellant was granted discretionary leave to remain from 24 October 2011 to 23 April 2012 from 14 February 2013 until 13 August 2013 and, most recently, from 15 April 2014 to 14 October 2014. Given the length of the periods of discretionary leave awarded to the appellant, he was entitled to appeal against the decision of April 2014 under the provisions of Section 83 of the Nationality, Immigration and Asylum Act 2002 (as amended). His appeal first came before the First-tier Tribunal which allowed his appeal. That decision was set aside and the appeal remitted for hearing *de novo* by Deputy Upper Tribunal Judge Chamberlain by a decision of 12 April 2016. Thereafter, a newly-constituted First-tier Tribunal (Designated Judge McCarthy; Judge M Hall) in a decision promulgated on 6 April 2017, also allowed the appeal of the appellant, finding that he was not excluded from refugee protection. The Secretary of State now appeals, with permission, against that decision. At the hearing before the Upper Tribunal on 22 September 2017, Mr De Mello of Counsel appeared for the appellant. Mr Dunlop of Counsel appeared for the Secretary of State.

3. The factual matrix in this appeal is summarised as follows. Between 1992 and 1994, the appellant worked as a doctor for Al-Istikhbarat (the Military Intelligence Agency of the regime of Saddam Hussein in Iraq). The appellant is a Sunni Muslim who claims that his father was a colonel in the Iraqi army and was also a member of the ruling Ba'ath Party of Saddam Hussein. The appellant worked as a doctor at the clinic of the Al-Istikhbarat headquarters in Iraq. He treated both military intelligence officers and detainees. He was aware that some of the prisoners whom he treated had been tortured and would be tortured again after he had treated them. During his military service at Al-Istikhbarat, the appellant did not seek alternative employment within the army or elsewhere in government service.

4. Having completed his military service in 1994, the appellant worked as a doctor in Iraq. In 1995, he left Iraq and travelled to Jordan. Thereafter, he travelled to Libya where he again worked in the medical profession. Travelling via Malta to the United Kingdom in 2000 on a visit visa, he entered this country and applied for asylum. Although, as I have noted above, the appellant has been granted various periods of leave to remain, he has never been granted asylum. In January 2011, the War Crimes Unit of the Border Agency completed a report in relation to the appellant. In a letter to the appellant dated 24 October 2011, it was explained by the Secretary of State that the appellant had been excluded from the Convention by the operation of Article 1F(a).

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

6. In April 2013, the appellant's wife and children were granted five years' leave to remain as refugees. By a decision dated 3 March 2014, the MPT concluded that the appellant's fitness to practice was no longer impaired and his practising certificate was reinstated. The respondent, however, continued to reject the appellant's claim for refugee status.

7. The appellant has not disputed the fact that he was complicit in a crime against humanity. The only issue is whether the appellant is entitled to the defence of duress. The initial First-tier Tribunal to consider the appeal found that the appellant had proved that he was able to rely on the defence of duress and that he should be entitled to refugee status. The Upper Tribunal set aside the First-tier Tribunal's decision because, *inter alia*, it had failed coherently to make findings of fact on the appellant's evidence, in particular as regards his family connections to the Iraqi State regime. The Deputy Upper Tribunal Judge also concluded that the MPT had made findings which were of no assistance to the appellant in his immigration appeal. The judge noted the MPT had not found that the appellant had acted under duress.

8. A newly-constituted First-tier Tribunal convened to determine the remitted appeal in February 2017. That Tribunal concluded that there were serious reasons for concluding that the appellant had been involved in crimes against humanity, namely in the torture perpetrated upon prisoners at Al-Istikhbarat. There was no evidence that the appellant himself had tortured anyone but he had provided medical aid to both the perpetrators and also detainees whose suffering at the hands of the regime the appellant was aware may not have come to an end. The First-tier Tribunal also found the appellant had carried out orders and that, had he disobeyed those orders, he may have put his own life at risk. The Tribunal concluded there had been "some force" in the respondent's arguments that the appellant had not worked under duress because he had been deployed at Al-Istikhbarat because of his family's links to the Ba'athist regime and further that he had never sought to use any family influence he may have had to leave that facility. However, the appellant had changed his account; having claimed that he had obtained work at Al-Istikhbarat through family links, he later claimed that he did not know why he had worked there as opposed to in some other facility. The First-tier Tribunal had concerns regarding this change noting that, "if the burden was on the appellant, we would have no hesitation but to find that he has not given a truthful account." However, the Tribunal concluded that the burden of proof rested on the Secretary of State and there was no evidence to show that the appellant or his family have been loyal to the regime other than by reference to the appellant's own first, unreliable and now rejected first account of past events. In consequence, the Secretary of State had not discharged the burden of proof.

THE LAW

9. Article 1F of the Refugee Convention (as amended) and subject to the Protocol of 31 January 1967 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:
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> (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 ...

10. The Rome Statute of the International Criminal Court defines a crime against humanity as "any of the following acts when committed as part of a widespread systematic attack directed against any civilian population with knowledge of the attack ... (f) torture." Article 25 of the same statute provides that an individual shall incur criminal responsibility if he or she shall facilitate, "the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission including providing the means for its commission."

11. Article 31 provides the grounds on which criminal responsibility may be excluded. Criminal individual responsibility shall not attach to conduct which has "been caused by duress resulting from the threat of imminent death or of continuing or imminent serious bodily harm against that person or another person and the person acts necessarily or reasonably to avoid this threat provided the person does not intend to cause a greater harm than the one sought to be avoided." The Article provides that the threat must emanate from "other persons" or be "constituted by other circumstances beyond that person's control". In domestic law, Article 1F(a) should be construed restrictively. The burden of proof rests on the State.

12. The Rome Statute, Article 31 provides five requirements for the defence of duress:

> i. There must be a threat of imminent death or of continuing or imminent serious bodily harm;
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> ii. Such threat requires to be made by other persons or constituted by other circumstances beyond the control of the person claiming the defence;
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> iii. The threat must be directed against the person claiming the defence or some other person;
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> iv. The person claiming the defence must act necessarily and reasonably to avoid this threat;
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> v. In so acting the person claiming the defence does not intend to cause a greater harm than the one sought to be avoided

DISCUSSION

13. Mr Dunlop submits that the First-tier Tribunal misunderstood sub-paragraph (iv) of Article 31. This requirement, the need to show that one 'has acted necessarily and reasonably to avoid' the threat of 'death or of continuing or imminent serious bodily harm' was recently examined by the Upper Tribunal in the case of *AB (Article 1F(a) – defence – duress) Iran* [2016] UKUT 00376 (IAC),in particular [78-80]:

> 78. The reality of the appellant's account of acting under duress is that for a period of many years she took no steps whatsoever to avoid compliance with her duties in the prison, despite her knowledge of the consequence for those taken to the torture facility. Even despite being off work after the birth of her child for a lengthy period of time she chose not to explore any other option but to return to her duties in the prison. She continued in those duties accepting promotion along the way. The immediacy of her reaction on learning of her relative's detention and the combined manner of the transfer to hospital and subsequent escape is evidence of a cunning and resourceful nature, along with an ability and willingness to take appropriate steps when she chose to do so.
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> 79. We are perfectly satisfied that the defence of duress cannot be engaged on the basis of the evidence which the appellant has adduced. It is untenable on the basis of the vague and speculative consequence which she has associated with making a request to be allowed to resign, leave or transfer. It is equally untenable on the basis of the appellant's own evidence of having made no effort of any description to extricate herself from her duties at the prison over a period of 24 many years. The harm which the appellant knew she was causing was out of all proportion to the risk to herself which she has identified as befalling her if she had made efforts to leave short of desertion.
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> 80. In these circumstances we are satisfied that the necessary evidential burden has not been discharged by the appellant and she has advanced no valid answer to the serious reasons for considering that she has committed a crime against humanity as identified by the Secretary of State. Since we were otherwise satisfied that the Secretary of State was well entitled to arrive at the conclusion which she did, the appellant's appeal against the Secretary of State's decision of 2 October 2012 must fail. The same outcome would be reached if we viewed the matter in the way suggested by Ms Pickup. If we ask ourselves whether the Secretary of State has shown that there are serious reasons for considering that the appellant did not act under duress, then the answer is that she has, upon the same basis as we have just set out in paragraph 79 above

14. In the instant appeal, the First-tier Tribunal acknowledged that there were difficulties in "fixing the appellant" with his earlier account. This is the account which he had given prior to being notified that he had been excluded from refugee protection. The appellant had claimed that his strong family connections with the hierarchy of the Saddam Hussein regime had enabled him to obtain work at the Al-Istikhbarat military facility in the first instance. At [21], the Tribunal recorded that, "at the hearing, the appellant distanced himself even further from his initial account by suggesting his interactions with prisoner-patients were so restricted that he was not actually able to properly carry out any medical

function. We recognised that the appellant changes his account after being notified that he is excluded from refugee protection. The respondent suggests this means his earlier accounts are true accounts because the appellant does not want to be excluded." The Tribunal recorded the fact that the appellant had given two widely-differing accounts indicated that neither of the accounts should be treated as reliable. At [24] the Tribunal, "concluded that it was not permissible for the respondent to fix the appellant with his earlier account." On that basis, the Tribunal went on to make findings in respect of the appellant's conduct. The Tribunal accepted the appellant had never actually tortured anyone himself but the Tribunal also found that there was "nothing in the law that enables the appellant to distance himself from his involvement in these atrocities." The Tribunal went on to record that, "in simple terms, if [the appellant] had not treated the prisoners, their torture may have ceased. The fact that he treated the prisoners knowing what the organisation did and what would do means he is linked to the torture of those prisoners." However, at [45], the Tribunal found that "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."

15. The Tribunal proceeded to consider duress. At [50] the Tribunal reminded itself that the "repressive regime in Iraq was not merely an abstract danger or an elevated possibility of a dangerous situation." (see *NT (Article 1F(a) – aiding and abetting) Zimbabwe* [2012] UKUT 0015). At [51], the Tribunal characterises the respondent's argument as follows: "The appellant carried out his duty as a loyal supporter of the regime. He was deployed to the headquarters of Al-Istikhbarat because of his family's links to the regime particularly through his father and brother who the appellant literally said served in the Saddam Hussein army. According to the respondent, the appellant did not seek an alternative placement and did not use his family's influence to assign him elsewhere." The Tribunal acknowledged there was "some force in these arguments" but found that that force survived if the appellant were to be fixed for the accounts which he gave prior to the exclusion decision. The Tribunal had already decided not to so fix the appellant with those accounts. At [54-55], the Tribunal said this:

> 54. If the burden was on the appellant, we would have no hesitation but to find that he has not given a truthful account. We would not accept his explanation if we were to find that his account is incoherent because of this inconsistency. If we were determining an ordinary asylum appeal, we would find the appellant's evidence to be lacking in truth on this aspect and we would find he has not made out his account that his family were loyal to the former Iraqi regime. We would reject both versions of events because it is reasonably likely the appellant sought to exaggerate his family's links to the former regime to secure refugee status and because it is reasonably likely that he sought to downplay his family's links to the former regime to avoid being excluded from refugee protection.

> 55. The burden of proof is on the respondent. The respondent has no evidence to show that the appellant's family is loyal to the Iraqi regime other than the appellant's own earliest account which he says is not accurate. We are unable to find that the respondent can rely on that evidence since he would find it to be unreliable at the lower standard of proof. Thus, we find the respondent has not proven to the relevant standard the appellant did not act under duress.

16. In its subsequent analysis [56], the Tribunal observes that it has also come "to the same conclusion by an alternative route." Even assuming that the appellant's account of his family members holding senior rank within the Ba'ath Party was true and even if family members had arranged for his deployment to the Al-Istikhbarat headquarters in Baghdad there had been "no evidence to say the appellant was involved in that decision-making himself." The Tribunal concluded, "we find it is speculative to conclude that the appellant served in the Al-Istikhbarat out of his own loyalty to the former regime and therefore the evidence of family loyalty would not be sufficient to show the appellant does not have a defence of duress."

17. I have quoted at length from this part First-tier Tribunal's analysis because it is the focus of the Secretary of State's appeal. Mr Dunlop submitted that the Secretary of State had never sought to "fix" the appellant with his earlier accounts. Rather, the fact that the appellant had given two widely differing accounts (depending on how he thought each account at any given time might assist his appeal) should have led the First-tier Tribunal to conclude that nothing which the appellant had said was reliable. The practical effect of the inconsistency was that the appellant was could not be relied upon as a witness of truth. Secondly, Mr Dunlop submitted that the question of the appellant's loyalty to the Saddam Hussein regime is wholly irrelevant. Whether he loyally carried out his duties as a doctor treating torture patients or whether he did so without any sympathy towards the regime was immaterial and the Tribunal's discussion of the mater had led it into error.

18. Mr Dunlop further submitted that what mattered to the success of the defence was whether the appellant had shown that he had made any attempt to be deployed during his military service elsewhere in location where his complicity in torture may have been avoided (sub-paragraph (iv) of Article 31). I agree with that submission. The Tribunal, having rejected the appellant as a truthful witness, appears at [56] to place reliance upon the appellant's pre-exclusion account concluding that, whilst the appellant's family members may have had influence with the regime, there was nothing to suggest that the appellant himself had any influence sufficient to enable him to be deployed elsewhere. That approach is, in my opinion, inconsistent with the Tribunal's statement at [55] that it felt "unable to find the respondent can rely upon [the pre-exclusion accounts of the appellant] since we find it would be unreliable at the lower standard of proof." Either the appellant's pre-exclusion account was unreliable or it was not. The Tribunal went on to make a further error by concluding that, if the appellant had no personal influence over the progress of his military

service, then it was for the Secretary of State to prove that the appellant remained at the facility treating torture patients out of loyalty to the regime. I agree with Mr Dunlop that the appellant's attitude towards the regime is not relevant a consideration. I agree with him that it was for the Tribunal to satisfy itself, by reference to all the evidence, whether the appellant had taken all reasonable steps to cease assisting the regime in its crimes against humanity. In answering that question, the Tribunal should have had regard to the fact that (a) in neither of his accounts had the appellant claimed to have taken or to have considered taking any steps to leave the military facility and thereby avoid the threat under which he claimed to work; (b) there was no need "to fix" the appellant with his previous account; nothing the appellant had said was, in light of the inconsistency in his evidence, reliable so did not add to (a). Ultimately, and without fixing any account upon the appellant, there existed no or no reliable evidence to show that the appellant had acted "necessarily and reasonably" to avoid the threat of imminent death or continuing imminent serious bodily harm. The Tribunal in *AB* (see above) observed that this test requires an individual to seek "every reasonable, not too distant evasive alternative for avoiding the commission of the crime." ([73-74]). This requirement of Article 31 does not require the State to prove that an individual was a loyal adherent of or a particular regime or to prove that he or she enjoyed particular influence with that regime sufficient to enable the individual to avoid complicity against crimes against humanity. It simply requires the individual to show that he/she did everything that was reasonable to avoid complying with duties that constituted or involved a crime against humanity. Whether or not he or his family may have enjoyed influence with the regime, the fact remains that the appellant has never suggested that he did anything at all to seek to avoid the threat.

19. I find that the First-tier Tribunal has fallen into error by its binary approach to the appellant's differing accounts by focusing unnecessarily upon what it considered the failure of the respondent to "fix" the appellant with his pre-exclusion account of past events. Moreover, by requiring the respondent to prove that the appellant was a loyal supporter of the regime (which Mr Dunlop submits was never part of the Secretary of State's case) the Tribunal's analysis has drifted away from focussing on the much more obvious fact that the appellant had himself provided no credible evidence whatever to show that he had sought to meet the requirement of sub-paragraph (iv) of Article 31. On the evidence which was before the Tribunal, it could not have concluded that the appellant had even contemplated let alone take the steps required by sub-paragraph (iv). In consequence, because he does not meet each of the five requirements of Article 31, the appellant is not entitled to rely upon the defence of duress and the Tribunal erred in law by concluding otherwise.

20. In the light of the above, I set aside the First-tier Tribunal's decision. I remake the decision by dismissing the appeal against the Secretary of State's refusal of asylum. I am satisfied that the respondent has shown

that the appellant should be excluded from refugee protection by reason of Article 1F of the Convention.

21. I will deal briefly with the cross-appeal of the appellant. The first ground of appeal challenges the First-tier Tribunal's decision on the basis that the Tribunal erred by finding that it was not bound by the findings of the MPT. I find that the Tribunal did not err in law as asserted. As Mr Dunlop submitted, the MPT is a different statutory Tribunal, performing a different function which heard different evidence and was applying a different legal test. Its findings of fact are not binding on another Tribunal operating according to a different statutory regime. Further, I note that the MPT did not, in any event, find that the appellant had acted under duress. Secondly, the appellant's argument that he cannot have contributed to torture because he was treating and not actively injuring patients is not supported by jurisprudential authority - see *MH (Syria)* [2009] EWCA Civ 26; medical personnel are not automatically excluded from Article 1F. The cross-appeal of the appellant is dismissed.

NOTICE OF DECISION

22. The decision of the First-tier Tribunal which was promulgated on 6 April 2017 is set aside. I have remade the decision. The appellant's appeal against the decision of the Secretary of State dated 14 April 2014 is dismissed.

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 Date 1 December 2017

Upper Tribunal Judge Lane

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date 1 December 2017

Upper Tribunal Judge Lane