



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/02870/2016

THE IMMIGRATION ACTS

Heard at Field House

On 2 November 2018

Decision & Reasons

Promulgated

On 16 November 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KQ (IRAN)

(ANONYMITY DIRECTION MADE)

Respondent/Claimant

Representation:

For the Appellant: Mr Sebastian Kandola, Senior Home Office Presenting Officer

For the Respondent: Ms Rowena Moffatt, Counsel instructed by Paragon Law

DECISION AND REASONS

1. The Secretary of State for the Home Department ("the Department") appeals on procedural fairness grounds from the decision of First-tier Tribunal Judge Blake promulgated on 30 July 2018 in which he allowed the claimant's appeal against the refusal of his protection claim.

The Reasons for the Grant of Permission to Appeal

2. On 23 August 2018 First-tier Tribunal Judge Shimmin granted permission to appeal for the following reasons:

“The grounds requesting permission to appeal to the Upper Tribunal argue that the Judge erred in committing a procedural irregularity by failing to adjourn the hearing at the request of the Presenting Officer. The application was made because the Presenting Officer was only furnished with a witness statement that the medical report was based on at the hearing. It was argued by the Presenting Officer that the witness statement differed greatly from previous witness statements and the Secretary of State wished to address these inconsistencies in full.

It is arguable that the Judge erred by committing a procedural irregularity in failing to adjourn to allow the respondent a proper opportunity to examine a newly furnished witness statement.”

Relevant Background

3. The claimant was encountered by the police on 17 June 2015, having entered the United Kingdom hidden in the back of a lorry. He claimed asylum on the same day. He said that he was an Iranian national of Kurdish ethnicity, whose date of birth was 17 June 1998. He came from Kani Zard near Sardasht. He had never been to school and he was illiterate. His father and brother were smugglers. He had worked as a shepherd, but he had also become a smuggler. He had been detained for six months when he was 12 years old for smuggling. On 9 May 2015 he had attended a demonstration in Sardasht which he had heard about through social media. The reason for the protest was that a Kurdish woman named Farinaz Khosrawani had died in a hotel in Mahabad when she was trying to rebuff the advances of an Iranian Intelligence Officer. The claimant went to the demonstration with two of his friends, but they were arrested when violence erupted. He managed to run away, but he believed that his friends had given his name to the authorities. He had fled Iran the same day, and he had since heard that his parents had been arrested and that his brother had been shot dead by the authorities.
4. The claimant made two witness statements in support of his claim. In his witness statement of 25 August 2015, the appellant gave an account of ill-treatment during his detention as a smuggler. He said that he was beaten up and food had been thrown at him. Near the time of his eventual release, they tied him to a chair and then tied his legs together. They put him on the floor, lifted his legs and smacked his feet with a wooden stick and hose pipes. He had sustained bruises but not any scars. After he had been detained for six months, he was released to his family. In the same statement, he said that his problems in Iran had started on 9 May 2015 when he had attended the demonstration.
5. On 2 March 2016 the Department gave its reasons for refusing the claimant’s protection claim. He was questioned about his identity and

nationality, and his responses were not consistent with the Country Information about Iran. With regard to his core claim, he had been inconsistent about the date of the demonstration in Sardasht, and he had also given details about the demonstration which were not consistent with the background evidence.

6. It was acknowledged that he was 17 years and 8 months old, but it was not accepted that he was an Iranian national, or that he was wanted by the authorities in Iran. It was also not accepted that his parents had been arrested or that his brother had been killed, and it was not accepted that he had lost contact with his parents.
7. The Department expressed no view one way or the other on his account of being detained for smuggling, as the claimant did not rely on this detention as being a trigger for his departure from Iran.
8. While his appeal was pending, the claimant's solicitors arranged for him to be assessed by Dr Juliet Cohen at the Manor Hospital in Oxford on 14 December 2016. In her subsequent report, she detailed the witness statements that she had been shown, and she said that her report was based on answers given to the questions asked by her in the course of her examination, her observations and her findings on her physical examination of the claimant.
9. In a section headed "*History*", she said as follows at paragraph 7:

"He stated that his first arrest was when he was aged about 12 and he was detained for two years. In his witness statement and elsewhere, he has described the first detention as six months and the second detention as two years. He said he felt sure today that it was the two-year detention first."
10. The claimant gave Dr Cohen an account of ill-treatment in detention which represented a considerable expansion on what he had previously said to the Home Office. Amongst other things, he said that he was forced to take a tablet that made him very dizzy. He thought he was given this tablet a number of times when they wanted to do something to him.
11. Following the first detention, which lasted two years, he was detained again six months after his release from the first detention. The second detention was because he was again accused of smuggling. It was a different place of detention, but he was treated equally brutally. One of the ways he was ill-treated was being forced to fill a barrel with water using a small cup. Also, he recalled that on one occasion a nail was repeatedly stabbed into the sole of his feet, and on another occasion they forced him to put his hands on the hot tar, causing burns to his palms.
12. At paragraph 35, Dr Cohen observed that his memory and concentration were poor. He repeated many times that his memory was terrible and appeared completely unaware of elements of the experiences recorded in his witness statement when she asked him directly about them, since he had not mentioned them during his free narrative. He looked puzzled and

slightly distressed, but resigned to the unreliability of his memory. His narrative was not chronological or clearly stated. He appeared unaware of any importance attached to, for example, the difference in his account to her, and in his witness statement, regarding the two detentions and whether the two year detention was first or second.

13. Dr Cohen found a large number of lesions and scars on the appellant's body. One of these she regarded as particularly significant. L22 referred to a scar in the right groin of approximately 8cm, running into the basis of the scrotum. The condition of the scar was not that of any standard surgical procedure. The presence of such an injury on an intimate part of the body was a red flag for sexual assault. The claimant had told her that he was not sexually assaulted in detention, but on finding this injury she had a very strong concern that he had had experiences that he was not able to discuss that were likely to involve sexual violence. He also identified scars on the right palm and the left palm which were highly consistent with the attribution of his hands being held onto hot tar while in detention.
14. At the end of her report, Dr Cohen reiterated her concern about the claimant's capacity to give evidence. In her view, he needed to be treated as a vulnerable young person with significant memory impairment. The clear physical evidence of his head injuries and assault injuries should be borne in mind, despite his difficulties in describing clearly all his experiences.

The Hearing Before, and the Decision of, the First-tier Tribunal

15. The claimant's appeal came before Judge Blake sitting at Taylor House in the First-tier Tribunal on 19 June 2018. Ms Moffatt appeared on behalf of the claimant, and Ms Biririyu, Presenting Officer, appeared on behalf of the Department. In addition to being represented by Ms Moffatt of Counsel, the claimant had also been assigned a Litigation Friend, who was Ms Jennifer Blair of Counsel.
16. For the purposes of the hearing, the claimant's solicitors had filed a supplementary bundle containing an updated medical report from Dr Cohen dated 12 June 2018 and a Country Expert Report from Dr Mohammed Kakhki dated 25 May 2018.
17. In her updated report, Dr Cohen said that she had seen the claimant in interview at the Manor Hospital in Oxford for one hour on 31 May 2018. She was concerned that his memory and general cognitive function was worse than when she assessed him in 2016. He was less able and less willing to access memories of his torture and he struggled to describe events in the past few months. His memory was affected by his PTSD, past head injuries, possible forced administration of a drug, depression and sleep disorder. In her view, he was not fit to give evidence or to properly instruct his solicitor.

18. At the outset of the proceedings, Ms Biririyu stated that she was concerned that the Department had not been given all the witness statements made by the claimant. It appeared to her that Dr Cohen had seen a witness statement which had not been disclosed to the Department.
19. Judge Blake ascertained that Dr Cohen's first report had been disclosed to the Department in December 2016. Nonetheless, Ms Biririyu maintained that the Department had been taken by surprise in respect of the issue of torture. She said that she wished to see a copy of the statement that had been referred to by Dr Cohen. Ms Moffatt indicated that she had a copy of this statement on her laptop, and the Judge gave Ms Biririyu some time to read it.
20. After reading the witness statement on the screen of Ms Moffatt's laptop, Ms Biririyu requested, and was granted, a short adjournment to enable her to take further instructions.
21. Ms Biririyu returned nearly half an hour later. She handed in a copy of a witness statement of the claimant, neither signed nor dated, and his solicitor's letter of instruction to Dr Cohen dated 12 December 2016. Judge Blake enquired of Ms Biririyu if she was raising any points in respect of the witness statement and the letter. She stated that she was not. She then applied for an adjournment of the hearing, on the ground that the earlier witness statements of the claimant, which had been made in August and November 2015 respectively, had made no mention of torture; and because Dr Cohen had made a medical assessment based in part on an undisclosed witness statement. She stated that the Department wished for an adjournment in order to "*address this narrative*".
22. Ms Moffatt opposed the adjournment request, as she submitted that no prejudice had been incurred by the Department.
23. The Judge's reasons for refusing the adjournment request were set out in paragraphs [27] and [28] of his subsequent decision. Firstly, the Department had clearly been on notice of the claimant's case since December 2016 as a result of receiving the report of Dr Cohen. It was also clear that the claimant had mentioned that he had been the subject of ill-treatment whilst in detention in his witness statement of August 2015. So an adjournment was not necessary for a fair disposal of the appeal.

The Hearing in the Upper Tribunal

24. At the hearing before me to determine whether an error of law was made out, Mr Kandola developed the arguments advanced in the permission application. In reply, Ms Moffatt directed my attention to her typed note of the hearing, and she submitted that no error of law was made out for the reasons given in her Rule 24 response.

Discussion

25. Ms Biririyu had a legitimate complaint that there had been a failure to disclose to the Department the draft witness statement which was apparently provided to Dr Cohen with a letter of instructions dated 12 December 2016. For reasons which are unclear, Dr Cohen listed the two witness statements of 2015 as being part of the documentary evidence that had been provided to her, but she did not list the additional unsigned witness statement from the claimant that had been generated in 2016 for the purposes of his appeal.
26. It was, however, apparent to the reasonable reader of her report that such a further witness statement existed, as Dr Cohen referred to its existence in her discussion of the narrative given to her by the claimant.
27. The case which the Department addressed in the refusal decision was that the claimant had been detained for six months at the age of 12. The new case contained in the undisclosed witness statement was that he had in fact been detained on two occasions. The difference between what the claimant said in his unsigned witness statement and what he told Dr Cohen in interview was that in the former he said that he was detained for six months and then two years, and in latter he said he had been detained for two years and then six months.
28. The reason why the additional witness statement seen by Dr Cohen was not disclosed to the Department was because his solicitors recognised that it was inherently unreliable; and, given the claimant's lack of capacity, it was not appropriate for the claimant to endorse the truth of its contents through affixing his signature to it.
29. Nonetheless, since it formed part of the material provided to Dr Cohen, it should have been disclosed to the Department with an explanation as to why it was not signed.
30. However, it was clearly open to Judge Blake to hold that the Department was not prejudiced by its late disclosure. As indicated by Judge Blake when giving his reasons for refusing the adjournment request, from December 2016 the Department knew that it was now the claimant's case (a) that he had been much more severely tortured in detention than hitherto disclosed; (b) that his PTSD, memory loss and cognitive impairment consequential upon his experience of torture reasonably accounted for the inconsistencies and discrepancies in his earlier account which had led to the Department rejecting his claim to be an Iranian national as well as rejecting his claim to be of adverse interest to the Iranian authorities for his imputed political opinion; (c) that his PTSD, memory loss and cognitive impairment consequential upon his experience of torture also reasonably accounted for the fact that further inconsistencies in his narrative had emerged, as identified by Dr Cohen.
31. It was open to the Judge to find that the Department was not taken by surprise by the contents of the hitherto undisclosed witness statement, and that no useful purpose was going to be served by granting an

adjournment in circumstances where the claimant did not have capacity to give evidence, and hence could not be cross-examined on the inconsistencies in his narrative.

Notice of Decision

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity - rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014

Unless and until a tribunal or court directs otherwise, the Respondent to this appeal 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 12 November 2018

Deputy Upper Tribunal Judge Monson