IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003606
First-tier Tribunal No: PA/52799/2021
IA/08382/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 19 February 2023

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MK
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr K Khan, Kings Laws Solicitors
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 8 December 2022

Anonymity Order

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

Introduction

1. The appellant is a citizen of Iraq who was born on 15 July 1985. He first arrived in the United Kingdom on 11 December 2007 and claimed asylum. The basis of his claim was that he had been a taxi driver in Iraq. His vehicle had been commandeered by two armed men and he had been forced to drive them to Kirkuk. He was then thrown out of his car at gunpoint and they had driven away. The individuals concerned were then involved in a terrorist incident and were captured by the Patriotic Union of Kurdistan ("PUK") intelligence agency in Kirkuk where the appellant's taxi log book was found in the car and, as a result, he was wanted by the police because of his suspected involvement in the terrorist incident. When the appellant returned home, his family told him that the police were looking for him and had come to arrest him. The appellant then fled the country and came to the UK.

2. On 25 November 2009, the Secretary of State refused the appellant's claim for asylum on that basis. Subsequently, his appeal was dismissed by Judge Fisher and his application for permission to appeal to the Upper Tribunal was refused on 17 February 2010.

3. The appellant was deported to Iraq on 25 October 2010. He returned to the United Kingdom on 20 April 2016. He again claimed asylum. He claimed that on return to Iraq he was arrested at Baghdad Airport and detained. He was subsequently transferred to prison in Kirkuk where he was interviewed and tortured by the PUK's intelligence service. The PUK wanted the appellant to confess to his involvement in the terrorist activity in 2007 as the car used had belonged to him. He was held in Kirkuk prison for five years. He was tortured and, during his detention, he fractured his right ankle and was admitted to hospital in Sulaymaniyah for about three days. Whilst in hospital, his brother, with the help of Goran supporters in the hospital, enabled the appellant to escape and he fled to Iran. He stayed there for three months whilst his fractured ankle healed and he then came to the UK.

4. On 1 June 2019, the Secretary of State refused the appellant's application for asylum.

5. The appellant appealed to the First-tier Tribunal. In a decision dated 2 April 2022, Judge Sweet dismissed the appellant's appeal on asylum and humanitarian protection grounds and under Arts 3 and 8 of the ECHR. Judge Sweet made an adverse credibility finding and did not accept the appellant's account of events in 2007 or on his return to Iraq in 2010. Further, Judge Sweet found that the appellant could return to Iraq with an ID document and so would not be at risk on return on that basis.

The Appeal to the Upper Tribunal

6. The appellant sought permission to appeal to the Upper Tribunal. First, he challenged the judge's adverse credibility finding on the basis that the judge had given "little weight" to a psychiatric report prepared by Dr Vaidya, a Consultant Psychiatrist which supported the appellant's claim as he had diagnosed the appellant as suffering from PTSD and a depressive episode. In addition, the grounds contend that the judge wrongly found aspects of the appellant's account to be implausible.

7. Second, the judge erred in law by concluding that the appellant could obtain a replacement CSID or INID by obtaining a Registration Document (1957) from the Iraqi Embassy in the UK which could be converted into a CSID or INID.

8. Third, the judge erred in law in finding that, in any event, the appellant had not lost contact with his siblings in Iraq, in particular his brother with whom he had said he had left his identity documents.

9. Fourth, the grounds contend that the judge failed properly to consider Art 8 of the ECHR.

10. On 25 July 2022, the First-tier Tribunal (Judge R Chowdhury) granted the appellant permission to appeal.

11. On 24 August 2022, the respondent filed a rule 24 notice seeking to uphold the judge's decision.

12. The appeal was listed at Cardiff Civil Justice Centre on 8 December 2022. The appellant was represented by Mr Khan and the respondent by Ms Rushforth. I heard oral submissions from both representatives. Mr Khan also relied upon short written submissions and Ms Rushforth relied upon the rule 24 response.

Discussion

13. It will be helpful to consider the grounds under three headings: (1) the expert report; (2) the identity document issue; and (3) Art 8 of the ECHR.

(1) Expert Report

14. Mr Khan submitted that the judge had been wrong to give "little weight" to the expert report of Dr Vaidya at paras [15] and [17] of his decision. At [15] and [17], Judge Sweet said this:

> "15. He has now provided a psychiatric report, dated 24 March 2022, from Dr Vaidya, Consultant Psychiatrist, who concludes that the appellant is suffering from PTSD and a depressive episode, which should be treated by medication and psychological therapies. The appellant, despite having been in the UK since April 2016, maintained that he has made six attempts to join a GP practice without success, and is not currently taking any medication, save for over-the-counter paracetamol. I found that aspect of his account to be wholly unreliable, for if his health condition is such as he described in his written and oral evidence, he would have taken further and earlier steps to obtain medical treatment.
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> ....
>
> 17. The appellant stated in evidence that he is suffering physically and mentally and cannot be around people. He maintains that he is no longer in contact with his four siblings, and his father died in 2001 and his mother in 2013. I place little weight on the psychiatric report, because it is based upon evidence which the appellant gave to Dr Vaidya, the report does not fully comply with the Rules as to expert evidence and in any event, as already stated, if the appellant was truly suffering from mental health conditions, he would have consulted a doctor at an earlier date, and no doubt have received treatment if required".

15. Mr Khan accepted that, as the judge had pointed out in [17], Dr Vaidya's report did not fully comply with para 10 of the *Practice Direction, Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (2010)* (the "PD"). However, he submitted that the judge had been wrong to count against the appellant, and give little weight to the expert report, that the appellant had not provided GP medical records as the appellant had not been able to see a GP until 6 June 2022. (I interpolate that was, of course, a date after the hearing before Judge Sweet.) Mr Khan submitted that the judge had been wrong to count against the appellant that, if he had indeed suffered from mental health issues, he would have consulted a GP earlier.

16. Paragraph 10 of the PD, sets out the requirements for expert evidence (and an expert report) in the IAC. It provides as follows:

> "10.1. A party who instructs an expert must provide clear and precise instructions to the expert, together with all relevant information concerning the nature of the appellant's case, including the appellant's immigration history, the reasons why the appellant's claim or application has been refused by the respondent and copies of any relevant previous reports prepared in respect of the appellant.
>
> 10.2. It is the duty of an expert to help the Tribunal on matters within the expert's own expertise. This duty is paramount and overrides any obligation to the person from whom the expert has received instructions or by whom the expert is paid.
>
> 10.3. Expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation.
>
> 10.4. An expert should assist the Tribunal by providing objective, unbiased opinion on matters within his or her expertise, and should not assume the role of an advocate.
>
> 10.5. An expert should consider all material facts, including those which might detract from his or her opinion.
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> 10.6. An expert should make it clear:
>
> (a) when a question or issue falls outside his or her expertise; and
>
> (b) when the expert is not able to reach a definite opinion, for example because of insufficient information.
>
> 10.7. If, after producing a report, an expert changes his or her view on any material matter, that change of view should be communicated to the parties without delay, and when appropriate to the Tribunal.
>
> 10.8. An expert's report should be addressed to the Tribunal and not to the party from whom the expert has received instructions.
>
> 10.9. An expert's report must:
>
> (a) give details of the expert's qualifications;
>
> (b) give details of any literature or other material which the expert has relied on in making the report;

(c) contain a statement setting out the substance of all facts and instructions given to the expert which are material to the opinions expressed in the report or upon which those opinions are based;

(d) make clear which of the facts stated in the report are within the expert's own knowledge;

(e) say who carried out any examination, measurement or other procedure which the expert has used for the report, give the qualifications of that person, and say whether or not the procedure has been carried out under the expert's supervision;

(f) where there is a range of opinion on the matters dealt with in the report:

(i) summarise the range of opinion, so far as reasonably practicable, and

(ii) give reasons for the expert's own opinion;

(g) contain a summary of the conclusions reached;

(h) if the expert is not able to give an opinion without qualification, state the qualification; and

(i) contain a statement that the expert understands his or her duty to the Tribunal, and has complied and will continue to comply with that duty.

10.10. An expert's report must be verified by a Statement of Truth as well as containing the statements required in paragraph 10.9(h) and (i).

10.11. The form of the Statement of Truth is as follows: "I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true, and that the opinions I have expressed represent my true and complete professional opinion".

10.12. The instructions referred to in paragraph 10.9(c) are not protected by privilege but cross-examination of the expert on the contents of the instructions will not be allowed unless the Tribunal permits it (or unless the party who gave the instructions consents to it). Before it gives permission, the Tribunal must be satisfied that there are reasonable grounds to consider that the statement in the report or the substance of the instructions is inaccurate or incomplete. If the Tribunal is so satisfied, it will allow the cross-examination where it appears to be in the interests of justice to do so.

...."

17. Ms Rushforth submitted that the report of Dr Vaidya failed to comply with the PD in a number of ways. First, it was not addressed to the Tribunal (para 10.8). Second, the report did not contain a statement setting out the instructions given to the expert (para 10.9(c)) or a statement that the expert understood his duty to the Tribunal and has complied with it (para 10.9(j)). Third, the expert report did not contain a Statement of Truth (paras 10.10 and 10.11).

18. I did not understand Mr Khan to dispute that this was the case. Although Dr Vaidya has set out his qualifications and experience (at page 2 of his report), I accept Ms Rushforth's submission that his report does not comply with the PD in the ways she submitted. He does not set out his instructions from the appellant's solicitors other than to state that he has had access to "information from Kings Law Solicitors" (page 2). There is no statement by Dr Vaidya that the report is directed to the FtT other than, inadequately in my view, to state that it has been prepared at the request of the appellant's solicitors "in anticipation of" the appellant's appeal. Most significantly, however, the report contains no statement by Dr Vaidya that he understands that his duty is to the Tribunal and that he has complied with it; and further there is no Statement of Truth.

19. Ms Rushforth relied upon these failures to comply with the PD as entitling the judge to give the report "little weight". She referred me to the UT decision in HA (expert evidence; mental health) Sri Lanka [2022] UKUT 00111 (IAC) (Lane J, President and UTJ Rimington) in support of that submission. In HA the UT set out the proper approach to expert evidence, including psychiatric evidence, and the importance of an expert complying with their professional obligations. At paras (1)–(7) of the judicial headnote the following is set out; I have emphasised paras (1) and (6) as particularly relevant to this appeal:

> "(1) *Where an expert report concerns the mental health of an individual, the Tribunal will be particularly reliant upon the author fully complying with their obligations as an expert, as well as upon their adherence to the standards and principles of the expert's professional regulator. When doctors are acting as witnesses in legal proceedings they should adhere to the relevant GMC Guidance.*
>
> (2) Although the duties of an expert giving evidence about an individual's mental health will be the same as those of an expert giving evidence about any other matter, the former must at all times be aware of the particular position they hold, in giving evidence about a condition which cannot be seen by the naked eye, X-rayed, scanned or measured in a test tube; and which therefore relies particularly heavily on the individual clinician's opinion.
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> (3) It is trite that a psychiatrist possesses expertise that a general practitioner may not have. A psychiatrist may well be in a position to diagnose a variety of mental illnesses, including PTSD, following face-to-face consultation with the individual concerned. In the case of human rights and protection appeals, however, it would be naive to discount the possibility that an individual facing removal from the United Kingdom might wish to fabricate or exaggerate symptoms of mental illness, in order to defeat the respondent's attempts at removal. A meeting between a psychiatrist, who is to be an expert witness, and the individual who is appealing an adverse decision of the respondent in the immigration field will necessarily be directly concerned with the individual's attempt to remain in the United Kingdom on human rights grounds.
>
> (4) Notwithstanding their limitations, the GP records concerning the individual detail a specific record of presentation and may paint a broader picture of his or her mental health than is available to the expert psychiatrist, particularly where the individual and the GP (and any associated health care professionals) have interacted over a significant period of time, during some of which the individual may not have perceived themselves as being at risk of removal.
>
> (5) Accordingly, as a general matter, GP records are likely to be regarded by the Tribunal as directly relevant to the assessment of the individual's mental

> health and should be engaged with by the expert in their report. Where the expert's opinion differs from (or might appear, to a layperson, to differ from) the GP records, the expert will be expected to say so in the report, as part of their obligations as an expert witness. The Tribunal is unlikely to be satisfied by a report which merely attempts to brush aside the GP records.
>
> (6) *In all cases in which expert evidence is adduced, the Tribunal should be scrupulous in ensuring that the expert has not merely recited their obligations, at the beginning or end of their report, but has actually complied with them in substance. Where there has been significant non-compliance, the Tribunal should say so in terms, in its decision. Furthermore, those giving expert evidence should be aware that the Tribunal is likely to pursue the matter with the relevant regulatory body, in the absence of a satisfactory explanation for the failure.*
>
> (7) Leaving aside the possibility of the parties jointly instructing an expert witness, the filing of an expert report by the appellant in good time before a hearing means that the Secretary of State will be expected to decide, in each case, whether the contents of the report are agreed. This will require the respondent to examine the report in detail, making any investigation that she may think necessary concerning the author of the report, such as by interrogating the GMC's website for matters pertaining to registration." (my emphasis)

20. The importance of complying with the PS (or its equivalent in civil litigation) was emphasised by the Court of Appeal in R (HK & Ors) v SSHD [2017] EWCA Civ 1871 where, at [63], Sales LJ (as he then was) (with whom Lindblom LJ and Sir Stephen Richards agreed) said this:

> "63. These are important provisions, because they emphasise the neutral and even-handed approach which an expert is supposed to follow in assessing evidence in a case and expressing his opinion. They also emphasise the personal responsibility which an expert witness has to ensure that his report complies with this approach. ...".

21. The need to comply with para 10 of the PD in relation to an expert report is not a mere matter of form. The requirements upon an expert, set out in para 10, seek to ensure that the author of the report is an expert; is independent of the party or parties instructing the expert; and that the integrity of the report is such that it is a reliable statement of expert opinion upon which the Tribunal may place reliance. I accept Ms Rushforth's submissions. In my judgment, Dr Vaidya's report lacked essential elements required by the PD which entitled Judge Sweet to place "little weight" upon the expert's opinion that the appellant suffered from PTSD and depressive episode.

22. In addition, I do not accept Mr Khan's submission that the judge was not entitled to take into account, in assessing whether the appellant suffered from mental health problems, that he had not been able to see a GP since April 2016 when he last arrived in the UK. In the grounds, the appellant relied on the case of HK (Sierra Leone) v SSHD [2006] EWCA Civ 1037. At [28] Neuberger LJ (as he then was) said this:

> "28. Further, in many asylum cases, some, even most, of the appellant's story may seem inherently unlikely but that does not mean that it is untrue. The ingredients of the story, and the story as a whole, have to be considered against the available country evidence and reliable expert evidence, and other familiar factors, such as consistency with what the

> appellant has said before, and with other factual evidence (where there is any)".

23. That was, of course, said in the context of any assessment of whether an individual's account was plausible (as being relevant as to whether it was true) in relation to circumstances occurring outside the UK. The Court of Appeal in HK was cautioning against making such an assessment without having regard to the particular cultural and social circumstances appertaining in the other country. It was cautioning against a UK-centric view leading to a conclusion that what is said to have happened was implausible or unlikely.

24. That is different from the circumstances which the judge was considering in [15] and [17] of his decision. The judge was considering the implausibility of the appellant being unable to see a GP since his arrival in the UK in April 2016 (some six years before the hearing) if, indeed, he suffered from mental health problems. It is important to see the context in which the judge said this at [15]. There, he sets out the appellant's evidence that he had made six attempts to join a GP practice without success. Given the timespan since April 2016, I do not consider that it was Wednesbury unreasonable for the judge to infer that this was unlikely. It was, in my judgment, reasonably open to the judge to take into account, in assessing whether the appellant suffered from mental health issues, at [17] that: "if the appellant was truly suffering from mental health conditions, he would have consulted a doctor at an earlier date, and no doubt have received treatment if required". Read with [15], it is plain that the judge considered it unlikely that the appellant would have been unable to obtain a GP appointment, and the necessary treatment, over the period since April 2016 if, indeed, he suffered from mental health problems.

25. In truth, in the absence of any GP records, which was a matter of fact and which the judge was entitled to take into account following TK (Burundi) v SSHD [2009] EWCA Civ 40, there was no supporting evidence that the appellant suffered from any mental health condition because Dr Vaidya's report was, for the reasons I have set out, was evidence upon which the judge was entitled to place "little weight".

26. In my judgment, the judge did not err in law in his approach to the psychiatric evidence and in reaching his adverse credibility finding.

(2) *Identity Documents*

27. It is common ground that in order to safely return to, and travel through, Iraq an individual requires an identity document, in particular a CSID or INID (see SMO and Others (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC) and more recently affirmed in SMO and KSP (Civil status documentation, Article 15) CG Iraq [2022] UKUT 110 (IAC)).

28. Ms Rushforth conceded that the judge had erred in law in [19] of his decision in concluding that the appellant, by obtaining a Registration Document (1957) from the Iraqi Embassy in London, would be able to safely return to, and travel through, Iraq because he would be able to obtain a CSID or INID.

29. Ms Rushforth submitted, however, that that finding was immaterial to the judge's decision that the appellant would return with an identity document and so would be safe. She relied upon [20] of the judge's decision where he found that the appellant could obtain his ID document, which he had left with his brother in

Iraq, because the judge did not accept that he was no longer in contact with his siblings. She submitted that, if the judge's adverse credibility finding was sustainable, then so was his finding that he did not accept the appellant's evidence about having lost contact with his siblings.

30. Mr Khan accepted that this issue essentially turned upon the sustainability of the judge's adverse credibility finding. However, he submitted that, in addition, it was plausible that the appellant had lost contact with his siblings in Iraq and that his parents had died even if the adverse credibility finding stood.

31. At [20], Judge Sweet set out his reasons for finding that the appellant could obtain his existing CSID from his brother in Iraq as follows:

> "20. In any event he says that his identity documents are with his brother in Iraq. I am not persuaded that he is no longer in contact with his siblings, and that he could not receive any assistance with the procuring of identity documents. His family in Iraq have not suffered any threats or harm there. He has not provided any evidence from his brother Hardi regarding his escape from prison (or from other family members with whom he was reunited after his release), nor medical evidence on the alleged fracture to his ankle from the military or civilian hospitals where he was said to have been taken, whether such evidence was obtained by email (thereby hiding his current whereabouts in the UK), witness statement(s) or by other documents. As I have found his asylum claim to be totally lacking credibility, likewise I reach the same conclusion on his claimed inability to acquire his ID documents".

32. In my judgment, given the sustainable adverse credibility finding made by the judge, it was reasonably open to the judge to conclude that the appellant had failed to establish, on the basis of his evidence, that he had lost contact with his siblings in Iraq. It was the appellant's evidence that he had left his CSID with his brother in Iraq. I do not accept Mr Khan's submission that the judge's finding in [20] is legally flawed because it is plausible that the appellant may have lost contact with his siblings. The issue turned upon the veracity of the appellant's claim of what had, he said, occurred to him in 2007 and then again on his return to Iraq in 2010 before leaving in 2016 including whether he had lost contact with his family. Having rejected the appellant's evidence in relation to his account, it was undoubtedly open to the judge to reject his evidence that he had lost contact with his family. The latter was, in effect, connected to the former account which the judge did not accept.

33. For these reasons, although the judge erred in law in finding in [19] that the appellant could obtain a replacement identification document, that error was immaterial as the judge's finding in [20], which is legally sustainable, was that the appellant can obtain his original identity document and so safely return, and travel through, Iraq consistent with the relevant CG decisions.

(3) Article 8

34. Mr Khan contended that the judge had failed to give adequate consideration to the issue of proportionality under Art 8.2. In his oral submissions, he accepted that he had not raised the issue in his oral submissions before the First-tier Tribunal but he had raised it in his skeleton argument.

35. Judge Sweet dealt briefly with Art 8 at [23] of his decision as follows:

> "23. In respect of any Article 8 ECHR claim, which was not put forward in oral submissions (though relied on in the skeleton argument), I reject that claim for the same reasons as set out in the refusal letter. Such a decision is not disproportionate is consistent with maintaining effective immigration control and will not result in unjustifiably harsh consequences for the appellant or a family member".

36. The judge's reasoning has to be seen in the context in which the case was put to him at the hearing by Mr Khan. Mr Khan provided me with a copy of his skeleton argument that had been before Judge Sweet. Apart from setting out the structure of Art 8 for a decision-maker, the only matter of substance under Art 8 relied upon was as follows:

> "The appellant arrived in the UK in April 2008 and now lived in the UK for over five years, during this time he has established a private life in the UK".

37. Of course, that is not an accurate statement of the appellant's immigration history. He arrived in the UK initially in December 2007 but was deported in October 2010 before returning in April 2016. His private life, therefore, arose, in effect, for consideration from April 2016. Apart from the assertion that he had spent over five years in the UK – which was correct on the basis of his most recent arrival in April 2016 – it is not surprising, perhaps, that Judge Sweet dealt relatively briefly with his claim under Art 8 in [23]. The judge did refer to the respondent's reasons for rejecting the appellant's Art 8 claim in the decision letter. There, the respondent concluded that, having rejected the appellant's asylum claim, he had failed to establish that there were "very significant obstacles" to his integration in Iraq applying para 276ADE(1)(vi) of the Immigration Rules and that his return would result in a breach of Art 8 outside the Rules. In relation to para 276ADE(1)(vi), the decision letter said this:

> "You have failed to demonstrate that you have no social, cultural or family ties in Iraq. It is not accepted that there are "very significant obstacles" marks preventing you from continuing with and re-establishing and developing your private life upon return to your home country.
>
> You have been well integrated within Iraqi society and speak a language that is widely spoken in Iraq and have a family or support network on return.
>
> You are resourceful, having travelled hundreds of miles to reach the UK. You have managed to support yourself in the UK for a period despite not having permission to work. As such you would be able to reintegrate back into society with a support network available to you utilising your resourcefulness. Upon return you could maintain contact with any UK based friends and other associates through modern channels of communication. You enjoyed an established private life before coming to the UK and there is no reason you could not do so again upon your return to your home country... and you therefore failed to fulfil rule 276ADE(1)(vi)."

38. There was, in truth, no realistic basis upon which the appellant could succeed under Art 8 before Judge Sweet. Brief though his reasons were in [23], I am unable to discern any material error of law in reaching his conclusion that the appellant could not succeed under Art 8. That conclusion was, in my judgment, inevitable on the material relied upon before Judge Sweet.

Decision

39. For the above reasons, the First-tier Tribunal's decision to dismiss the appellant's appeal did not involve the making of an error of law. That decision, therefore, stands.

40. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Andrew Grubb

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 January 2023