Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/01406/2020**

THE IMMIGRATION ACTS

Heard remotely at Field House
On 25 February 2021 *via Skype for Business*

Decision & Reasons Promulgated
On 12 April 2021

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

AA (IRAQ)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S. Michaels, Counsel, instructed by Shawstone Associates
For the Respondent: Mr C. Avery, Senior Home Office Presenting Officer

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

The documents that I was referred to were primarily the decision of the First-tier Tribunal, the grounds of appeal and the supporting documents, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: they were content that the proceedings had been conducted fairly in their remote form.

1. The appellant is a citizen of Iraq born in January 1969. He appeals against the decision of First-tier Tribunal Judge S Khan promulgated on 22 April 2020 dismissing his appeal against a decision of the respondent dated 27 January 2020 to refuse his asylum and humanitarian protection claim.

2. The focus of this appeal is whether it was unfair for the judge to refuse the appellant's application to adjourn the proceedings, and whether she failed to apply the Joint Presidential Guidance Note No. 2 of 2010 and take other necessary steps arising from the appellant's vulnerability.

Factual background

3. The appellant claimed asylum on the basis of the risk he claimed to face from having provided assistance to Western allies in Iraq during the war and in the years that followed. Specifically, he claims to have worked for a company which provided housing, food and clothes for American troops. Subsequently, he worked as a professor at a university. He claims that militia groups in Iraq attempted to assassinate him by running him over. He fears returning to Iraq on account of being targeted by the militia upon his return. He also claimed to have manifested anti-regime views, which would place him at risk from the Government of Iraq.

4. The appellant experiences a number of mental and physical health conditions. He experiences lower back pain and depression. He had been referred to an organisation called iCope and had been receiving counselling. At the time of the hearing before the judge, there was a letter from the appellant's GP which stated the appellant was experiencing depression as a result of his unsettled situation, including his incomplete studies, his separation from his wife and children, and his shared accommodation with other refugees. He had been prescribed with medication and was awaiting treatment for CBT.

5. The respondent considered the appellant's claim to be speculative. He had not been targeted by the militia personally and had been able to live in Iraq unhindered for a number of years. The appellant also claimed to have anti-regime views. The respondent rejected that limb of his account.

6. In her decision, having recounted the respective cases for the appellant and respondent, the judge gave reasons for refusing an adjournment request made by the appellant at the outset of the hearing. Ms Michaels, who also appeared before me, had applied for an adjournment in order to obtain a psychiatric report. It was relevant to the appellant's mental health and any Article 3 claim, she had submitted. The judge refused the application, giving these reasons in her decision:

> "27. I considered the [adjournment] application carefully. I took account of all the information the appellant gave in support of the adjournment request and I considered whether the refusal would deprive the appellant of a fair hearing *(Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC)). I decided to refuse

> the adjournment request. I informed Ms Michaels that I had taken account of the medical evidence that had been filed already [as] that was sufficient for me to arrive at a just decision in this case. I would take account of the [iCope] letter, the counsellor's letter and the medical notes already filed.
>
> 28 In light of the medical information filed, I informed Ms Michaels I was prepared to treat the appellant as a vulnerable witness following the joint presidential guidance on child, vulnerable adult and sensitive appellant [*sic*]. I invited her to make submissions on what special measures I should adopt. She asked me to simply take account of the appellant's vulnerability in any questions that the appellant was asked, to have regular breaks if the appellant so required them and to take account of it in the assessment of the appellant's evidence I agreed to those measures. I noted there is no representative from the respondent so the questions the appellant would face were limited."

7. The judge's substantive reasoning commences at [30] with an outline of the appellant's mental health conditions. The judge outlined the medical materials that had been provided as part of the appellant's case, and stated at [34] that, having already indicated to the appellant that she would treat him as a vulnerable witness, she would undertake her credibility assessment in light of the medical evidence and the appellant's vulnerability.

8. At [35], the judge noted that, although the appellant had been dependent on his wife's asylum claim which had been brought on a similar factual matrix, and that claim had been refused and an appeal dismissed, she did not have a copy of that decision, and so would consider the appellant's account afresh.

9. The judge considered the issue of delay. The appellant had arrived in this country as a student in January 2014. His wife claimed asylum in October 2014, with the appellant as her dependent. The appellant separated from his wife in May 2019 and claimed asylum in his own capacity on 2 August 2019. Although the appellant only claimed asylum after having been served with removal papers, the judge did not hold that against him for reasons that have not been challenged by the respondent [36]. However, the delay in the appellant claiming asylum following his arrival here was a factor which harms credibility, she found [37]. The appellant had claimed not to have received the right advice about when to claim asylum and sought to attribute the delay to that factor. The judge rejected that explanation. The delay in making the claim impacted the appellant's credibility.

10. The judge accepted the appellant's account to have worked for the company he claimed were his employers in Iraq, although rejected his account to have provided interpretation for half of his role. There were some inconsistencies in the appellant's case. At [43], the judge did not take issue with those factors, on account of the appellant's vulnerability.

11. At [46], the judge found the appellant had not demonstrated he was specifically targeted by militia groups. He had not been able to say who they were yet claimed there was more than one group targeting him; the judge considered the appellant to be speculating. The appellant had been able to continue with his life in Iraq. The

militia must have known where he lived, on the appellant's case, yet they had not contacted him or sought to harm him in any way, other than the claimed attempts to run him over, which were fewer than 10, and all happened before the appellant relocated internally within Iraq, at which point they stopped. The judge did not accept that the appellant had been perceived as a collaborator, nor that he had been targeted by militia while in Iraq.

12. The second limb of the appellant's asylum claim was that he feared being persecuted on account of his political opinion against the government of Iraq. There were a series of social media documents before the judge, which she described as unclear [49]. There was nothing in those posts to confirm that they were public, they dated from 2015, and there was nothing to show they were recent. WhatsApp messages provided by the appellant took things no further. As the respondent noted, the appellant had been unable to articulate how his feelings towards the Iraqi regime grew and developed. The judge accepted that the appellant had been vague about his political views. He sought to explain his failure to mention certain features of his case in the "preliminary information questionnaire" as being the fault of his former solicitors, yet he had made no complaint against them. Even accounting for his vulnerability, that harmed his credibility. See [54].

13. The judge dismissed the appeal.

Permission to appeal

14. There are two grounds of appeal.

15. First, that the judge failed to apply the correct test of whether to adjourn the hearing, namely whether to refuse to do so would deprive the appellant of his right to a fair hearing. Alternatively, if the judge applied the correct test, she reached a conclusion that was not rationally open to her on the evidence and was insufficiently reasoned.

16. The second ground of appeal is that the judge failed to give proper consideration to the appellant as a vulnerable witness, in light of his health conditions.

17. Permission to appeal was granted by Upper Tribunal Judge Lindsley in these terms:

> "The First-tier Tribunal directs itself properly as to the test for an adjournment at paragraph 27 and accepts that the appellant is a vulnerable witness, and correctly agrees to consider this in the assessment of his evidence at 28 of the decision, with a repeat of this assessment following a summary of the medical evidence in the bundle at paragraph 34 of the decision.
>
> However I find that it is arguable that the decision to proceed with the appeal and not adjourn the hearing to obtain a detailed psychiatric evidence was insufficiently reasoned to be fair and lawful, and as a result it is arguable that evidence of the appellant's vulnerability was not brought into play when assessing his credibility."

Submissions

18. The appellant made further submissions in writing on 6 October 2020, enclosing a report of a Dr K. Balasubramaniam; the respondent made written submissions on 8 October 2020.

19. In developing her grounds of appeal, and in her written submissions, Ms Michaels highlighted the main question to be addressed when considering an application to adjourn: would refusing to do so deprive the appellant of a fair hearing? In refusing to grant the adjournment, the judge did not explain how, by not adjourning, the appellant would enjoy a fair hearing. A funding application had been made and it was irrational for the judge to refuse the adjournment. There was insufficient material in the bundle to enable the judge to determine the appeal; fairness required a short adjournment to be granted.

20. Ms Michaels referred to the report of Dr Balasubramaniam which, by the time she made her written submissions in support of the Upper Tribunal proceedings, was available. It diagnosed the appellant as suffering from a mixed anxiety and depressive order. He experienced a range of symptoms including poor concentration. The causal factors included the difficulties he experienced in Iraq by being intimidated by the militia, the loss of his job and income, separation from his wife and children, and his unresolved asylum proceedings in this jurisdiction. The appellant had capacity, concluded the report. Attempts to remove the appellant from the UK would be likely to worsen his anxiety and depressive order and increase the risk of suicide.

21. In turn, Ms Michaels submits that the judge failed properly to assess the question of the appellant's vulnerability. In so failing, she did not apply the Joint Presidential Guidance Note No. 2 of 2010, in particular in relation to that guidance's exhortation to take vulnerability into account when assessing an individual's credibility. Without the psychiatric report, the judge was unable to have a full and proper picture of the appellant's mental health conditions. Pursuant to AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123, it was an error of law for the judge to fail to follow the presidential guidance note when assessing credibility.

22. The Secretary of State submitted that the judge applied the correct test, and that the decision not to adjourn the proceedings did not impact the outcome of the proceedings. It is hard to see how the report would have made a difference. The judge had a number of materials before her concerning the appellant's mental health, which did not take matters any further than Dr Balasubramaniam's report would have done. As far as Article 3 was concerned, the report was silent as to the appellant's likely health needs and access to healthcare upon his return. The judge took the appellant's vulnerabilities into account throughout her decision, and reached a conclusion that was open to her, having ensured the appellant was able to enjoy a fair hearing.

Legal framework

23. The test governing whether to adjourn is not in dispute. In Nwaigwe, the Presidential panel stated as follows:

> "If a Tribunal refuses to accede to an adjournment request, such decision could, in principle, be erroneous in law in several respects: these include a failure to take into account all material considerations; permitting immaterial considerations to intrude; denying the party concerned a fair hearing; failing to apply the correct test; and acting irrationally. In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing? See SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284."

24. At [8], the then President said:

> "The cardinal rule… is expressed in uncompromising language in the decision of the Court of Appeal in SH (Afghanistan) v Secretary of State for the Home Department [2011] EWCA Civ 1284, at [13]:
>
> > 'First, when considering whether the immigration Judge ought to have granted an adjournment, the test was not irrationality. The test was not whether his decision was properly open to him or was Wednesbury unreasonable or perverse. **The test and sole test was whether it was unfair**'." (Emphasis original)

25. Concerning the Joint Presidential Guidance Note No. 2 of 2010, in AM (Afghanistan) the then Senior President held, at [30]:

> "To assist parties and tribunals a Practice Direction 'First-tier and Upper Tribunal Child, Vulnerable Adult and Sensitive Witnesses', was issued by the Senior President, Sir Robert Carnwath, with the agreement of the Lord Chancellor on 30 October 2008. In addition, joint Presidential Guidance Note No 2 of 2010 was issued by the then President of UTIAC, Blake J and the acting President of the FtT (IAC), Judge Arfon-Jones. The directions and guidance contained in them are to be followed and for the convenience of practitioners, they are annexed to this judgment. Failure to follow them will most likely be a material error of law."

Discussion

26. In relation to Ground 1 concerning the decision not to adjourn, the judge applied the correct test, took into account all relevant considerations, and reached a decision that was rationally open to her on the materials before her. The subsequent report of Dr Balasubramaniam added little to what the judge, in effect, accepted as being the appellant's mental health conditions.

27. As Judge Lindsley noted when granting permission to appeal, the judge *did* apply the correct test, namely whether the appellant would enjoy a fair hearing in the absence

of an adjournment. So much is clear from [27] of the judge's decision where she considered whether, in the event she did not adjourn, the appellant would be deprived of a fair hearing. That was plainly the correct test. The judge cited Nwaigwe, further demonstrating that she was aware of the relevant principles. She then added, in the same paragraph, that she considered the materials already filed to have enabled her to arrive at a just decision. Those were the very considerations the judge was required to, and did in fact, address.

28. The gravamen of Ms Michaels' submissions under Ground 1 is a rationality challenge; the judge reached a decision that was irrational, or that no reasonable judge could have reached. There is no merit to this submission.

29. The judge had before her a number of documents pertaining to the appellant's mental health conditions. She outlined those documents at [25] and analysed them at [30] to [33]. She accepted that the appellant suffered from depression as a result of his unsettled situation, his incomplete studies, his separation from his wife and children and from living in shared accommodation with 'other' refugees. She recorded the anti-depressant medication that he was taking. She noted at [31] a letter from Penny Smith, a counsellor at Refugee Action Kingston. The letter outlines the appellant's fear at returning to Iraq due to the danger he believed he would be in, is poor sleep, his anxiety, the nightmares he experiences, and his morbid dread of the future. The judge also had access to a letter from the relevant mental health NHS trust outlining the appellant's mental health conditions. The letter recorded that the appellant experienced poor concentration and was experiencing daily suicidal thoughts. She also had a letter from iCope, a psychological therapy service, and the appellant's GP notes. As I have set out above, the judge considered those materials in depth at [30] to [33].

30. The report of Dr Balasubramaniam adds little, if anything, to the details that were already before the judge. I accept that it consolidates the different conditions experienced by the appellant into a single medical analysis. However, its operative analysis and conclusions merely underline what was stated in the materials already before the judge. Significantly, the judge took the appellant's mental health conditions into consideration at several key junctures in the appeal, in addition to what she stated at [27] and [28] which I will not repeat here. They are worth quoting in full:

> "I have already indicated to the appellant that I was going to treat him as a vulnerable witness. I have made my credibility assessment in light of the medical evidence and the appellant's vulnerability." [34]
>
> "the decision letter takes issue with the frequency the appellant interpreted for his wife's cousin. However, in light of the appellant's vulnerability I do not hold this point against him. Likewise, the point about inconsistency with the screening interview do [*sic*] not undermine the appellant's credibility in light of his vulnerability." [43]
>
> "I have assessed the appellant's evidence carefully and taken account of the appellant's vulnerabilities." [46]

> "I take account of the appellant's vulnerability and note that the screening interview is not a time when the appellant can be expected to give details [*sic*] answers. I therefore do not hold this point against his credibility[.]" [52]

31. This tribunal now has the benefit of seeing the medical report in respect of which the appellant sought the adjournment. It would have added nothing to the judge's analysis which, as set out above, accommodated the appellant's vulnerability at multiple points. Dr Balasubramaniam's report does not feature any analysis or findings which could rationally have affected the judge's conclusions. As I pointed out to Ms Michaels at the hearing, its conclusions could not possibly merit a finding that the appellant's removal would be contrary to his rights under Article 3 of the ECHR; Ms Michaels made no attempt to demonstrate that it demonstrates that that threshold was met. The report notes the varying causes which lay behind the appellant's mental health conditions, which corresponded with the materials already before the judge. Nothing in the report is capable of demonstrating that the core credibility of the appellant's account should have been accepted, and nor could it; the most it could have done was to require the judge to calibrate her credibility assessment by reference to the appellant's vulnerabilities, which she did, at multiple points in her decision. The appellant enjoyed a fair hearing. It was not necessary for the judge to have adjourned. Her decision not to adjourn was sound.

32. There is no merit to this ground of appeal.

33. Similarly, in relation to Ground 2, the judge took the appellant's vulnerability into account throughout her analysis, as I have set out. The respondent was not represented in the proceedings before the First-tier Tribunal, with the effect that there was no invasive questioning or inappropriate cross-examination. Indeed, Ms Michaels makes no specific complaint about the conduct of the hearing and there can be no suggestion that the judge failed properly to make reasonable adjustments or take other steps to accommodate the appellant's vulnerability.

34. The judge calibrated her operative analysis of the case by reference to the appellant's vulnerability, as set out above. There is nothing more that the judge reasonably could have been expected to do. Certainly, nothing in the report of Dr Balasubramaniam highlights any steps that the judge should have, but did not, take.

35. There is no merit to Ground 2.

Conclusion

36. The appellant enjoyed a fair hearing. An adjournment would not have added to her analysis in material terms, in light of the medical report of which we now have the benefit. He was treated as a vulnerable appellant and the judge correctly approached her reasoning on the basis that some allowances for his vulnerability had to be made. That an appellant is vulnerable does not pave the way for an appeal being allowed. It simply means that reasonable adjustments are necessary, both during the hearing, and during the analysis of the appellant's evidence. That is precisely what the judge did on this occasion. There was no error of law.

37. This appeal is dismissed.

Anonymity

38. In light of the contents of this decision, to guard against the risk that it may expose the appellant to a risk he does not currently face in the event it were to fall into the wrong hands (and bearing in mind that it will be published online), I grant the appellant anonymity.

Notice of Decision

The decision of Judge Khan did not involve the making of an error of law.

This appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Stephen H Smith* Date 30 March 2021
Upper Tribunal Judge Stephen Smith