



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: RP/00097/2017

THE IMMIGRATION ACTS

Heard at Newport
On 27 February 2018

Decision & Reasons Promulgated
On 27 March 2018

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SRA

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer

For the Respondent: Ms S Sharma instructed by Portway Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the respondent (SRA). A failure to comply with this direction could lead to Contempt of Court proceedings.
2. Although this is an appeal by the Secretary of State, I shall for convenience refer to the parties as they appeared before the First-tier Tribunal.

Background

3. The appellant is a citizen of Iraq who was born on [] 1996. He first arrived in the United Kingdom on 11 April 2010 as an unaccompanied minor. On 14 October 2010, he claimed asylum. That application was refused on 27 May 2010 but, as he was an unaccompanied minor, he was granted discretionary leave until 1 June 2014.
4. On 11 June 2011 the appellant appealed against the refusal of his asylum claim. On 7 February 2012, the First-tier Tribunal (Judge Osborne) allowed his appeal both on asylum and human rights grounds. As a consequence, on 6 March 2012, the appellant was granted refugee status with five years' leave to remain on that basis valid until 7 February 2017.
5. Between 25 March 2013 and 19 January 2016, the appellant was convicted of a number of offences. Most recently, on 19 January 2012, he was convicted at the Bristol Crown Court of wounding or inflicting grievous bodily harm under s.20 of the Offences Against the Person Act 1861 and sentenced to a period of eighteen months' detention in a Youth Offender Institution. He was also, on that occasion, convicted of possessing an imitation firearm with intent to cause fear and violence and sentenced to a consecutive period of nine months' detention in a Youth Offender Institution. On a third count, of assault occasioning actual bodily harm contrary to s.47 of the OAPA 1861, he was sentenced to a concurrent term of six months' detention in a Young Offenders Institution. The total sentence was, therefore, one of 27 months' detention in a Young Offenders Institution.
6. On 18 April 2016, the appellant was issued with a notice of a decision to make a deportation order against him as a result of his convictions.
7. On 2 February 2017, the appellant was issued with notification of an intention to revoke his refugee status. Further representations were made on 5 May 2017 and on 22 May 2017, he was detained under powers contained within the Immigration Act 1971.
8. On 18 July 2017, a decision was made to deport the appellant and revoke his protection status. In addition, his human rights claim was also refused. A deportation order was signed on 18 July 2017.

The Appeal to the First-tier Tribunal

9. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge I D Boyes on 30 August 2017.
10. Before Judge Boyes, the appellant (through his Counsel) withdrew any reliance upon the Refugee Convention and a claim that he was at risk as a result of his conversion to Judaism and because of his sexual orientation, namely that he is bisexual. The appellant continued to contend that his return to Iraq would breach Art 15(c) of the Qualification Directive (Council Directive 2004/83/EC) and Arts 3 and 8 of the ECHR.
11. Judge Boyes dismissed the appellant's appeal on asylum grounds finding that he had fabricated his claim.

12. Further, Judge Boyes dismissed the appeal on humanitarian protection grounds under Art 15(c) of the Qualification Directive on the basis that the appellant had failed to establish the required level of indiscriminate violence in Baghdad (his home area).
13. However, Judge Boyes went on to allow the appeal under Art 3 of the ECHR. He found that the appellant would not be able to obtain a CSID document and that he had no family left in Baghdad and, applying the Court of Appeal's decision in AA (Iraq) v SSHD [2017] EWCA Civ 944, there was a real risk that the appellant would be destitute and, as a consequence, at risk of serious harm contrary to Art 3 of the ECHR.
14. Finally, the judge, having found in the appellant's favour under Art 3 of the ECHR, declined to make any decision in respect of his Art 8 claim.

The Appeal to the Upper Tribunal

15. The Secretary of State sought permission to appeal to the Upper Tribunal on three grounds. On 17 October 2017, the First-tier Tribunal (Judge A M Black) granted the Secretary of State permission to appeal.
16. On 22 November 2017, the appellant filed a rule 24 response seeking to uphold the judge's decision allowing the appellant's appeal under Art 3.

The Secretary of State's Challenge

17. Before me, Mr Mills, who represented the Secretary of State, relied upon the three grounds of appeal upon which permission to appeal was granted although he acknowledged that he was in difficulties in sustaining ground 3.
18. Ground 1 sets out two distinct grounds of appeal. First, it is contended that the judge erred in law by not determining the Art 8 claim made by the appellant. Reliance is placed upon s.86 of the Nationality, Immigration and Asylum Act 2002 which states in sub-section (2) that:

"The Tribunal must determine -

 - (a) any matter raised as a ground of appeal, and
 - (b) any matter which section 85 requires it to consider".
19. Mr Mills acknowledged that, notwithstanding s.86, the judge's error in failing to deal with Art 8 may not be material to the outcome of the appeal.
20. Secondly, Mr Mills placed reliance upon the remainder of ground 1 which contended that the judge had approached the issue of whether the appellant could obtain a CSID on return to Baghdad with a "preformed and closed view" such that he was "biased and unfair".
21. Mr Mills relied upon the extract from the Presenting Officer's hearing note set out in para 3 of the grounds as follows:

"I cross-examined the appellant, he maintained that he had no contact with his family in Iraq and had made no effort to trace them.

Before I could cross-examine the witness IJ said that he thought there was no evidence the appellant could obtain a CSID in a reasonable period. He asked if I had anything to add, I accepted I was in some difficulty on this point but highlighted that the appellant may have family ties in Iraq he had just not made efforts to trace them the IJ stated that it was only that he may have family and there was no legal obligation for him to trace them so he said he would allow the appeal on this point”.

22. Mr Mills, relying on the terms of the ground, submitted that the judge had fallen into error by refusing to hear further witnesses and hear further submissions beyond the exchange recorded by the Presenting Officer on the issue of fact, namely whether the appellant could obtain a CSID (which he currently lacked) on return to Iraq.
23. Ground 2 challenges the judge’s finding in para 44 of his decision that the appellant had no family in Iraq such as to assist him in obtaining a CSID or to provide support to him. Relying on ground 2, Mr Mills submitted that the judge had, in effect, reversed the burden of proof when he had said that he would “work on the assumption that there is no family there as I have not been told there are any”.
24. Mr Mills also submitted that the judge had failed properly to reason why he accepted the appellant's evidence on this issue when he had found that the appellant had lied about his asylum claim. He placed reliance upon the Supreme Court’s judgment in MA (Somalia) v SSHD [2010] UKSC 49 at [47]–[48] where it was acknowledged that a Tribunal could determine that an appellant had failed to establish a fact because he had previously told lies. Mr Mills submitted that the judge had given no reasons in para 44 sufficient to show that he had taken into account that the appellant lied but, nevertheless, had discharged the burden of proof upon him to show that he had no family in Baghdad as the judge had found.
25. Ground 3 raises two issues. First, it seeks to challenge the judge’s approach to subsidiary protection. Secondly, it contends that merely because the judge found that the appellant would be destitute does not in itself, necessarily, establish a breach of Art 3.
26. In relation to these two points, Mr Mills did not pursue the first point, and in my judgment, rightly so. The judge found against the appellant on subsidiary protection under Art 15(c) and that is not challenged. The passage in the judge’s determination at para 38 which is challenged in the grounds, appears to have no bearing upon any of the findings that he subsequently made. His statement that there is a difference between subsidiary protection and Art 3 of the ECHR by reference to claims based upon differentially available medical treatment in the UK and the individual’s home country, is borne out by the CJEC’s decision in M’bodj v État Belge [2015] Imm AR 3. However, as was confirmed by the parties before me, the appellant did not seek to rely on any medical condition that might have engaged the issue raised by the judge at para 38 of his decision.
27. Further, as regards the second point raised in ground 3, Mr Mills accepted that he was in some difficulty as the Court of Appeal (in the relevant country guidance decision) of AA (Iraq) had concluded that if an individual returned to Iraq without a

CSID, and no prospect of obtaining one within a reasonable time and no family support to assist, there was a real risk that he would be destitute and a breach of Art 3 would be established. Mr Mills indicated that he wished to place no further reliance on this aspect of ground 3.

The Appellant's Submissions

28. On behalf of the appellant, Ms Sharma, who represented the appellant (and had done so before Judge Boyes), acknowledged that the appellant had retracted his reliance upon the asylum ground at the outset of the hearing. She acknowledged that no challenge had been made to the judge's adverse finding that the appellant had lied about that aspect of his claim.
29. Ms Sharma submitted, however, that in reaching his findings, in particular in para 44, the judge had taken a common sense view. There was an earlier decision in his favour on asylum grounds. It was, therefore, accepted that the appellant had not been back to Iraq since he was 6 years old. He had been out of Iraq since 2010 and, it was open to the judge to find that, therefore, as he could not say who was there or that he had any knowledge relevant to obtaining a CSID, it was open to the judge to find that he would not be able to obtain a CSID within a reasonable timeframe and he had no one to support him.
30. Ms Sharma accepted that the judge had made it clear that the CSID issue was the paramount issue and that he did not need to hear the other witnesses concerned with Art 8. She submitted that even if he had heard those witnesses, he would still have reached the decision that he did.
31. Ms Sharma submitted that the judge's findings in para 44 were sustainable and the appeal was properly allowed under Art 3 of the ECHR.

Discussion

32. At the hearing, I indicated to both representatives that if it was necessary to the outcome of the appeal before me that I should reach a decision on the allegation in ground 1 which raised procedural issues at the hearing, then it would be necessary to re-list the appeal in order to obtain statements both from the Presenting Officer and the appellant's representative who was, of course, Ms Sharma before the judge. In addition, it would be usual practice to seek the judge's comments on the allegation made in the grounds.
33. I indicated to the parties that I would reach a view on that matter following the hearing having considered all the arguments. I have now done so. As will shortly become clear, I am satisfied that Judge Boyes' decision cannot stand, in essence, because the Secretary of State has established ground 2. It is not, therefore, necessary to re-list the hearing and issue the appropriate directions for the necessary evidence to be produced in order to reach a conclusion on ground 1 insofar as it raises an allegation of procedural irregularity at the hearing. There was no supporting statement from the Presenting Officer and the only "evidence" is found in a quotation from her "hearing note records" set out in the grounds. That is not free from ambiguity as to what happened at the hearing, in particular in relation to the

cross-examination of the appellant. There is no evidence from the appellant's representative at the hearing (Ms Sharma) on the issue. She was, of course, not in a position to provide any evidence before me as she continued to represent the appellant. Likewise, the judge's comments on the procedural aspects raised in the grounds have not been sought. It would be wrong for me to make any finding or to say more in relation to this aspect of ground 1 without any available evidence being provided by the parties and the judge having an opportunity to comment.

34. Ground 2 is, however, made out and for that reason the decision cannot stand.

35. At para 44, the judge says this:

“Having considered the matter with care I find that the appellant could not obtain a CSID card within a reasonable timeframe. I reach this conclusion for the following reasons; it has been 14 years since the appellant left Baghdad and he does not know anyone there. I work on the assumption that there is no family there as I have not been told there are any. It is highly unlikely that there will be anyone who can vouch for the appellant as to his identity. He has no identity documents, no birth certificate or documents relating to his parents by which he could try to establish to the authorities who he is”.

36. I accept Mr Mills' submission that the judge has, in effect, reversed the burden of proof. That is clear from the sentence where he says: “I work on the assumption that there is no family there as I have not been told there are any”.

37. It was the appellant's case that his father had been killed when he was 1 or 2 years old and that his mother had moved to Morocco – which is where the appellant moved to when he was 6 years old. If the appellant's case was that he had no family in Baghdad to provide him with temporary support and to assist him in obtaining a CSID, the judge could not assume that was true. Neither common-sense, as Ms Sharma submitted, nor any findings by Judge Osborne in the earlier appeal, demanded such a finding. The judge had to make a finding on whether he believed the appellant's account. It was not for the Secretary of State to prove that he had family in Baghdad but rather for the appellant to prove that he had no family, a fact which would, undoubtedly, have assisted him in establishing he would be destitute and at risk of Art 3 ill-treatment following AA (Iraq). As Mr Mills pointed out, at para 30 the judge found that the appellant's account that he had converted to Judaism and was bisexual was “not true”. He had, therefore, made a finding– in what might be considered a central part of his international protection claim up to the beginning of the hearing – that he had lied. Of course, a judge may find that an individual has lied in one respect of his account but nevertheless accept other aspects of his account as true. However, in doing so the judge must take into account that the individual has lied about an important part of his claim and give reasons for any finding (whether positively or negatively) on the other aspects of his claim, here whether or not he had any family in Baghdad. As the Supreme Court pointed out in MA (Somalia) it is properly open to a Tribunal to make a finding that an individual has simply failed to establish (even on the lower standard of proof) the other matters when he has lied about aspects of his claim. Here, the judge has not, in my judgment, grappled with his previous finding that the appellant has lied and how

that, if at all, impacts upon whether he is to be believed about his circumstances on return to Baghdad.

38. For those reasons, the judge's findings in para 44 which led him to conclude, applying the Court of Appeal's decision in AA (Iraq), that the appellant would be at risk of treatment contrary to Art 3 on return to Baghdad is flawed and cannot stand.
39. Consequently, the judge's decision to allow the appeal cannot stand either.
40. I need say no more about the judge's failure to make any findings in respect of Art 8. That is, at least in part, understandable given that he found in the appellant's favour under Art 3. In one sense, of course, that latter finding *ipso facto* would lead to a finding that a breach of Art 8 had been established. Of course, the appellant's claim under Art 8 in this appeal was based, not centrally upon his circumstances on return to Baghdad, but rather upon the impact upon his relationship with his partner in the UK and her child. Section 86 of the NIA Act 2002 did require the judge to determine the Art 8 claim as a "matter raised as a ground of appeal". As Mr Mills acknowledged, that failure was not material to the outcome of the appeal so long as the Art 3 decision stood. I have set that decision aside and, as the proper disposal of this appeal is to remit it to the First-tier Tribunal for a re-hearing, the issue of whether the appellant's removal would breach Art 8 will be one upon which he can rely again before the First-tier Tribunal.

Decision

41. For the above reasons, the decision of the First-tier Tribunal to allow the appellant's appeal involved the making of a material error of law. That decision is set aside.
42. The appeal is remitted to the First-tier Tribunal for a re-hearing before a judge other than Judge I D Boyes.
43. I see no reason why the judge's finding in relation to the appellant's asylum claim (which he did not pursue before Judge Boyes) should not be preserved. All other findings will not be preserved. To the extent that the appellant continues to rely upon them, the First-tier Tribunal should re-make the decision in relation to subsidiary protection and Arts 3 and 8 of the ECHR.

Signed



A Grubb
Judge of the Upper Tribunal
23, March 2018