IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002473
UI-2024-002853
First-tier Tribunal No:
PA/55348/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 September 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

BHK
(ANONYMITY ORDER MADE)

Respondent

AND

BHK

Cross-appellant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Secretary of State: Ms Young, a Senior Home Office Presenting Officer.
For BHK: Mr Karnick, instructed by Fisher Stone Solicitors.

Heard at Phoenix House (Bradford) on 27 September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, BHK is granted anonymity.

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

DECISION AND REASONS

1. The Secretary of State appeals with permission, and BHK cross appeals with permission, a decision of First-tier Tribunal Judge Curtis ('the Judge') promulgated on 9 May 2024 in which the Judge dismissed the appeal on protection grounds, challenged by BHK, and allowed it on article 8 ECHR human rights grounds which is challenged by the Secretary of State.
2. For ease of reference, I shall refer to BHK and the Secretary of State by reference to the status they held as they appeared before the Judge.
3. BHK is an Iraqi Kurd born in Chamchamal in Kirkuk on 23 December 1988 who has also lived in Erbil in the IKR.
4. The appellant arrived in the UK on 17 May 2020 with her husband and two young children. She claimed asylum on arrival but her application was refused on 26 July 2023. It was her appeal against that decision which came before the Judge. The appellant's husband and children are dependants on her application.
5. In summary, the appellant claims to fear her family who she states tortured her at home.
6. The Judge records the schedule of issues advanced by BHK and noted the Secretary of State accepted (i) the appellant is a Kurdish Iraqi born in Chamchamal in the Kirkuk Governorate near Sulaymaniyah, (ii) that the appellant was subject to serious harm/torture by her father and stepmother, (iii) that the appellant suffered serious harm on the basis of the expert medical evidence is accepted.
7. The Secretary of State did not accept that the appellant's family searched for her and located her after she had fled or that she could not have or could not obtain Iraqi ID documents. The Secretary of State also asserts the appellant's behaviour engages section 8 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004, and that there are no exceptional circumstances pursuant to article 8 ECHR.
8. BHKs claim refers to paragraph 339K of the Immigration Rules which reads:

> 339K. The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

9. BHK also asserted that her account should be accepted, that relocation within Iraq is not an option, that the section 8 factor should not count against her, and that she is undocumented. BHK also refers to the state of her mental health in light of past persecution, asserting that return will be contrary to her article 3 rights.
10. Having considered the documentary and oral evidence the Judge sets out findings of fact from [19] of the decision under challenge.
11. At [20 -21] the Judge writes:

> 20. A significant part of the Appellant's claim has been accepted by the Respondent. That is, that the Appellant was subject to serious harm / torture at the hands of her father and stepmother when she was living with them. The abuse started when the Appellant was 12 or 13 years old following her mother's decision to leave her father.

> The abuse included the Appellant's step-mother making the Appellant do all of the homework, not permitting her to go to school, locking her in her room and depriving her of food. It also included objectively more serious conduct whereby she was verbally abused and repeatedly beaten. For instance, after trying to escape on two occasions the Appellant was beaten with a belt and plastic hose (the first time) and burnt with a spoon (the second time). She was also beaten and attacked with a knife for refusing to marry the men of her father's choosing. A torture report substantiated the assault allegations. The above was accepted.
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> 21. It was also accepted as plausible that the abuse stopped when the Appellant escaped and took a taxi to Kirkuk whilst her father and step-mother were sleeping. The taxi driver provided some sanctuary to her and they ended up later marrying. What happened thereafter, though, remains in issue.

12. The Secretary of State did not accept BHK's account of the events that happened once she left the family home as the same with vague, speculative, and did not convince the Secretary of State that what was being said was genuine [22]. The Judge noted that BHK's witness statement of 15 March 2021 at [25] contained a very detailed account of her history of mistreatment from her father and stepfather, but thereafter there was a reduction in the level of detail provided. The Judge did not find the report from Professor Katona provided a good explanation for why BHK was able to provide detailed and compelling account of past persecution within the family home, which included physical assaults on torture, but was unable to provide a detailed account of what she claimed were numerous incidents thereafter when she was tracked down by her family.
13. In the following paragraph the Judge analyses the evidence referring to inconsistencies on a number of occasions.
14. The Judge at [64] accepted that BHK's cumulative effects of prolonged and repeated traumatic experiences she described could properly account for some inconsistencies in her account, particularly where related to date and time intervals. However, at [65 – 66] the Judge writes:

> 65. However, what it does not account for, is the marked reduction in detail given about events after her flight from her father's house than she had given about pre-flight events. It does not account for the very late introduction of significant features of the incident when a fire is said to have been started. It does not account for inconsistencies relating to the birth of her first child or whether she has had contact with her mother. Furthermore, the Appellant's husband's evidence does not serve to remedy the deficiencies in the detail of the post-flight events because his evidence, too, has been almost equally, if not more, vague.
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> 66. I remind myself of the lower standard of proof and that a large part of the Appellant's account has been accepted. I do not accept, though, for the reasons that I have set out in detail above, that the Appellant has told the truth about what happened after she met her husband. I am willing to accept, given how the Appellant was treated by her father whilst living with him, that it is at least reasonably likely that he initially wished to locate her after she had fled/escaped. However, I am not willing to accept that what followed, between 2011 and 2015, was a cat-and-mouse-like pursuit around the major cities of northern Iraq during which the Appellant and her husband had to repeatedly move around after being located and threatened by the Appellant's father. I do not accept that the Appellant left Iraq because of the attentions of her father or that he is actively engaged in trying to locate her. Ultimately, in answer to the first issue, I do not accept that the Appellant has given a credible account of events after she left her father's house.

15. The Judge considers the question of documentation from [67] leading to the finding at [70] that:

> 70. Accordingly, I do not accept that the Appellant and her husband's CSIDs were abandoned at their home in Kirkuk. Given the planned departure (which, after all, involved the obtaining of visas for Turkey) it seems to me significantly more likely, and I so find, that important belongings of the Appellant's and her family, such as their CSIDs, were left for safekeeping with the Appellant's husband's family members in Iraq. The Appellant's husband confirmed in oral evidence they had no problems navigating checkpoints thereafter using only their passports because it is sufficient to tell those stationed at such checkpoints that they only have their passports because they are undertaking international travel. Since I have rejected the suggestion that the Appellant's husband is not in contact with his family, those documents can be obtained by being sent to the UK or arrangements can be made to have them handed over upon arrival at the airport in Iraq.

16. Thereafter, the Judge considers the question of internal relocation writing at [73] – [74]:

> 73. The expert cannot otherwise particularly help about relocation because her section 4, about internal relocation, is predicated on the basis that she is at risk from her father and paternal family and that they have been tracked down across Iraq. Aside from in Chamchamal, I have not found the fear from her father to be well-founded or that she was tracked down several times in various cities. The bulk of section 4 is concerned with general country conditions and not about the reasonableness of relocation outside of the asserted fear.
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> 74. The Appellant's husband confirms in his own statement that he was able to work in Sulaymaniyah driving a bus and that they rented a house (albeit in a poor area) (para. 22). Given that the Appellant and her husband have spent some time living in Sulaymaniyah and given that, whilst there, they were able to establish themselves with a place to live and, in the Appellant's husband's case, securing gainful employment I do not consider that relocation there would be unreasonable or duly harsh on them.

17. The Judge considers Article 8 ECHR from [75] in which the Judge again refers to the expert evidence of Professor Katona and the impact of the appellant's experiences in Iraq and the diagnosis of PTSD. At [79] the Judge writes:

> 79. Importantly, he says that the Appellant's subjective fear of the consequences of her returning to Iraq is real, whether or not it is objectively well-founded. He describes a "consequent constant sense of threat and danger" which would likely lead to a significant worsening of her PTSD, depression and anxiety and "would apply wherever in Iraq she was sent". The "possible cognitive difficulties" coupled with the Appellant's subjective fear in my view would, more likely than not, lead to her failing to engage properly with the recommended treatment identified by Prof. Katona in para. 11, whether or not such treatment was available and accessible in Sulaymaniyah.

18. At [80] the Judge agrees with an opinion of Professor Katona who observed an exasperation of the appellant's mental health following return, coupled with the likelihood of her husband being required to work to support them and therefore being absent from the family home for that purpose, which would impede her in providing appropriate care for her two children and for the baby she was expecting at that time. The Judge considered this fed into the best interests of the children which is a primary consideration leading to the conclusion at [81] that the best interests of the oldest two children are to remain living in the UK with their parents where their mother's mental health has the best chance of improvement.
19. The Judge moves on to undertake the necessary balancing exercise, weighing up the competing arguments, from [82] of the decision under challenge. Between [84] – [86] the Judge writes:

84. For the reasons I have set out above, in my view there are particularly strong features of the protected family lives and the cumulative weight of the factors on the Respondent's side of the scales do not serve to outweigh the primary consideration of the children's best interests, which is to remain in the UK, particularly when the consequences to the Appellant's mental health upon return are also factored in.

85. Another way of expressing the above is to say that unjustifiably harsh consequences would be caused to the Appellant and her children were they subject to a removal to Sulaymaniyah.

86. I conclude my confirming that a return of this family unit to Iraq amounts to a disproportionate interference with rights protected by article 8 ECHR and is therefore unlawful under s.6 of the Human Rights Act 1998. The appeal will be allowed on that basis.

20. The Secretary of State sought permission to appeal claiming the Judge had incorrectly treated the best interests of the children is of paramount consideration when determining proportionality, instead of treating them as a primary consideration. The author of the grounds argues that the Judge's wording at [84] in finding the public interest is outweighed by the children's best interests is indicative an incorrect approach by the Judge when undertaking the article 8 proportionality balancing exercise.
21. Permission to appeal was granted by another judge of the First-tier Tribunal on 23 May 2024 the operative part of the grant being in the following terms:

2. The grounds asserting summary that the Judge materially urging his findings, that the Judge had erred in paragraph 80 of the decision that it will be in the children's best interest to receive education in the UK, and this outweighs the public interest in the maintenance of effective immigration control.

3. There is an arguable error of law that has been identified which merits further consideration. There is a reasonable prospect that a different Tribunal would reach a different decision.

22. BHK opposes the appeal. In a Rule 24 response filed by Mr Karnik dated 12 August 2024 he writes:

3. SUBMISSIONS

3.1. No Material Error at [80-86]

8. The SSHD challenges the weight FTTJ Curtis gave to the best interests of the children in the assessment of proportionality. She does so by misconstruing what FTTJ Curtis actually said. At no point does the FTT say that the best interests are paramount, and to accept that was the FTT's approach would be an improper misreading of the decision, and is unsustainable.

9. The FTT correctly treated those interests as a primary consideration, capable of overriding the interests in immigration control, the SSHD cannot point to a rule of law that says otherwise. It was properly open to the FTT to treat them as such, in the particular facts of this case, especially where there were no other countervailing factors.

10. The SSHD further advances a point that ignores the context in which the best interests are examined by the FTT. They were not the only factors that weighed in the Appellants' favour. The first Appellant's mental health, was properly a factor to take into account when drawing the balance, both in and of itself, and in respect of how that could affect the children; it is a factor the SSHD's grounds wrongly overlook. The FTT took a real world view and applied EV (Philippines) v SSHD [2014] EWCA Civ 874.

11. The FTT undertook a careful balancing exercise taking the interests of the children into account along with features of private life. Striking a fair balance is a matter of judgment, with which superior courts should be slow to interfere.

12. In UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095 at [19] Floyd LJ observed: “it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one”. 13. Floyd LJ further relied upon Baroness Hale’s dicta in AH (Sudan) Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. And at [26] citing Lord Hope in R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority [2013] UKSC 19, at [25]: judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined.

23. In relation to the cross-appeal, permission to appeal was initially refused to BHK but granted on a renewed application by Upper Tribunal Judge Perkins on 15 July 2024, the operative part of which reads:

> The First-tier Tribunal, in a separate decision, refused the appellant permission to appeal on protection grounds and described the grounds as a disagreement. I understand the reasons for that but it is accepted that the appellant has been seriously ill-treated by her father and the judge recognises that there is evidence that the appellant is vulnerable but, arguably, does not decide clearly if that claim is made out and how it impacts on the determining the appeal. Arguably the judge erred by considering credulity as an end in itself rather than a mean to deciding if she had proved that she needed protection.
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> It is also arguable that the judge erred by making adverse findings on points that were not clearly in issue.
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> I give the appellant permission on all grounds.

24. In relation to the cross-appeal, BHK relies on two ground seeking permission to appeal, Ground 1 asserts the Judge erroneously dismissed the protection claim grounds of credibility without considering, or doing so properly, whether BHK faced a real risk irrespective of the conclusions on credibility.
25. Ground 1 refers to [20] of the Judge’s decision in which it is accepted BHK is a victim of serious long-term violence and torture at the hands of her father, inter-alia, for refusing to marry as he required. The grounds assert the proper question for the Tribunal, applying paragraph 339 K of the Immigration Rules was to determine whether there was good reason to conclude that the prolonged animus would not continue. It is asserted the Judge erred in law for restricting consideration to the issue of credibility and in failing to address that essential element.
26. BHK asserts evidence was included in the bundle that “honour breaches” arising from disobedience rarely end. There is reference at [6] of the grounds for the requirement of the Judge to have (a) undertaken a risk assessment, (b) to have recognised that even a 10% chance that an applicant will face persecution for a Convention reason may satisfied the relevant test, and (c) that an appellant may exaggerate or fabricate evidence in order to reduce the risk of the appeal being wrongly dismissed. Reference is made to the decision of the Court of Appeal in MAH (Egypt) v Secretary of State for the Home Department [2023] EWCA Civ 216 (MAH), with specific reference to[51] in support of requirement (a) above, [52] in relation to requirement (b) and [25] in relation to requirements (c).
27. Ground 2 asserts the Judge erred in his approach to evaluation of credibility. It is asserted at [9] that the Judge was critical at [25] of the decision about core elements of the appellant’s claim, yet when the latest statement contained

more information, the Judge is criticised it for that reason. The grounds assert it was not the Secretary of State's position that the new evidence was inadequate or inconsistent when BHK was cross-examined on that aspect. The grounds assert the Judge was wrong to expect the same level of detail in respect of an incident that lasted a few moments as opposed to detail in respect of prolonged mistreatment.

28. BHK also argues that between [25 – 31] the Judge failed to take into account, or to do so properly when placing significant weight upon the interview, the letter drafted on the day after the asylum interview was first received in which BHK sought to correct the interview record. The logic of the Judge's argument is that an interview, once given, is not open to challenge even if it contains mistake which is said to be contrary to the interests of fairness and irrational. The grounds assert the interview was not conducted on the basis BHK was a vulnerable witness and not conducted applying equal treatment bench book guidelines the tribunal adapted in her oral evidence which it is asserted was overlooked by the Judge.
29. At [13] of the grounds BHK asserts that at [55] of the decision the Judge adopted a position that was never part of her case. It is said it was never BHK's case that her mother had simply left the family home without her father's consent, which was not her evidence, and she was not examined on that point.
30. At [55] the Judge wrote:

> 55. I also attach some weight to the expert's opinion that abuse in circumstances where honour of a patriarchal head of a family has been transgressed rarely stops and ends only with the satisfaction of male honour. However, on the topic of the Appellant's father's honour, one element of the claim which was difficult to reconcile with the asserted long-standing pursuit of the Appellant around Iraq, and for which there was not an adequate explanation, was why the Appellant's mother, as one of her father's three wives, would be able to simply leave the family home with the Appellant's brothers without consequence. The Appellant's mother continues to live in Chamchamal and there is no suggestion that she has come to harm from the Appellant's father. It places into some doubt the suggestion that the Appellant's father would hound her across Iraq for several years but engage in nothing like the same kind of action against one of his wives (the Appellant's mother) when she acted in a way that objectively impugned his honour.

31. BHK also asserts both she and her husband gave oral evidence that the grounds assert ran for almost 2 hours, and that evidence was consistent with their written evidence and with each other. The grounds assert the Judge discloses that no issue was taken by the Secretary of State that inconsistencies arose out of the oral evidence, making the failure of the Judge to take into account the consistency of the oral evidence a material error.
32. BHK, finally, asserts the Judge raises an issue with the expert evidence at [53] but the appellant was not on notice that more and better was expected and had she been further evidence could have been called. It is argued this breaches the principle of fairness.
33. At [53] the Judge wrote:

> 53. There is a further lack of clarity, in my view, about the expert's use of the word "database". She first uses that word in para. 3v. when she says that the Kurdish authorities controlled Erbil, Sulaymaniyah and Kirkuk and had access to "the database" without an explanation of what database she was referring to. The expert then sets out how "a simple request by the Appellant's father to find a missing daughter or payment of a bribe would secure the address of the man that had become her husband".

34. There is no cross rule 24 reply on behalf of the Secretary of State.

Discussion and analysis

35. A person challenging a decision of a judge of the First-tier Tribunal must have regard to the guidance provided by the Court of Appeal in Volpi v Volpi [2022] EWCA Civ 462 (see below).
36. This approach has been repeated in the more recent decision of the Court of Appeal in Hafiz Aman Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201 in which Lord Justice Green in giving the lead judgement, with which the other members of the Court agreed, wrote:

> UT's jurisdiction and errors of law
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> 26. Sections 11 and 12 TCEA 2007 Act restricts the UT's jurisdiction to errors of law. It is settled that:
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> (i) the FTT is a specialist fact-finding tribunal. The UT should not rush to find an error of law simply because it might have reached a different conclusion on the facts or expressed themselves differently: see AH (Sudan) v Secretary of State for the Home Department [2007] UKHL 49 [2008] 1 AC 678 at paragraph [30];
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> (ii) where a relevant point was not expressly mentioned by the FTT, the UT should be slow to infer that it had not been taken into account: e.g. MA (Somalia) v Secretary of State for the Home Department [2010] UKSC 49 at paragraph [45];
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> (iii) when it comes to the reasons given by the FTT, the UT should exercise judicial restraint and not assume that the FTT misdirected itself just because not every step in its reasoning was fully set out: see R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority [2013] UKSC 19 at paragraph [25];
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> (iv) the issues for decision and the basis upon which the FTT reaches its decision on those issues may be set out directly or by inference: see UT (Sri Lanka) v The Secretary of State for the Home Department [2019] EWCA Civ 1095 at paragraph [27];
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> (v) judges sitting in the FTT are to be taken to be aware of the relevant authorities and to be seeking to apply them. There is no need for them to be referred to specifically, unless it was clear from their language that they had failed to do so: see AA (Nigeria) v Secretary of State for the Home Department [2020] EWCA Civ 1296 at paragraph [34];
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> (vi) it is of the nature of assessment that different tribunals, without illegality or irrationality, may reach different conclusions on the same case. The mere fact that one tribunal has reached what might appear to be an unusually generous view of the facts does not mean that it has made an error of law: see MM (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10 at paragraph [107].

37. Also of considerable relevance is the more recent decision of the Court of Appeal in Alexander Isaac Hamilton v Mark Colin Barrow (1), Claire Michelle Barrow (2) and Matin Welsh (3) [2024] EWCA Civ 888 in which Lade Justice Falk, who gave the lead judgment with which the other members of the Court agreed, wrote at [30]-[31]:

> **Approach to the appeal**
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> 30. Mr Hamilton rightly referred us to case law reiterating the approach of this court to appeals on questions of fact. Lewison LJ's summary in *Volpi v Volpi* [2022] EWCA Civ 464, [2022] 4 WLR 48 at [2] bears repeating:
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> "The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:

(i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.

(ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.

(iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.

(iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

(v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

(vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

31. The appeal court's reluctance to interfere applies not only to findings of primary fact but to their evaluation and the inferences to be drawn from them: *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29 at [114]. Absent an error of legal principle, this court will interfere with such findings only in limited circumstances: see for example *Walter Lilly & Co. Ltd v Clin*. [2021] EWCA Civ 136, [2021] 1 WLR 2753 at [85], where Carr LJ said:

"In essence the finding of fact must be plainly wrong if it is to be overturned. A simple distillation of the circumstances in which appellate interference may be justified, so far as material for present purposes, can be set out uncontroversially as follows:

(i) Where the trial judge fundamentally misunderstood the issue or the evidence, plainly failed to take evidence in account, or arrived at a conclusion which the evidence could not on any view support.

(ii) Where the finding is infected by some identifiable error, such as a material error of law.

(iii) Where the finding lies outside the bounds within which reasonable disagreement is possible."

38. I do not find the points relied upon by BHK based upon the finding of the Court of Appeal in MAH establishes legal error.

39. Paragraph 25 of the lead judgement in that case was handed down by Lord Justice Singh and comes within the section of the judgement in which he was setting out a summary of the decision of the Upper Tribunal that was under appeal to the Court of Appeal. At [25] he stated:

25. The UT also bore in mind that genuine protection claimants might exaggerate or fabricate evidence in order to reduce the risk of the appeal being wrongly dismissed, citing SB (Sri Lanka) v Secretary of State for the Home Department

> [2019] EWCA Civ 160, at para. 43. It then set out in full what was said by Green LJ in SB (Sri Lanka) at para. 46, which I will quote below.

40. Judges of the First-tier Tribunal are taken to understand and apply the law unless it is shown otherwise. The Judge in the current appeal would have been well aware when assessing credibility of the possibility of exaggeration or fabrication. It is not made out, however, that the Judge failed to consider this possibility or alternatively considered it but he rationally rejected it or placed inappropriate weight on the evidence, for any reason connected with this principle.
41. Paragraph [51] of MAH falls within the section of the determination in which Lord Justice Singh was discussing the standard of proof in asylum cases, as is [52].
42. In [51] Lord Justice Singh considers "strictly speaking it could be said that it is not entirely accurate to refer to this as a standard of "proof", because the applicant does not in fact have to prove anything. It could more accurately be described as being an "assessment of risk".
43. This was clearly the view of Lord Justice Singh and has not led to a substantive change in guidance provided to decision-makers or judges not to consider the concept of burden and standard of proof in asylum or any other protection related claims. That is the current test which was correctly considered by the Judge.
44. There is also the point that the grounds referring to [51] appear to be challenging the semantics as the Judge did properly consider whether BHK would face a real risk if returned to Iraq on the basis she was entitled to be recognised as a refugee, but concluded she did not on the basis her claim was found to lack credibility. No legal error is made out in that assessment.
45. At [52] is referenced by Lord Justice Singh to what he describes as being a well-established principle that the standard required is less than a 50% chance of persecution occurring. That is a reference to the lower standard of proof applicable to an asylum appeal. The statement that even a 10% chance that an appellant may be persecuted is enough, by reference to the authorities set out in that paragraph, is not disputed but neither does it establish arguable legal error in the decision of the Judge because the Judge does not find sufficient credible evidence had been provided to establish sufficient risk to warrant the granting of refugee status whatever % is considered. That has not been shown to be finding outside the range of those reasonably open to the Judge on the evidence. Whether a person faces a real risk to the require degree is a question of fact.
46. Even if the asylum interview was not conducted on the basis the appellant was a vulnerable witness the Judge clearly treated the appellant as such during the course of the hearing and it is not made out the appellant was not able to properly put her case. It is not made out there is any procedural unfairness on this basis in the hearing before the Judge or his assessment of the evidence.
47. The comment at [14] of BHK's grounds is no more than that and fails to identify any legal error. It is not made out the Judge descended into the arena or anything other than assess the weight that could be given to the evidence, after which he made a judgement based upon those aspects that he felt he could consider and those he could not as a result of a lack of credibility.
48. Although the appellant asserts as [55] the Judge sets out something that was not part of the appellant's case the issue is whether such error, even if made out, is material. It is important to read the determination as a whole. Having done so I find it is not. There is no basis for accepting Mr Karnik's submission that this issue infected the other findings made by the Judge. Similarly, the

challenge to the decision at [53] is without merit and does not establish material legal error.

49. Proceedings before the First-tier Tribunal are adversarial. Directions were given for the parties to provide all the evidence on which they were seeking to rely. BHK provided reports from experts which were considered with the required degree of anxious scrutiny by the Judge. The quote in the grounds from Griffiths v TUI [2023] UKSC 48 at [70] appears in the section of the judgement of the Supreme Court when they were providing guidance in relation to the status and application of the rule in Browne v Dunn and the cases discussed previously by the Justices. That guidance said to be summarised in the following propositions:

    (i) The general rule in civil cases, as stated in Phipson, 20th ed, para 12-12, is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses.

    (ii) In an adversarial system of justice, the purpose of the rule is to make sure that the trial is fair. Page 30

    (iii) The rationale of the rule, ie preserving the fairness of the trial, includes fairness to the party who has adduced the evidence of the impugned witness.

    (iv) Maintaining the fairness of the trial includes fairness to the witness whose evidence is being impugned, whether on the basis of dishonesty, inaccuracy or other inadequacy. An expert witness, in particular, may have a strong professional interest in maintaining his or her reputation from a challenge of inaccuracy or inadequacy as well as from a challenge to the expert's honesty.

    (v) Maintaining such fairness also includes enabling the judge to make a proper assessment of all the evidence to achieve justice in the cause. The rule is directed to the integrity of the court process itself.

    (vi) Cross-examination gives the witness the opportunity to explain or clarify his or her evidence. That opportunity is particularly important when the opposing party intends to accuse the witness of dishonesty, but there is no principled basis for confining the rule to cases of dishonesty.

    (vii) The rule should not be applied rigidly. It is not an inflexible rule and there is bound to be some relaxation of the rule, as the current edition of Phipson recognises in para 12.12 in sub-paragraphs which follow those which I have quoted in para 42 above. Its application depends upon the circumstances of the case as the criterion is the overall fairness of the trial. Thus, where it would be disproportionate to cross-examine at length or where, as in Chen v Ng, the trial judge has set a limit on the time for cross-examination, those circumstances would be relevant considerations in the court's decision on the application of the rule.

    (viii) There are also circumstances in which the rule may not apply: see paras 61-68 above for examples of such circumstances.

50. The first point to note is that this criticism does not relate to a challenge by either party to the evidence of a witness but rather a comment by the Judge of the lack of clarity of certain aspects of the report.

51. When one considers the determination as a whole it is not made out that BHK did not receive a fair hearing. It is not made out the hearing was unfair or the manner in which the Judge conducted the hearing or determined the weight to be given to the evidence is infected by procedural unfairness. At [53] the Judge gives reasons why he finds there is a further lack of clarity in the report of Sheri Laizer, identifying issues of concern to him in the determination.

52. It is clear from a reading of the decision that Sheri Laizer was not called by BHK to give oral evidence or tendered for cross-examination. The Judge was therefore entitled to examine the report and decide what weight, if any, he could give to that report. Suggesting the Judge erred in not putting to the expert his concerns about the wording of the document does not establish material legal error. Having read the report myself the Judge's conclusions are well within the range of reasonable findings open to him on that specific evidence, which was clearly considered with the required degree of anxious scrutiny.
53. The comment at [15] that BHK and her husband gave oral evidence for almost two hours may be so, but that is a statement rather than identifies arguable legal error. I find no merit in the final sentence of that paragraph in which BHK asserts the Judge failed to take into account the consistent oral evidence. As I have found above, a reading of the determination shows the Judge considered that evidence with the required degree of anxious scrutiny. The Judge had the benefit of seeing and hearing oral evidence being given, but did not find whatever degree of consistency was given, that was sufficient to override the concerns recorded in the determination which have not been shown to outside the range of those reasonably open to the Judge on the evidence.
54. Then Judge is criticised for the findings between [25 – 31] in which it is claimed he failed to have proper regard to a letter sent following receipt of the asylum interview setting out a number of corrections. It is not made out the Judge failed to consider such evidence. A Judge is not required to set out each and every aspect of the evidence in the decision and I have not been referred to anything in the letter which as a material impact upon the findings made by the Judge.
55. Th asylum interview is dated 5 March 2021, witness statement 15 March 2021, with further representations having been made on 16 March 2021, 9 November 2021, 11 August 2022, within asylum questionnaire dated 6 June 2023. The contents of those documents, together with other information available to the Secretary of State formed the basis of the refusal of the protection claim dated 26 July 2023.
56. BHK's bundle for the purposes of the hearing before the Judge did not contain evidence not taken into account by the Judge. The index shows the material relied upon was a chronology, BHK's two statements said to be dated 5 December 2023, a country report of Sheri Laizer dated 22 November 2023, medicolegal report from Prof Katona dated 25 November 2023, and the Secretary of State's CPIN: Internal Relocation, civil documentation and Returns, Iraq dated October 2023.
57. The first of these statements undermines this ground of appeal as within it BHK provides further information in addition to that in the first statement of the same date, but sets out her response to the refusal letter in which she describes the interview, disagrees with a conclusion in the refusal letter arising from that interview, and maintains her case which the Judge clearly considered. BHK therefore took every available opportunity, in both written and oral form, to put her case before the Judge indicating no procedural unfairness arises.
58. In relation to [9 – 10] the Judge is criticised at [25] but the Judge gives adequate reasons for why he had concerns in relation to this evidence. This is therefore, in effect, a weight challenge when the weight to be given to the evidence was a matter for the Judge. The Judge also does not find this matter determinative but considered it together with all the other evidence made available as the Judge was required to do. The criticism at [10] that it was wrong of the Judge to expect the same level of detail in respect of an incident that lasted a few moments as opposed to details in respect of prolonged mistreatment is without merit and is no more than a disagreement with the Judge's findings on this

point. The Judge gave proper regard to Professor Katona's report in relation to what may impact past events and current mental health issue may have had upon the ability to recollect matters but found the inability of the appellant to recollect details of events much nearer the date of the hearing, with the same details as those of historical matters, to be material. That finding is within the range of those reasonably open to the Judge which is adequately reasoned.

59. In relation to Ground 1, it is not disputed that past persecution is relevant to the assessment of future risk and future persecution. It is not made out the Judge was unaware of or failed to consider such a submission. The issue of paragraph 339 K was raised in Mr Karnik skeleton argument before the Judge. What the Judge finds, however, is that notwithstanding BHK having suffered ill treatment and harm in the past there was no credible evidence that she would suffer ill treatment from the same source in the future. That is a finding which is adequately reasoned and within the range of those reasonably open to the Judge on the evidence.
60. In relation to the assertion in Ground 1 that the Judge erroneously dismissed the protection claim on the basis of credibility without considering whether even if BHK was not credible she may still face a real risk is without merit. The Judge gives ample reasons why there was good reason for concluding that what had occurred in the past would not occur in the future sufficient to entitle BHK to a grant of international protection. I find no merit in the assertion the Judge failed to maintain an open mind in relation to whether BHK had made out her case. I find no merit in the assertion the Judge was blinkered by focusing on issues of credibility as a result of which he failed to apply the proper principles set out in MAH.
61. Permission to appeal was refused to BHK by another judge of the First-tier Tribunal on the basis that the grounds are, in effect, no more than disagreement with the findings made by the Judge. I find there is merit in this conclusion. I find the Judge has not erred in law in a manner material to the decision to dismiss the appeal on protection grounds. The Judge considered the evidence with the required degree of anxious scrutiny, made findings supported by adequate reasons (they only need to be adequate not perfect), within the range of those reasonably available to the Judge on the evidence. Whilst BHK disagrees with the outcome and suggests alternative findings the Judge could have made, the findings actually made have not been shown to be rationally objectionable. On that basis I dismiss the cross-appeal.
62. In relation to the Secretary of State's appeal, it is important to read the determination as a whole.
63. It is unarguable that a protected right exists within the United Kingdom in relation to their private life. Although there is also family life the Judge correctly notes at [76] that as BHK, her husband, and their children will be returned together, there will be no interference with the same. The Judge properly accepts that the decision under challenge will interfere with the private life formed in the UK and identifies the real issue is the question of the proportionality of any such interference.
64. The Judge's findings on this issue are set out between [77 – 86] of the decision under challenge. The Judge accepts the best interests of the children are a primary consideration [80]. I find no merit in the assertion the Judge elevated the status of the best interests of the children to that of the paramount consideration when determining proportionality.
65. Having specifically stated that they are a primary consideration the Judge goes on to weigh up the competing arguments from [82] in which the Judge finds

there are no insurmountable obstacles for the purposes of paragraph 276 ADE [82].

66. I set out above the Judge's findings at [84] – [86] above. It is clear from the first sentence of [84] that the Judge has incorporated into the proportionality assessment all the reasons set out above in the determination, including by reference to the expert evidence, as demonstrated by [80]. The Judge's finding in this paragraph is clearly that the appellant's mental health issues, coupled with her husband having to work and not being available to support her, will impact upon her ability to provide appropriate care for the children. That is a result of the holistic assessment the Judge was required to undertake.
67. Having weighed up the potential damage to BHK's ability to be able to meet the best interests of the children if they were returned to Iraq, for which adequate reasons have been given, the Judge found that the weight to be given to the factors in favour of BHK outweighed the public interest. This is not a decision solely made on the basis of the best interests of the children in isolation.
68. As noted by the Judge at [85] unjustifiably harsh consequences will be caused to BHK and the children if they are removed to Iraq, those unjustifiably harsh consequences are not limited to the children and it cannot be proportionate to remove them if such circumstances exist.
69. It does not matter that another judge might not make this decision, many would. The fact the Secretary of State may consider the decision to be overgenerous is irrelevant. Taking into account the guidance provided by the Court of Appeal above it cannot be said the Judge's conclusion in relation to the human rights aspects is a finding outside the range of those reasonably open to the Judge on the evidence. It has not been shown to be rationally objectionable or to be a finding infected by material legal error.
70. On that basis the Secretary of State's appeal is also dismissed.

Notice of Decision

71. The appeal and cross-appeal are dismissed as neither establishes material legal error. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 September 2024