IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-000978
UI-2024-001070
First-tier Tribunal No:
HU/57632/2023
LH/05745/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 13 May 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

MMSZ
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr. E. Wilford, Counsel instructed by KBP Law LLP
For the Respondent: Mr. C. Avery, Senior Home Office Presenting Officer

Heard at Field House on 2 May 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and/or any member of his family, is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of First-tier Tribunal Judge Chana (the "Judge"), dated 15 February 2024, in which she dismissed the appellant's appeal against the respondent's decision to refuse his protection claim.

2. I make an anonymity direction, continuing that made in the First-tier Tribunal, given that this is a protection claim.

3. Permission to appeal was granted on limited grounds by First-tier Tribunal Judge O'Brien in a decision dated 11 March 2024 as follows:

> "2. The grounds assert in para 4 that the Judge erred in seven ways clearly numerated which I need not rehearse.
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> 3. Ground 1 seeks to draw a forensic fine-tooth comb through the judgment and does not disclose a material arguable error of law. However, the judge possibly approached the expert report erroneously per Mbanga [2005] INLR 377, and so ground 2 is arguable, as is ground 3 in the alternative. It is arguable that the judge went too far in finding the expert to have acted partially per ground 4, although I am not satisfied that an arguable unfairness to the expert himself arose (it not being suggested that the expert would have otherwise have been called to give oral evidence). The judge does not appear to have found that the appellant left Iran lawfully, although she does arguably appear to have failed properly to have considered the risk to the appellant from having left illegally and thereby subsequently evading the draft.
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> 4. Grounds 2, 3, 4 and 7 are arguable, The remaining grounds disclose no arguable error of law."

4. The appellant renewed his application for permission to appeal in relation to the other grounds. Upper Tribunal Judge Sheridan granted permission in a decision dated 28 March 2024 as follows:

> "1. Seven grounds of appeal were advanced by the appellant. The First-tier Tribunal granted permission on grounds 2, 3, 4 and 7.
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> 2. Having regard to what is said about limiting a grant in Ferrer (limited appeal grounds; Alvi) [2012] UKUT 00304 (IAC) and the Joint Presidential Guidance Note 2019 No. 1: Permission to Appeal to the UTIAC, I am of the view that this is not a case where there is utility to limiting the grant. Moreover, I am persuaded, having reviewed Counsel's note, that there is arguable merit to ground 1.
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> 3. Permission is granted on all grounds."

5. There was no Rule 24 response.

The hearing

6. The appellant attended the hearing.

7. Mr. Avery accepted that it was not a clear case where he could say that the decision was sound, but stated that the respondent continued to resisted the appeal. After a brief discussion with the representatives, I stated that I found that the decision involved the making of material errors of law. I set the decision aside in its entirety.

8. Mr. Avery had not seen the witness statement of Mr. Wilford, nor his note of the hearing in relation to the oral evidence. It was therefore more difficult for him to comment on Ground 1. The discussion was in regard to the Judge's treatment of the expert evidence. For that reason I will focus on that here, as having found that there is an error in the Judge's approach to the expert evidence, the other grounds necessarily follow.

Error of Law

9. Ground 2 asserts that the Judge erred in rejecting the credibility of the appellant's testimony without any, or any adequate, consideration of the expert's evidence which was material to the assessment of credibility. Reference is made to the case of Mbanga [2005] INLR 377. The Judge rejected the expert witness evidence on the basis that he had breached his duty to the Tribunal. However, she also stated that she had considered his evidence in the round. The grounds state at [17] and [18]:

> "17. Those two assertions can only be reconciled if Judge Chana's consideration of the expert report was limited to her reasons for rejecting that evidence on the grounds that Dr Hedayati-Kakhki had breached his duty to the Tribunal.
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> 18. Such an interpretation is supported by the conspicuous absence of any reference to that report in her consideration of the credibility of A's account, which taken together with her allegation that Dr Hedayati-Kakhki's integrity, strongly suggests that the report played no role in her assessment of A's credibility. After all, as Judge Chana tells the reader, one of the reasons she rejects the expert evidence is that she has found A not to be credible (see [32])."

10. Ground 3 asserts in the alternative that, if the Judge had considered the expert evidence "in the round", she has failed to address it. Ground 4 submits that she has failed to provide clear and sustainable reasons for impugning the expert's impartiality.

11. I have carefully considered the Judge's assessment of the expert evidence, and the appellant's credibility. At [29] to [32] of her decision the Judge states:

> "29. I have considered the expert report of Dr Kakhi in the round irrespective of where it appears in my determination. In general terms each report of an expert stands to be considered on its own merits, unless, of course past criticism is in strong terms. I accept he is an expert on the Iranian law and procedure and has provided opinions for many cases in the United Kingdom. Although I consider his report in isolation and not with regard to other cases in which he has testified, I consider them in my evaluation of his expert evidence.
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> 30. Dr Kakhi was an expert in the case of **CG [2016] UKUT 00308** where his evidence is recorded as differing markedly from the conclusions drawn by the Tribunal in the headnote at paragraph 33 of his report. He also gave evidence in **ZS and JM Iran CG [2008] UK AIT 00082** when the Tribunal found at paragraph 95 that they are prepared to accept him as an expert on Iranian intelligence, however it has been taken into account that he approaches evidence from the standpoint that he has been out of Iran for six years.
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> 31. He also provided expert evidence to the Tribunal in the case of **SB** where the Tribunal found at paragraph 60 that as regard to the expert reports by him the court has regards to the comments made by the IAT President in **MS** vendor (sic) said that they note that the expert was one of the country experts chosen to assist on the former a PCI (advisory panel on country information), in his review of the

> August COIS report on Iran. It was stated that "for the reasons given earlier, we do not find that either of his reports provided much substantiated evidence specific to the issue of risk on return for returnees from Iran generally and we do not find that his latest report demonstrated a properly empirical approach to the evidence he drew on to suggest recent events had resulted in a significant change in relation to risk on returnees as such (including failed asylum seekers). The expert states as a result of recent events those associated with the United Kingdom would be more likely to face risk on return, he appears to be too readily to rely on sources without seeking to check whether there are corroborated/substantiated and to be too ready to jumble together quite different items of evidence (those concerning returnees as such and those concerning returnees some type of profile) and to draw overgeneralised inferences from them". However the court said that they did derive considerable benefit from his report insofar as they conveyed his own expertise regarding the Iranian justice system and helpfully drew together what is known about the current aspects of Iranian society and its justice system from other background sources.
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> 32. I find that the expert report is not impartial and has been written to assist the appellant. The expert has believed the appellant's narrative completely. I rely on the background evidence in the CPIN and country guidance case on Iran. I have found the appellant not credible and credibility is an issue for the Tribunal to decide and not an expert. I find that the expert has has (sic) relied on cases which support the appellant's case and has made no reference to cases that do not. The expert has given his opinion on the bases (sic) that the appellant is credible and that his story is true. I have found that it is not."

12. The Judge has stated that she has considered the expert evidence "in the round" before then going on to state that the expert is "not impartial" and his report "has been written to assist the appellant". She has given no reasons for this finding. I find that the Judge has asserted that she has taken the expert evidence into account "in the round", at the same time as finding that this evidence is not impartial.

13. The Judge has found that the expert has given his opinion on the basis that the appellant is credible "and I have found that he is not". She has found that the appellant is not credible without reference to the expert evidence, stating that the expert "has believed the appellant's narrative completely" whereas she has found that the appellant's story is not true. The grounds cite [24] of Mbanga as follows:

> "What the fact finder does at his peril is to reach a conclusion by reference only to the applicant's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the expert evidence."

14. I find that this what the Judge has done. I find that her approach to the expert evidence and to her assessment of the appellant's credibility involves the making of material errors of law. I find that the grounds are made out, and that the Judge's findings cannot stand.

15. I find that the decision involves the making of material errors of law. In considering whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade I have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

> *"(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is*

that the case will be retained within the Upper Tribunal for the remaking of the decision.

(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal."

16. I have carefully considered the exceptions in 7(2)(a) and 7(2)(b). I find that there are no findings that can be preserved. Therefore, given the extent of fact-finding necessary, it is appropriate to remit this appeal to be reheard in the First-tier Tribunal.

Notice of Decision

17. The decision of the First-tier Tribunal involves the making of material errors of law and I set the decision aside. No findings are preserved.

18. The appeal is remitted to the First-tier Tribunal for a de novo hearing.

19. The appeal is not to be listed before Judge Chana.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
5 May 2024