IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003354

First-tier Tribunal No: PA/00249/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 15th of October 2024

Before

UPPER TRIBUNAL JUDGE HOFFMAN

Between

RE
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Jafar, Counsel
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on 8 October 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant 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. The appellant, who is national of Egypt, appeals the decision of First-tier Tribunal Judge Shiner ("the judge") promulgated on 28 May 2024 dismissing his appeal against the respondent's decision dated 10 January 2023 refusing his fresh asylum claim.

Background

2. The appellant arrived in the UK on 15 July 2015 with a business visa valid until 2 December 2015. However, on expiry of that visa the appellant failed to leave the country. On 27 July 2016 the appellant was arrested on suspicion of committing a criminal offence following which he was served with notice that he was liable to removal as an overstayer. On 31 August 2016, the appellant claimed asylum on the basis that he feared persecution from his family because he had converted from Sunni to Shia Islam. The appellant's asylum claim was refused on 15 February 2017 and his appeal against that decision was dismissed by First-tier Tribunal Keith on 13 April 2017.

3. On 17 July 2021, the appellant made further submission to the respondent. This time, he said that he could not return to Egypt because he had been sentenced in absentia to 25 years' imprisonment for membership of the Muslim Brotherhood. The appellant's further representations were refused by the respondent in the decision dated 10 January 2024. As explained above, the appellant's appeal to the First-tier Tribunal was then dismissed by the judge on 28 May 2024.

4. On 9 July 2024, the appellant was granted permission to appeal to the Upper Tribunal by First-tier Tribunal Judge Hollings-Tennant on the following three grounds:

> (1) The judge made a material error of law in rejecting the evidence of the appellant's witness, Mr Al-Khafage, in circumstances where the witness was not cross-examined or his evidence challenged by the respondent.
>
> (2) The judge made material errors of law in his treatment of the expert evidence relied upon by the appellant.
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> (3) The judge perversely made findings that Egyptian court documents obtained by the appellant's expert witness through an Egyptian lawyer and verified by another Egyptian lawyer were "bogus".

Findings – Error of Law

Ground 1: Treatment of the appellant's witness

5. Judge Keith dismissed the appellant's first asylum appeal in part on the basis that the appellant had failed to produce any witness evidence from his mosque to support his claim to have converted to Shia Islam. However, at his second appeal hearing before Judge Shiner, the appellant produced a witness, Mr Al-Khafage, who claimed to have met the appellant in 2015 at his mosque and confirmed that the appellant had converted from Sunni to Shia Islam. Mr Al-Khafage provided a witness statement dated 21 October 2023 and also attended the hearing before the First-tier Tribunal to give oral evidence. However, the presenting officer did not cross-examine him.

6. At [48] of his decision, the judge had regard to Judge Keith's findings that the appellant had failed to prove that he had converted to Shia Islam and that there was an absence of supporting witnesses before him. The judge was entitled to take that as his starting point in accordance with the case of Devaseelan (Second Appeals, ECHR, Extra-Territorial Effect) [2002] UKAIT 00702. At [49], the judge says,

> "I have had particular regard to the evidence relied upon by the Appellant from [Appellant's Bundle] 116 to 129 and to the witness statement and

> evidence of Mr Al Khafage. Mr Al Khafage says that he has known the Appellant since having met him in 2015 at the Shia Mosque, in 2015 [sic] in Kilburn. He refers to having known him and their friend Magred since then. I have had no proper explanation from the Appellant as to why Mr Al Khafage could not have given evidence at the hearing before judge [sic] Keith, since they knew each other at the time, and as such falls to be considered in line with Devaseelan [39 (4)], as evidence which I should and do treat with the greatest circumspection. I note too that such a letter from S.F. Milani minister of religion [sic] could also have been provided by him or someone from the Islamic centre at the time. That letter I also treat with caution for the same reasons (Devaseelan [39 (4)] noting that such an absence of evidence was referred to by judge [sic] Keith. I consider the possibility that the Appellant has in light of judge [sic] Keith's decision sought thereafter to bolster this claim in respect of conversion to Shia by obtaining the evidence that judge [sic] Keith suggested was expected – see [59] of judge [sic] Keith's decision. The appellant in as much said so in oral evidence when he said that the letter from the cleric was not required to show he was Shia, the inference being that he obtained it for evidence only. That of itself is not significantly undermining of the claim, but within the context of his overall claims as to conversion to Shia, and judge [sic] Keith's decision I find that letter and indeed the photographs add little to the Appellant's claims of conversion."

7. Mr Jafar, on behalf of the appellant, argued that there was no engagement with the actual evidence of the witness. However, I reject that submission. It is clear from the second and third sentences of [49] that the judge was aware of the crux of Mr Al-Khafage's evidence. Mr Jaffar also submitted that it was unclear from the decision whether or not the judge accepted or rejected Mr Al-Khafage's evidence. If the judge rejected evidence, he said, then he was required to give reasons; moreover, it was not open to the judge to reject Mr Al-Khafage's evidence when his evidence has not been challenged by the respondent.

8. In reply, Mr Wain, on behalf of the respondent, argued that the judge correctly applied the principles set out in Devaseelan at [40(4)] (and not [39(4)] as the judge erroneously cited it):

> "40. We now pass to matters that could have been before the first Adjudicator but were not.
>
> (4) Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. An Appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. (Although considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute.) It must also be borne in mind that the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should not usually lead to any reconsideration of the conclusions reached by the first Adjudicator."

9. I am satisfied that the evidence of Mr Al-Khafage was not introducing new facts to the appellant's case. Rather, Mr Al-Khafage's evidence was presented to

support the claim made by the appellant in his first asylum appeal that he had attended a Shia mosque in the UK since 2015. That is not, however, to say that the judge was wrong in principle to question why the appellant did not ask Mr Al-Khafage to give evidence at his first appeal. Nevertheless, I am satisfied that the judge was wrong in his treatment of the evidence of Mr Al-Khafage in circumstances where the respondent declined to test his evidence or otherwise question his credibility. I have given careful consideration to whether this error was material.

10. On the one hand, at [23], the judge records that the appellant's representative confirmed that the appellant was not pursuing his claim that he was at risk from his family, which was based on his purported conversion to Shia Islam. Mr Wain suggested that this might be the reason why Mr Al-Khafage was not cross-examined, although there is no evidence before me to confirm that. Nevertheless, the issue of conversation was clearly an aspect of the appeal because the judge considers the evidence in relation to this in his decision. It appears that the purported conversion was relevant to the appellant's claim that he feared persecution from the Egyptian authorities on the basis of his perceived political opinion because it went to the issue of why his family in Egypt did not inform him before his first asylum appeal of the prosecution brought against him: see [36] where the appellant claimed that his family had rejected him because of his conversion and stopped talking to him in 2016. However, at [51], the judge states that the appellant confirmed in oral evidence that his family knew about the prosecution in August 2015 but failed to mention it because they did not want to worry him and thought it could be resolved. The judge goes on to find that even if the appellant had converted to Shia Islam, there was a three-month window when his family were still in contact with him during which they could have told him about the prosecution. The judge found it to implausible that the appellant's family would not tell him that he was being prosecuted by the Egyptian authorities. That finding is not challenged by the appellant and I am satisfied that it is one that was reasonably and rationally open to the judge based on the evidence before him. On that basis, it might be said that the question of whether the appellant had converted to Shia Islam and attended a Shia mosque in the UK was immaterial to the judge's findings.

11. However, on consideration, I am satisfied that the adverse findings made by the judge regarding the conversion did feed into his ultimate findings on credibility at [72] and, as a consequence, I am unable to say that but for the judge erring in his approach to the witness's evidence, the outcome would have been the same. I therefore find that the judge did make a material error of law for the reasons argued by the appellant.

Grounds 2: Approach to the expert evidence

12. In support of his appeal, the appellant provided an expert report from Mr Md Solaiman Tushar. Mr Tushar is an advocate of the Supreme Court of Bangladesh, Head of Chambers at Justice for All, a researcher and a journalist. He has also been called to the Bar in England and Wales. Beyond writing an opinion piece on Egypt for a publication called The Daily News Nation in September 2023, it is difficult to identify what qualifies Mr Tushar to be a country expert on Egypt. It is unclear from his CV whether he has even visited the country. Nevertheless, at [55] the judge accepted Mr Tushar's qualifications and that he was "qualified to comment upon society, politics and security matters in Egypt".

13. Mr Tushar had instructed an Egyptian lawyer, Mr Masoud Nassrallah Abu Farag, to verify that the appellant had been subject to a criminal prosecution in Egypt. According to Mr Tushar, Mr Farage was able to verify that was the case: see para 53 of his report. At para 54 of his report, Mr Tushar explains the steps taken by Mr Farag to verify the existence of the criminal case, which involved Mr Farag visiting Tanta Court on 27 August 2023 and paying a fee to access the information. Mr Tushar also says at para 55 that a letter was provided by another Egyptian lawyer, Mr Mahmoud Al-Laboudy, providing information about the case as well as copies of the verdict, arrest warrant and the travel ban order issued against the appellant.

14. However, at [59] the judge questions why Mr Tushar rather than the appellant's British lawyers would instruct Mr Farag to verify the case, and he found that this risked Mr Tushar's objectivity as an expert witness. The appellant argues, and I accept, that without more, this finding is not adequately reasoned and is not therefore a sufficient basis to cast doubt on Mr Tushar's report.

15. The judge also states that it is unclear how Mr Farag was chosen to undertake the task. That I am satisfied that finding was more reasonably open to him. However, at [60], the judge says:

> "Mr Tushar says that it is plausible that a person could be prosecuted for collecting finance for the MB. I note that he gives examples from AB51[58] to [62] of those in leadership of the MB or supporters committing violence and demonstrations. Mr Tushar asserts that he finds it rational that there was a delay from the initial investigation in 2015 to the judgment in January 2021. <u>It seems to me that six years is a long time to gather information etc, and Mr Tushar has not adequately explained to me, by reference to source material, country information, reported examples and the like why it would be that such a prosecution would be delayed to that degree. Even taken at its highest Mr Tushar has not uncritically, I conclude examined this aspect of the Appellant's claim and his report falls short in this regard</u>."
>
> Underling added]

16. I am satisfied that the underlined sentences demonstrate that the judge failed to have sufficient regard to the report of Mr Tushar. As the appellant points out, contrary to what the judge claims, Mr Tushar did in fact provide several examples at paras 58 to 60 of his report of cases where there has been a gap of several years between alleged Muslim Brotherhood-related acts and conviction. At para 58, Mr Tushar refers to a man named Mahmoud Ezzat being convicted in 2021 for acts alleged to have occurred in 2013. At para 59, Mr Tushar writes that in July 2021, 24 members of the Muslim Brotherhood were convicted of several crimes alleged to have taken place in 2014 and 2015. Finally, at para 60, Mr Tushar refers to 10 members of the Muslim Brotherhood being found guilty of offences against security officers in 2015. I am therefore satisfied that the judge made a material error of law by failing to have proper regard to the evidence of Mr Tushar.

17. The appellant also argues that, at [61], the judge erred in law by criticising Mr Tushar for not considering whether the appellant feigned conversion to Shia Islam. I accept that it was not the role of Mr Tushar to opine on whether the appellant had genuinely converted to Shia Islam. He had been instructed primarily to deal with the issue of the prosecution as a perceived member of the

Muslim Brotherhood. While Mr Tushar does consider the impact on a person who has converted from Sunni to Shia Islam at para 85 of his report, it was unnecessary for him to consider whether the appellant was a genuine convert. Instead, it was for the judge to consider what weight to attach to the expert's opinions in this regard and to consider the report in the round with the rest of the evidence. Instead, the judge says that Mr Tushar's failure to consider whether the appellant was "feigning conversion" amounts to an additional reason to undermine his evidence.

18. For the above reasons, I am satisfied that the judge did make a material error of law with regards to his assessment of Mr Tushar's report.

Ground 3: Assessment of the Egyptian court documents

19. At [66], the judge found that the Egyptian court documents relating to the alleged prosecution of the appellant were internally consistent and that he therefore attached "some weight to the documents as being genuine". However, the judge then goes on to consider whether the appellant had arranged, either alone or with others, to obtain "false documents to support his asylum claim through the use of Mr Al-Laboud". The judge notes that Mr Farag has verified that there was a prosecution and he finds that this means either that both the court documents and Mr Farag's report are bogus or that they are all genuine. As the judge then notes, if he was to find that the documents are bogus, that would also implicate Mr Tushar in the deception.

20. The judge goes on at [68] to [69] to take into account that the appellant had failed to give a plausible explanation as to why he waited until July 2021 to make further representations to the Home Office based on a risk of return to Egypt due to the prosecution when the judge had found that he should have been aware of this from his family in 2015.

21. At [70], the judge acknowledges that the country evidence supported the appellant's claim that prosecutions of Muslim Brotherhood members do occur "in the manner claimed and occur not infrequently" in Egypt. However, at [72], the judge says the following:

> "Notwithstanding the manner in which the Egyptian documents were obtained, and Mr Tushar's and Mr Farag's evidence, I find that the Appellant has not to the lower standard proved the Egyptian documents. For the reasons that I have set out above the Appellant's claim is simply not believable. It is is [sic] not plausible that the Appellant would have only become aware of the prosecution in 2020 as claimed, when on his account his family had known of it (as he claims) since 2015. I have set out my reasons in this regard including his evidence in respect of his brother and his claim of conversion to Shia – both claims I find to be wholly implausible for the reasons given. Thus whilst I give weight to the Egyptian documents, to Mr Tushar's report and Mr Farag's report for the reasons I have set out (internal consistency etc) I find the Appellant's account to be so unbelievable that I must reject that evidence. I do so considering all of the evidence to the lower standard in the round. I have had regard to Chiver [1997] INLR 212, and note that an appellant misleading or exaggerating an aspect of a claim should not necessarily lead to the conclusion that all is untrue. Moreover I note the comments of Sedley LJ in Shasi

> [2003] EWCA Civ 1137 in which it was said that in assessing credibility, the possibility must be considered that a fundamentally tenable case has been embellished with falsehoods. I have considered this aspect in respect of the Appellant's claims. But I find that the Appellant's case is so undermined in respect of his core claim - it is not an aspect of it or supplementary to it but goes to the heart of his claims in respect of his Shia conversion and being disowned by his family that his claims lack any credibility. I repeat my findings at [69] in this regard. He has failed to show to the lower standard that such claims are true."
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> [Underling added]

22. The appellant argues that in finding the court documents were bogus, the judge had, without foundation, made serious accusations about the integrity of three lawyers, one of whom (Mr Tushar) has been called to the Bar in England and Wales and is regulated by the Bar Standards Board. Mr Wain, in response, submitted that the judge made no such finding and, instead, the judge found that there were other aspects to the case that led him to conclude that, irrespective of the court documents, he did not accept the appellant's case was genuine.

23. I find that having found at [66] that the court documents were internally consistent and having then raised the possibility that they may be bogus, the judge then fails to make any findings about the genuineness of the court documents. What the judge says at [72] is that "Notwithstanding the manner in which the Egyptian documents were obtained, and Mr Tushar's and Mr Farag's evidence, I find that the Appellant has not to the lower standard proved the Egyptian documents". While it is correct that documents have to be considered in the round, the appellant argues that there was no country evidence before the judge to suggest that it was possible to obtain forged court documents in Egypt and, furthermore, that given that the court documents had come from independent and impartial sources, the judge erred in finding that adverse credibility findings in relation to the appellant's evidence materially affected the weight to be attached the court documents: see TF v Secretary of State for the Home Department [2018] CSIH 58 at [39].

24. On consideration, I am satisfied that the judge did make a material error of law. The judge accepted that the court documents were internally consistent. There was also evidence from two Egyptian lawyers before him. Furthermore, the judge found that the nature of the prosecution was supported by the country evidence which showed that prosecutions related to the Muslim Brotherhood were "not infrequent" in Egypt. Conversely, there was no country evidence before the judge that suggested it is easy to obtain forged court documents in Egypt. Nevertheless, the judge found that the credibility issues he had identified in the appellant's evidence regarding when he found out about the prosecution outweighed the weight he could attach the evidence of the prosecution. Given those findings were made in the context of the errors identified in Grounds 1 and 2, and that it is the lower standard of proof that applies in protection cases, I am satisfied that the judge did make a material error of law in relation to his assessment of the evidence at [72].

Remaking

25. In the circumstances, I am of the view that none of the findings of fact can be preserved. Taking into account the nature and extent of the findings of fact

required to remake the decision, applying paragraph 7.2 of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal* I am satisfied that remittal for a de novo hearing is the appropriate course of action.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on a point of law.

The decision of the First-tier Tribunal is set aside with no findings preserved.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal at Taylor House, to be remade afresh and heard by any judge other than Judge Shiner.

M R Hoffman

Judge of the Upper Tribunal
Immigration and Asylum Chamber
10th October 2024