Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/07611/2014

THE IMMIGRATION ACTS

Heard at Newport	**Determination Promulgated**
On 12 May 2015	**On 5 June 2015**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MJ
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondent: Ms N Gowman, instructed by Crowley & Co Solicitors

REMITTAL AND REASONS

1. This appeal is subject to an anonymity order by the First-tier Tribunal pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party invited me to rescind the order and I continue it pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698).

Introduction

2. The appellant is a citizen of Iran who was born on 6 July 1981. She arrived in the United Kingdom on 17 August 2012 and claimed asylum. On 11 September 2014, the Secretary of State refused the appellant's claim for asylum and humanitarian protection and under Art 8 of the ECHR. The Secretary of State accepted that the appellant had been detained and seriously mistreated by the Iranian authorities in 2009 but did not accept her claim that following a celebration of the Charshambeh Souri festival on 14 March 2010, the appellant, her husband and daughter, were attacked by plainclothes Basij and uniformed police. She and her daughter (but not her husband) escaped and seven days later she left Iran. Authorities had come looking for her and she was wanted by them.

3. Having refused the appellant's claim, on 12 September 2014 the Secretary of State refused the appellant leave to enter and proposed to remove her to Iran.

4. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 15 January 2015, Judge Suffield-Thompson allowed the appellant's appeal. She accepted the appellant's account and that, as a consequence, that she would be at risk on return to Iran.

5. The Secretary of State sought permission to appeal against the judge's positive credibility finding. First, the judge had erred in law in failing to deal with the points raised in paras 21–42 of the Reasons for Refusal Letter relevant to the appellant's credibility. Secondly, the judge had failed to deal with issues raised under s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 in reaching her positive credibility finding.

6. On 30 January 2015, the First-tier Tribunal (Judge Pooler) granted the Secretary of State permission to appeal on those grounds.

Discussion

7. Mr Richards, who represented the Secretary of State relied on the grounds. Ms Gowman, who represented the appellant, relied on a written skeleton argument. Both representatives made oral submissions.

8. In the Reasons for Refusal Letter, the Secretary of State raised a number of points in concluding that the appellant's account was not to be accepted. First, she relied on the fact that between 2009 and 2012 the appellant had been able to obtain a passport with the intention of travelling abroad for holiday purposes which suggested that the Iranian authorities had no interest in her (para 31). At paras 33 and 34, the Secretary of State considered it "inconsistent" (by which she surely meant "implausible") that the appellant would not have tried to phone her husband, shortly after she escaped, in order to find out what had happened to him and further that it was implausible that she would be

recognised personally and that, again, it was "inconsistent" that when she was told her home had been raided she did not ask who had done so in order to try to determine the fate of her husband. At para 35, the Secretary of State referred to the lack of supporting evidence or documentation to substantiate the appellant's claim.

9. At paras 36–37, the Secretary of State took into account the somewhat unorthodox route by which the appellant had reached the UK using a forged Israeli passport. Having travelled to Turkey, she and her daughter then flew to Malaysia (where they remained for 15–17 days) before returning to Istanbul Airport where they flew to Italy before taking a train to Switzerland, eventually flying from Zurich to the UK.

10. In paras 39–42, the Secretary of State considered certain of the appellant's behaviour to be potentially damaging of her credibility under s.8 of the 2004 Act, namely her failure to disclose her asylum claim immediately on arrival but only after being further interviewed and retracting her account to be an Israeli national on holiday in the UK, producing a forged passport to an Immigration Officer and failing to claim asylum in a safe third country where she had a reasonable opportunity to do so, namely Italy and Switzerland.

11. All of these points were relied upon by the Presenting Officer before the judge.

12. The judge set out the appellant's evidence at length and also a medico-legal report from Dr Mary Beyer. Dr Beyer works for the Freedom from Torture at the Medical Foundation for the Care of Victims of Torture. At para 20, the judge noted that:

> "The version of events given to the doctor is a mirror reflection of the evidence the appellant gave in court to the Tribunal. This account was found to be credible by the doctor."

13. The appellant presented to Dr Beyer with psychological problems, including features of PTSD. Dr Beyer concluded that the appellant was suffering from "a severe depressive episode and PTSD". At para 24, the judge notes that:

> "The doctor concluded this not solely based on what the appellant had told her."

Then, the judge sets out from para 38 of the expert's report the following:

> "On my observations of effect, body language and demeanour during the mental state examination. Although her depression is exasperated by the sudden and distressing separation from her husband in 2012 it is, in my view, together with the PTSD, linked to her torture experiences in 2009 which she constantly relives in flashbacks and nightmares."

14. At paras 42 and 43, the judge set out her reasons for her positive credibility finding as follows:

> "42. Throughout my consideration of the facts of this case I intend to bear in mind that great care must always be taken before making adverse findings of credibility and each finding should only be made where they are justified in the light of the a particular circumstances.
>
> 43. I am asked to assess this claim firstly as a refugee case and to find that the appellant meets the refugee criteria. I am greatly assisted by the Country Guideline case, the medico legal report obtained by the representative for the appellant and by the appellant's own written and oral testimony. I find from the outset that the appellant is an entirely credible witness. She was clearly very distressed in giving her testimony. Her account to the Tribunal was just as she had told the doctor and there were no material inconsistencies that led me to conclude she was not a witness of truth. It was hard for her to give her evidence as she was so distressed at points and various breaks were given to her to enable her to carry on. I accept the appellant's evidence in its entirety."

15. Mr Richards submitted that this was an inadequately reasoned finding which failed to take into account the points raised in the refusal letter and made no mention of the issues raised under s.8 of the 2004 Act which were "potentially damaging" of the appellant's credibility. He submitted that it was clear that the Presenting Officer had relied on these matters as set out in para 25 of the determination. He submitted that the judge's failure was a material error of law.

16. Ms Gowman submitted that an appellate tribunal should be reluctant to interfere with a finding by a Tribunal of fact particularly where it was based upon having seen and heard a witness. She relied upon Hemeng v SSHD [2007] EWCA Civ 640 at [15] *per* Buxton LJ for that proposition. Ms Gowman submitted that the judge had given adequate reasons namely the appellant's demeanour, the medico-legal report and also her reference to "the Country Guideline case".

17. In substance I accept Mr Richards' submissions that the Judge's decision cannot stand.

18. First, it is clear to me that the judge failed to apply s.8 of the 2004 Act. Section 8(1) states that:

> "In determining whether to believe a statement made by or on behalf of a person who makes an asylum claim or a human rights claim, a deciding authority shall take account, as damaging the claimant's credibility, of any behaviour to which this Section applies." (my emphasis)

19. That provision is unambiguous. A decision maker, which includes the First-tier Tribunal (see s.8(7)(c)) must take into account any behaviour covered by s.8. Here, there were three aspects of the appellant's "behaviour" which engaged s.8.

20. There was the failure on her part to disclose her claim immediately on arrival and only to do so after having been interviewed further and retracting her story of being an Israeli national coming to the UK for a holiday. That was behaviour which, under s.8(2):

> "…
>
> (a) is designed or likely to conceal information,
>
> (b) is designed or likely to mislead, or
>
> (c) is designed or likely to obstruct or delay the handling or resolution of the claim or the taking of a decision in relation to the claimant."

21. Further, the appellant produced a forged passport to the Immigration Officer. That falls within s.8(3)(b) which provides that:

> "Without prejudice to the generality of subsection (2) the following kinds of behaviour shall be treated as designed or likely to conceal information or to mislead –
>
> …
>
> (b) the production of a document which is not a valid passport as if it were,
>
> …"

22. Finally, the appellant failed to take "advantage of a reasonable opportunity" to make an asylum claim in a "safe country", namely Italy and Switzerland. That was "behaviour" falling within s.8(4).

23. Whilst none of this behaviour, even if established, required the judge to find the appellant not to be credible, it was nevertheless "potentially" damaging of the appellant's credibility (see JT (Cameroon) v SSHD [2008] EWCA Civ 878) and it was an error of law for the judge to fail to take that "behaviour" into account.

24. Secondly, there were a number of matters – perhaps wrongly described as "inconsistencies" – raised in the refusal letter with which the judge was required to grapple in reaching her adverse credibility finding. Again, these were perhaps not in themselves necessarily fatal to the appellant's credibility but they did require consideration; for example, the implausibility of the route of the appellant's journey to the UK.

25. I do not accept Ms Gowman's submission that the judge dealt adequately with the issue of credibility in paras 42–43 of her determination.

26. First, the Judge says that she was "greatly assisted" by the country guidance case. That appears to be a reference to two cases cited at para 29 of her determination: BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36 (IAC) and SB (Risk on return – illegal exit) Iran CG [2009] UKAIT 0053. At para 48, the judge again referred to the "Country Guidance case" in relation to the appellant's credibility as follows:

> "I rely on the following extracts from the Country Guideline case as factors which have assisted me in finding the appellant's fear is well founded and that her version of events of what happened to her in 2009 and 2012 is credible:

> Paragraph 1.2.1 "The security forces are reported not to be fully effective in combating crime and corruption remains a serious problem"
>
> Paragraph 1.2.3 "if the person's fear is of ill treatment / persecution by the state authorities, or by agents acting on behalf of the state, then they cannot be expected to go to those authorities for protection.
>
> Paragraph 1.2.6 "The Iranian government requires all citizens to have exit permits for foreign travel, A woman must have the permission of her husband, father or other male relative to obtain a passport …… Those who leave Iran illegally without an exit permit faces being fines on return or sentences to between one and three years imprisonment".
>
> Paragraph 1.2.8 "Iranians facing enforced return do not in general face a real risk of persecution or ill treatment …… Illegal exit may however add to the difficulties an applicant would face if they had attracted the adverse attention of the authorities for another reason.""

27. It is not immediately apparent to me how this supported the appellant's claim of what she said had occurred to her between "2009 and 2012". The 2009 detention and ill-treatment was, of course, accepted. Apart from dealing with issues of "sufficiency of protection" and the position of an individual who leaves Iran illegally, nothing in the passages cited appears to relate directly to the appellant's account.

28. Secondly, the judge relied upon the medico-legal report. Medico-legal reports can, of course, be helpful in assessing an individual's credibility. The consistency of the appellant's account given to the judge with that she gave to a doctor is supportive of her credibility on the basis that she has, on at least two occasions, given the same account. However, the fact that the expert found the appellant's account to be "credible", was not a matter which should have been given any real weight by the judge. The issue of credibility was for the Tribunal not for the doctor. Further, the expert's conclusion that the appellant suffered from "a severe depressive episode and PTSD" was related by the expert to the appellant's "torture experiences in 2009" as the judge set out in para 24 of her determination. The appellant's 2009 experiences were accepted before the judge. It is wholly unclear to me how, therefore, the medico-legal report, and in particular the diagnosis of PTSD, assisted to support the appellant's claim in relation to events <u>after</u> 2009.

29. Finally, the judge relied upon her own observation of the appellant, including that she was distressed and her evidence contained no "material inconsistencies". Whilst the latter may well be the case if the word "inconsistency" is read literally, that did not resolve the points made which were, in substance, that the appellant's account was not wholly "plausible". The judge failed to engage with that, as Mr Richards pointed out.

30. I accept, in principle, Ms Gowman's submission that an appellate tribunal should be cautious in interfering with a tribunal of fact who has seen and heard witnesses. That will be particularly the case where there is a conflict between witnesses at a hearing. The demeanour of a witness

may, but with care, be taken into account if it demonstrates one witness, for example, is more likely to be telling the truth. Of course, as is well recognised in this jurisdiction, special care must be taken when assessing the demeanour of witnesses from a multitude of cultural and ethnic backgrounds. Behaviour, gestures and body language may lead to signals such that both positive and negative demeanour may be misread. Here, the judge was assessing the oral evidence of the appellant alone against the background of all the material, including the medico-legal report, the background evidence and the country guidance case. I accept that the judge was, at least, entitled in principle to take into account that the appellant was distressed. But, as Mr Richards submitted, the accepted events of 2009 were undoubtedly distressing and the judge was not in a position to conclude that the appellant's distress was because of the genuineness of her whole account or simply because of her recounting or recollecting the 2009 events.

31. In my judgment, the judge erred in law in reaching her positive credibility finding for the reasons I have given. She failed to apply s.8 of the 2004 Act and failed to grapple with the points raised by the respondent in the refusal letter and relied upon before her. The judge's reasoning in paras 42–43 cannot stand up to scrutiny. They are inadequate to found her positive credibility finding.

Decision

32. Thus, the First-tier Tribunal's decision to allow the appellant's appeal cannot stand. I set it aside.

33. The appeal must be reheard *de novo* and the appropriate forum for that, applying the Senior President's Practice Statement at para 7.2, is the First-tier Tribunal.

34. Consequently, the appeal is remitted to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Suffield-Thompson.

Signed

A Grubb
Judge of the Upper Tribunal