



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/13024/2018

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
On 31 January 2020

Decision & Reasons Promulgated
On 4 March 2020

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

M H M H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Galliver-Andrew, Counsel

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS ON ERROR OF LAW

1. The appellant appeals with the permission of the First-tier Tribunal against a decision of Judge of the First-tier Tribunal Suffield-Thompson, promulgated on 30 October 2019, dismissing his appeal against a decision of the respondent, made on 1 November 2018, refusing his protection and human rights applications.
2. The appellant is an Iraqi citizen of Kurdish ethnicity. He claimed to be entitled to international protection on the basis he was at risk of 'honour killing' in his

home country following an extra-marital relationship with A, who was a member of an influential family or a family closely connected to influential people. The respondent did not accept that the appellant had had a relationship with A or that he had received threats from them. Nor was it accepted that A's family had political influence in Iraq.

3. The judge heard evidence from the appellant and also received an expert report, photographs and a DVD said to contain video clips of A. The judge made an adverse credibility finding against the appellant and concluded he was not at risk on return.
4. The grounds seeking permission to appeal challenged the judge's assessment of the appellant's credibility. The First-tier Tribunal granted permission on all grounds. There are four:
 1. The judge made a mistake of fact in concluding, without evidence, that the appearance of the girl portrayed in the clips, who was *"heavily made up, wearing jewellery and quite liberal clothes"* did not fit with the image painted by the appellant of A being from a very traditional and strict family. The judge also applied too high a standard of proof.
 2. The judge made findings which did not correctly reflect the evidence, such as finding there were inconsistencies as between how the appellant described how his relationship with A was discovered and in relation to an incident in which he was threatened.
 3. The judge's reliance on the fact he was targeted rather than A was inconsistent with the background evidence submitted.
 4. The judge failed to consider the evidence holistically.
5. Granting permission to appeal, Judge of the First-tier Tribunal O'Brien said,

"3. It is arguable that the Judge has applied her own preconceptions of how a girl from a traditional and strict household might dress. It is also arguable that the Judge has failed to assess credibility holistically."
6. The respondent has not filed a rule 24 response.
7. Mr Galliver-Andrew developed his grounds at the hearing. In relation to the first ground, he cited the well-known passage from the judgment of Keene LJ in Y v SSHD [2006] EWCA Civ 1223:

" ...

 25. There seems to me to be very little dispute between the parties as to the legal principles applicable to the approach which an adjudicator, now known as an immigration judge, should adopt towards issues of credibility. The fundamental one is that he should be cautious before finding an account to be inherently incredible, because there is a considerable risk that he will be over influenced by his own views on what is or is not plausible, and those views will have inevitably been influenced by his own background in this country and by the

customs and ways of our own society. It is therefore important that he should seek to view an appellant's account of events, as Mr Singh rightly argues, in the context of conditions in the country from which the appellant comes. The dangers were well described in an article by Sir Thomas Bingham, as he then was, in 1985 in a passage quoted by the IAT in Kasolo v SSHD 13190, the passage being taken from an article in Current Legal Problems. Sir Thomas Bingham said this:

"An English judge may have, or think that he has, a shrewd idea of how a Lloyds Broker or a Bristol wholesaler, or a Norfolk farmer, might react in some situation which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ships' engineer, or a Yugoslav banker. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his salt could possibl[y] assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even - which may be quite different - in accordance with his concept of what a reasonable man would have done."

26. None of this, however, means that an adjudicator is required to take at face value an account of facts proffered by an appellant, no matter how contrary to common sense and experience of human behaviour the account may be. The decision maker is not expected to suspend his own judgment, nor does Mr Singh contend that he should. In appropriate cases, he is entitled to find that an account of events is so far-fetched and contrary to reason as to be incapable of belief. The point was well put in the Awala case by Lord Brodie at paragraph 24 when he said this:

"... the tribunal of fact need not necessarily accept an applicant's account simply because it is not contradicted at the relevant hearing. The tribunal of fact is entitled to make reasonable findings based on implausibilities, common sense and rationality, and may reject evidence if it is not consistent with the probabilities affecting the case as a whole".

He then added a little later:

"... while a decision on credibility must be reached rationally, in doing so the decision maker is entitled to draw on his common sense and his ability, as a practical and informed person, to identify what is or is not plausible".

27. I agree. A decision maker is entitled to regard an account as incredible by such standards, but he must take care not to do so merely because it would not seem reasonable if it had happened in this country. In essence, he must look through the spectacles provided by the information he has about conditions in the country in question. That is, in effect, what Neuberger LJ was saying in the case of HK and I do not regard Chadwick LJ in the passage referred to as seeking to disagree."

8. Mr Howells accepted that the first ground disclosed an error of law but argued that it was not material because the judge had given other reasons for not giving weight to the video clips. He also agreed with Mr Galliver-Andrew that the judge appeared to have misdirected herself as to the standard of proof but argued, for the same reasons, that this error was immaterial.
9. Mr Howells argued the judge did not err in the manner described in the second and third grounds and she was entitled to find there were material discrepancies which undermined the appellant's credibility. Matters had been put to the appellant for explanation. He also argued that ground four was not made out because the judge was entitled to find there was no evidence showing the man in the photos was A's father.
10. Mr Galliver-Andrew replied briefly and asked me to find that the errors, taken cumulatively, were material and the decision should be set aside. I reserved my decision as to whether the decision of the judge contains a material error of law.
11. I note that a previous decision of the First-tier Tribunal dismissing the appeal was set aside by the Upper Tribunal because the judge had failed to consider properly whether the video and photographic evidence provided showed a link between A and the appellant (because A addresses the appellant by name in the videos) and the photographs which show A with her family and prominent PUK members, the identities of the prominent PUK matters having been confirmed by the expert in his report. It is clear that those decisions and the same evidence were before the judge who re-made the decision, including the same expert report. The judge viewed the video clips.
12. The judge set out a number of reasons for finding inconsistencies in the claim before turning to the video and photographic evidence at [40] to [48], concluding that, whilst she accepted the expert's evidence that the prominent people in the photographs were who the appellant said they were, the link between A and those people could not be substantiated "*and these pictures could have been given to him by anyone or obtained from social media*". At [51] she added, "*[t]he videos could be any female friend of the Appellant assisting him in his claim. The photo ... may or may not be of the same girl but again I have no proof this is A. I have no idea who the man the Appellant claims is her father is and no proof of his relationship to the girl. I have no proof of the relationships between the other people in the photographs and the Appellant and his supposed girlfriend.*"
13. I now turn to the reasons given by the judge for reaching these conclusions. It is clear that the judge erred in [41] by making her own assumptions about what a girl from a strict Kurdish family might wear when making a private video message for her boyfriend. The judge's beliefs are not supported by any evidence. I agree with Judge O'Brien. The dicta of Keene LJ are entirely apposite.
14. However, in the same paragraph, the judge says she finds the fact the girl was able to record herself and send a video clip was inconsistent with the

appellant's account of her being under surveillance with no access to a phone. She considered the explanation offered that the girl used her mother's phone but rejected this as well for sound reasons. I consider this part of the judge's reasoning to be sound.

15. In [42] the judge explains that two of the clips are of poor quality such that she cannot identify the girl as being the same person. She also notes that there are no marks on the girl's neck, whereas the appellant claimed she had been strangled. The clips did not show any date and, more generally, the girl could be anyone. I consider the point made about the absence of marks on the girl's neck to be contradictory with the point about the poor quality of the clips. However, the general point about identification holds good.
16. It is important to recall that the purpose of the video and photographic evidence was to demonstrate the link between A's family and the PUK. In the ensuing paragraphs the judge goes on to consider the photographs which were submitted. The appellant did not submit a photograph of himself with A (at least, not one showing their faces), which is why the video clips were potentially important. As I understand it, the speaker named the appellant and addressed him.
17. The judge continues her analysis at [45], dealing with the expert report. The judge is critical of his acceptance of the appellant's word that A's family are powerful. At [46] she criticises the expert's assertion that the girl depicted in the photographs with her father is the same girl as in the video clips. She gives reasons for doubting this based on her own viewings and she points out that the author of the report is not a face recognition expert. She does accept the expert's evidence that there are well-known PUK figures depicted in the photographs. She then makes the point in [47] to the effect that the link has not been made between the girl and the man, said to be her father. Then she makes the point again at [48] that there is no way to substantiate the claimed link between A and the PUK people.
18. However, there is a further issue. Mr Galliver-Andrew drew attention to the judge's use of language in [41] and [46] ("*... it is not possible to say for certain ...*", "*... I cannot definitively find ...*" and "*not clear enough to be able to say for certain that ...*") as indicating the judge was applying an impermissibly high standard of proof. I have noted that Mr Howells also recognised this was the wrong standard but again pointed out there were other reasons given by the judge.
19. The judge noted the lower standard of proof applicable in [21]. At least in [47] she concluded the paragraph by stating that she could not accept that the man in the photographs was A's father "*to the required standard of proof*". However, she also repeated the phrase "*I cannot be sure*". I do not consider that even the most generous reading of these paragraphs entitles me to conclude that the judge maintained the application of the lower standard, notwithstanding her correct self-direction at [21], when she reached her overall conclusion in [51] that there was "*no proof*" of the link.

20. Mr Howells can only be correct in suggesting the error is immaterial if the judge made no error in her primary finding that the appellant's account of the relationship with A (regardless of her family's connections) was a fabrication. This takes me to Mr Galliver-Andrew's second ground, which argues mistake of fact and failure to consider all the evidence. This ground refers to two separate findings by the judge.
21. Firstly, she found in [28] that the appellant had given "*two very different accounts*". That is because, in the screening interview, the appellant had said A's family became aware of the relationship when someone sent them a letter and, in the substantive interview, he said it was when A's mother saw them together. The discrepancy was put to the appellant in cross-examination and the judge rejected the explanation given. Mr Howells argued the judge was entitled to regard this as an unexplained discrepancy which undermined the appellant's credibility.
22. However, as Mr Galliver-Andrew pointed out, the appellant was answering two different questions. At 4.1 of the screening interview, he was answering the question, when did you realise it was a problem? At the substantive interview, he was asked, why do you fear the appellant's father? Furthermore, prior to the substantive interview the appellant had explained that his problems began when someone threw a letter into the yard of A's house saying they were together but it was only 2-3 months later that they were discovered together at A's house by A's mother. This explanation was carried forward to the appellant's witness statement, which was before the judge. Mr Galliver-Andrew appeared in the First-tier Tribunal hearing and he said he pointed this out to the judge.
23. It does appear that the judge may have misunderstood the evidence. I gain some limited support for that view from the fact the previous judge hearing the appeal, Judge O'Rourke, recorded in his summary of the claim that there were two separate incidents which led to the appellant having problems (see [15 (i) and (ii)]).
24. The second point is that in [31] and [32] the judge finds the appellant gave two "*totally different accounts*" regarding an incident in which he was attacked by a member of A's family. Specifically, at his interview, he described being kicked and punched in an alleyway by A's father and a man called Hazhar. In his witness statement, he described being accosted by A's brother, Hoger, in the bazaar. As far as I can see, only the alleyway incident was referred to in the interview (see Q86).
25. Mr Galliver-Andrew pointed out that the appellant had described two incidents in his witness statement. I consider that it is less clear-cut that the judge erred on this point. However, it does appear that the appellant had maintained prior to the hearing that there were two separate incidents, albeit similar. As such, the judge may have erred.

26. Mr Galliver-Andrew also argued the judge's reference at [36] to the appellant's chronology of events being "*also totally different*" as between the interview and statement is unexplained. I do consider the judge has not provided adequate reasons for this finding. Neither the preceding nor the subsequent paragraph refers to inconsistencies in the chronology. There is no way of knowing what the judge had in mind.
27. It is not necessary to consider the other grounds. Overall, I am driven to conclude that the judge's finding about the relationship and therefore the risk on return is unsafe and therefore the whole decision must be set aside. It may well be that a third judge will also conclude that the claim is not credible but this decision is erroneous and must be set aside.
28. Having considered the Senior President's Practice Direction of 15 September 2012, I make an order under section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007. The appellant is entitled to have his appeal heard again.
29. The appeal is therefore allowed and the decision of the First-tier Tribunal dismissing the appellant's appeal grounds is set aside. The appeal must be heard again in the First-tier Tribunal by a judge other than Judges O'Rourke and Suffield-Thompson with no findings preserved.

NOTICE OF DECISION

The Judge of the First-tier Tribunal made a material error of law and her decision dismissing the appeal is set aside. The appeal is remitted to the First-tier Tribunal de novo.

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 her or any member of her 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 7 February 2020



Deputy Upper Tribunal Judge Froom