



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/04840/2019

THE IMMIGRATION ACTS

Decided on the papers  
On 18 August 2020

Decision & Reasons Promulgated  
On 25 August 2020

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

SA  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (P)

*This has been a paper hearing which has not been objected to by the parties. The form of hearing was P (paper determination which is not provisional). A face to face hearing was not held because it was not practicable, and all issues could be determined on paper. The documents that I was referred to are in a bundle of [231] pages, plus additional supporting documents, the contents of which I have recorded. The order made is described at the end of these reasons.*

1. On 19 September 2019, First-tier Tribunal Judge Cope dismissed an appeal by the appellant brought against a decision of the respondent dated 8 May 2019 to refuse her asylum and humanitarian protection claim. On 29 January 2020, Designated Judge Shaerf of the First-tier Tribunal granted the appellant permission to appeal against that decision.

2. This decision sets out my reasons for allowing the appellant's appeal.

*Procedural background*

3. On 7 May 2020, Upper Tribunal Judge Blum directed that his provisional view was that it would be possible to determine whether the decision of Judge Cope involved the making of an error of law and, if so, whether it should be set aside, without holding a hearing. Judge Blum issued directions for an exchange of submissions concerning those issues, and the parties' substantive position in relation to the submissions, the time limit for compliance with which has now passed. The respondent, in notices dated 1 June and 30 July 2020, set out her reasons for resisting this appeal in response to Judge Blum's directions and supplementary directions I issued, to which I will turn shortly. The appellant, who is now a litigant in person, did not respond.

*Whether to hold a hearing*

4. Paragraph 4 of the Senior President of Tribunal's *Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal* dated 19 March 2020 provides that, "where a chamber's procedure rules allow decisions to be made without a hearing, decisions should usually be made in this way, provided this is in accordance with the overriding objective, the parties' ECHR rights in the chamber's procedure rules about notice and consent." Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides, where relevant:

"(1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.

(2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing."

5. The starting point for my consideration as to whether it would be appropriate to determine the issues identified by Judge Blum without a hearing is the overriding objective. Rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that the overriding objective of the Upper Tribunal is to "deal with cases fairly and justly". That includes, at (2)(c), "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings", and, at (d), "using any special expertise of the Upper Tribunal effectively". Also relevant is the need to avoid delay, so far as compatible with proper consideration of the issues: see paragraph (2)(e). In her 1 June 2020 written submissions, the Secretary of State, while setting out in robust terms why she does not consider the decision of the judge to have featured an error of law, did not object to the matter being determined on the papers. In her helpful supplementary submissions dated 30 July 2020 (as to which, see paragraph 9, below), she confirmed that she considered that the issue of the error of law may be determined on the papers.
6. The appellant has not responded to any of the directions. That suggests that she is unable fully to articulate the alleged errors of law, which is hardly surprising given she is a litigant in person who does not speak English. While as I note below this is a

matter of some concern, I will consider whether the error of law issue may be determined without further input from her, relying on the expertise I have as a judge in this specialist jurisdiction.

7. During my initial review of the decision of the judge, the grant of permission to appeal by Judge Shaerf, and the respondent's initial written submissions dated 1 June 2020, I considered that the decision of Judge Cope may have featured some "*Robinson-obvious*" errors of law, which I set out below. Under normal circumstances, I would have simply raised these concerns with the parties at the hearing. These are not normal times, and the prospect of listing the matter for an oral hearing in order to do so (even if conducted remotely), had the potential to infect the process with avoidable delay. As such, on 14 July 2020 I issued a "Note and Directions" to the parties on setting out my preliminary views on the potential *Robinson-obvious* points, the operative terms of which sought responses from the parties (in particular, the respondent), on the following:

"Within 14 days of being sent these Directions, both parties (but in particular the Secretary of State) are directed to make written submissions concerning:

- a. My preliminary views concerning possible *Robinson obvious* errors in the decision of Judge Cope, set out at paragraphs 7 to 13 [of the Note and Directions]; and
- b. Whether the error of law hearing can be conducted on the papers, without a further hearing, in light of the overriding objective and the need to avoid delay, where compatible with proper consideration of the issues and the need for fairness for all parties. Alternatively, whether it is in the interests of fairness and justice for a hearing to be held, whether remote or face to face.

The Parties should note that I do not invite further submissions concerning the observations of Judge Shaerf when granting permission to appeal. The respondent has already submitted her position in relation to those issues, for which I am grateful."

8. I attach the full Note and Directions to this decision as an **Annex**. I issued the directions in the interests of fairness to the respondent, to ensure she had the opportunity to address me on, first, the substantive issues arising from my preliminary observations and, secondly, any consequential impact on the suitability of this matter to be determined on the papers.
9. I am grateful to Mr Avery, a Senior Home Office Presenting Officer, for his succinct and helpful response to my directions, dated 30 July 2020. I will turn to the substance of the Secretary of State's position in response to the preliminary views set out in the Note in due course, but at this stage I need simply highlight the fact that the Secretary of State agreed through Mr Avery's response that the error of law issue could be determined on the papers.
10. Drawing together the procedural implications of the above process, I consider that it would be fair and consistent with the overriding objective, in particular the need to avoid delay insofar as compatible with proper consideration of the issues, for this matter to proceed on the papers. The Secretary of State has had the opportunity to

engage with the process in writing and has responded to the evolving concerns of the Tribunal as set out in my Note and Directions. While not determinative of the fairness of deciding the case on the papers, the fact that the Secretary of State agrees that the matter is suitable for consideration in that form is of some relevance to this issue. I note that the appellant has not engaged with the written procedure at all. Like Mr Avery, I agree that that is a concern. However, in light of the manner in which I propose to resolve this appeal, there is no prejudice to the appellant as a result.

11. The overriding objective is to avoid delay, so far as is compatible with proper consideration of the issues; I consider that the analysis set out below to be a proper consideration of the issues, and that, in light of the listing difficulties likely to be experienced for some time in the Upper Tribunal, it would be in the interests of justice for this matter to be determined on the papers.

#### *Factual background*

12. The appellant is an Iraqi of Kurdish ethnicity born in 1992. She lived with her parents. There were two strands to her claim for asylum. The first was that she had an extramarital relationship with a Mr M, in circumstances which were not approved by her family. Although the family of Mr M sought the permission of the appellant's family for their marriage, her elderly father had betrothed her in marriage to his former commanding officer in the Kurdish forces, in which he used to serve. This presented the appellant with a dilemma. She did not want to marry this man, Mr B, and if she refused, she would face the risk of death on account of the dishonour that that would bring upon her family. However, if she were to marry him, it would readily be apparent that she was no longer a virgin, which itself would place her at risk of being killed on honour grounds. She was mistreated by her family upon being told that she had to marry Mr B, as, it seems, they sensed her resistance. She was then given two days' notice ahead of the arranged marriage ceremony, at which point she made arrangements to leave the country, with the help of an agent. This took place in April 2018. She left for Turkey, passed through Europe, and into the United Kingdom, travelling clandestinely. She was arrested and, although there is some dispute between the parties about exactly when, claimed asylum shortly afterwards.

#### *The decision of the First-tier Tribunal*

13. The judge did not consider the appellant to have provided a credible account of what took place in Kurdistan. While he acknowledged (see [24]) that there were elements of consistency in the way that she had relayed her account, and, at [25], that elements of it were consistent with background materials concerning the position of women and honour crimes in the Kurdistan region, he considered that overall there had been significant inconsistencies in the different accounts provided by the appellant. At the heart of the judge's analysis lay his concerns about the initial written statement the appellant had provided to the respondent when she made her claim. Dated July 2018, the statement was said to have been prepared by her former solicitors, with the assistance of a Kurdish interpreter. It was signed by the appellant. It features differences, mainly in relation to dates, when compared to the account the appellant

gave in her substantive asylum interview, in her statement prepared for the proceedings in the First-tier Tribunal, and her oral evidence before the judge. The judge rejected the appellant's explanation that she had been poorly served by those solicitors, as she had not made an official complaint about them. He did not accept that the interpreter provided by the solicitors spoke a different dialect of the Kurdish language, on account of the interpreter coming from Turkey, rather than Iraqi Kurdistan. Nor did the judge accept that the statement was simply presented to her for signature, without it being read back to her. The judge found at [41] that the account the appellant had provided of the difficulties she encountered when making the statement, and with her previous solicitors, was not "reasonably likely to have occurred". The judge reached that finding before analysing the remaining aspects of the appellant's case.

14. The significance of the judge not accepting the appellant's explanations concerning the July 2018 statement lay in the fact he ascribed great significance to many of the discrepancies between the statement and the other evidence, having already rejected that the appellant's account concerning the initial statement before considering those matters. In the statement at [6], the appellant had said that she met Mr M in approximately March 2018; at [7], she said she met him in February 2017. That was a clear discrepancy which gave rise to credibility concerns, found the judge: see [44]. At [45], the judge contrasted [8] of the statement, in which the appellant said that she commenced sexual relations with Mr M in February 2018, with questions 114 and 127 of her substantive asylum interview, [6] of her appeal statement, and her oral evidence, in which she said that that took place in December 2017. The July 2018 statement said that the sexual relations took place in an orchard, whereas at question 127 of her substantive asylum interview, and at paragraph [6] of her appeal statement, she said that the incident took place at Mr M's home.
15. The judge outlined similar discrepancies at [49], in relation to the date when Mr M's family approached the appellant's family concerning the possibility of marriage. In the July 2018 statement the date given was March 2018, whereas in her asylum interview, she said that the date was January or February 2017. By letter dated 11 March 2019, the appellant's subsequent legal representatives, Iris law firm, wrote to the respondent stating that when she answered that question during the interview, she meant to say 2018. At [50], the judge said that, "no explanation has been put forward as to why the year 2017 was given..." The judge also had concerns that section 4.1 of the appellant's screening interview was confused in relation to who had made threats against the appellant.
16. The judge also found certain aspects of the appellant's case to be implausible. At [55], the judge did not believe the appellant's evidence that she was conveyed to the Turkish border without being told that her onward destination was the United Kingdom. The person the appellant made contact with upon her arrival in this country was the sister of the person who arranged her departure from Iraq; at [56], the judge said it was "completely implausible" that that would have not been mentioned to the appellant previously. It was also implausible that the appellant had not been in touch with the person who arranged her travel from Kurdistan, and the explanation provided as to why she was unable to give evidence at the hearing (on

holiday in Iraq) was not credible, especially in the absence of any documentary evidence.

17. These findings led to the following global conclusions, at [79]:

“I do not accept that the appellant had a relationship with Mr M; that this would not have been accepted by her family; that a marriage with Mr B had been arranged by her family unbeknown to her; that she refused to marry Mr B; that she was ill-treated and beaten by her family as a result; that she was helped to escape from her family by [Ms R]; that she did not know that she was coming to the United Kingdom; and that she was not aware that the telephone number given to her was that of Ms R’s sister.”

18. The judge found that, in light of his rejection of the appellant’s account of the hostility and threats from her family, and given she had certain identity documents available to her in Iraq, that she would be able to be returned to the IKR. For similar reasons, her alternative claim to humanitarian protection was also dismissed, and there had been no reliance on article 8 ECHR.

#### *Permission to appeal*

19. The grounds of appeal, which appear to have been drafted by the Iris law firm, are brief and feature no analysis of the judge’s decision. Judge Shaerf considered that it was arguable that the judge placed too much weight on what the appellant said during her screening interview, and suggested that the judge did not consider the implications of the Kurdish calendar ending at around 21 March, when considering the apparent inconsistencies between the dates proffered by the appellant. He added that the judge arguably failed to address the appellant’s claim that she left Iraq to escape forced marriage to a much older man, nor that he considered the risk on return as a single young woman.

#### *Submissions*

20. The respondent set out her initial position in relation to this appeal in the following terms in a response dated 1 June 2020. In light of their brevity, I will set their operative terms out in full:

“The grounds of appeal are extremely brief and are made and only general terms. The judge who granted permission himself identified a number of areas that concerned him.

The permission judge noted that no account was taken of the differences in the Kurdish calendar when the first-tier were considering the discrepancies over dates. At no point was this proffered by the appellant as an explanation for the differences in her accounts and it is essentially speculation by the permission judge. He was also concerned that excessive weight had been placed on screening interview but weight is a matter for the deciding judge. The last character, there is nothing to indicate that undue weight was given to the screening interview and the evidence formed only part of the issue with the discrepancies.

The determination shows that the first-tier judge made substantial and well reasoned adverse credibility findings in this case. They had the benefit of hearing oral evidence

from the appellant and there were significant discrepancies in her account. The adverse findings were clearly open to the judge on the evidence.

The permission [sic] also noted that the first-tier judge was required to make a finding on whether the appellant would face a forced marriage and return. The Secretary of State would point to the summary of the judge's credibility findings at paragraph 79 [quoted in full at [17], above]."

I will address Mr Avery's written submissions dated 30 July 2020 in due course.

### *Discussion*

21. The grounds of appeal are poorly drafted. They were submitted in the name of the Iris Law Firm, which has since come off the record. I have not been aided by the grounds of appeal but have found considerable assistance in the observations of Judge Shaerf when granting permission to appeal.
22. I reject the Secretary of State's submissions that the judge made sufficient findings concerning the claimed forced marriage to B and her likely circumstances of return as a single woman. Even putting to one side the issues with the judge's wider credibility analysis set out below, the judge did not give sufficient reasons for rejecting the appellant's case concerning the likely risk of forced marriage to B. The judge set out at some length his concerns with the appellant's account of her relationship with Mr M. Although at [49] the judge had highlighted consistency concerns with the appellant's account of the prospect of forced marriage to B, the reader of the decision is left wondering why the judge reached his global findings at [79] concerning that issue. The appellant's relationship with M was only one aspect of her case, yet the judge extrapolated his rejection of that limb of the appellant's case to the quite separate issue of the claimed prospect of forced marriage. Even if the relationship with M had been fabricated, it was incumbent upon the judge to say why he rejected the appellant's case in relation to Mr B. It is not clear from the decision what the judge's reasons are for reaching his finding concerning B, other than his general rejection of the credibility of the other limbs of the appellant's case, and a single concern about consistency concerning B. Judges must give reasons that are tolerably clear. The reasons given by this judge for rejecting this aspect of this case are not tolerably clear.
23. There are other reasons I consider the judge's credibility assessment to be tainted, which I consider to be "*Robinson obvious*", such that the Upper Tribunal's jurisdiction extends to considering those points even though they were not raised in the application for, or grant of, permission to appeal. The term "*Robinson obvious*" has its origins in R v Secretary of State for The Home Department, Ex parte Robinson [1998] Q.B. 929, referring to the obligation on a tribunal to consider an "obvious" point of refugee law not raised by an appellant. At 946, Lord Woolf MR said, "[w]hen we refer to an obvious point we mean a point which has a strong prospect of success if it is argued." The doctrine is based on the need for the jurisdiction of the tribunal to be exercised in such a way to avoid the United Kingdom being placed in an inadvertent breach of its international obligations, namely the Refugee Convention.

24. I have set out above the appellant's explanation concerning the discrepancies between her July 2018 statement and the other aspects of her case. Her explanation should have been considered in the round, along with the remaining evidence in the case, in order for the judge to reach a holistic assessment of the evidence. Yet the judge took the contrary approach. He considered the statement aspect of the case *first*, in isolation, and rejected it. Having done so, he then conducted the remaining aspects of his credibility analysis starting from the premise that the appellant's account concerning her statement was not true. So much is clear from [48], where the judge explains that "*given that I have not accepted that it has been shown that the statement was not read back to the appellant before signing it*", he was to reject the appellant's explanation in her substantive asylum interview for the inconsistencies arising from the July 2018 statement (emphasis added).

25. In essence, the judge rejected one limb of the appellant's case before considering the remaining limbs of it, rejecting those subsequent aspects of the case on account of his initial rejection of the appellant's account concerning the July 2018 statement. This was the error in Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367. See, for example, [24]:

"It seems to me to be axiomatic that a fact-finder must not reach his or her conclusion before surveying all the evidence relevant thereto."

26. The Secretary of State submits that Mibanga concerned expert evidence, which is not the situation presently facing the tribunal. That is true, but the Secretary of State submits no principled reason why the principle does not apply to other forms of evidence. The underlying rationale upon which Mibanga is based is that a judge must consider all relevant evidence, in the round, without making individual findings on an isolated basis. That rationale is of equal applicability to expert evidence as it is to other evidence. I therefore reject the Secretary of State's attempt to distinguish Mibanga; it is axiomatic that a judge should reach evidential findings by considering the entirety of the evidence in a case in the round. It is simply a facet of the judicial duty to consider all relevant factors and take into account all relevant considerations.

27. Next the Secretary of State submits that the judge divided his analysis on a logical basis; the issue concerning the alleged misconduct on the part of her previous solicitors was distinct from the substantive credibility issues with which the First-tier Tribunal was concerned. Further, Judge Lane (as he then was), cautioned against relying on Mibanga as some form of judicial straitjacket; a judge will necessarily have to deal with some parts of the analysis in a decision before others. See HH (medical evidence; effect of Mibanga) Ethiopia [2005] UKAIT 00164 at [21]. Just as all the ingredients in a cake cannot be thrown together simultaneously, so too is it necessary to address the "ingredients" of a judicial decision in order. The cake analogy seems to have first been used by Wilson J (as he then was) in Mibanga itself, where he said at [24]:

"It seems to me to be axiomatic that a fact-finder must not reach his or her conclusion before surveying all the evidence relevant thereto. Just as, if I may take a banal if alliterative example, one cannot make a cake with only one ingredient, so also



frequently one cannot make a case, in the sense of establishing its truth, otherwise than by combination of a number of pieces of evidence".

28. The difficulty with the Secretary of State's approach is that the judge made discreet findings concerning the appellant's former solicitors in isolation, and then used those findings as a basis to make his subsequent credibility findings against the appellant. See the emphasised text at [24], above, where the judge specifically anchored his global credibility findings to his pre-existing findings: "given that I have not accepted that it has been shown that the statement was not read back to the appellant..." This is not a complaint of form over substance. The judge's operative findings were reached in two distinct phases, where the findings made during phase 1 (rejection of the account concerning the statement made with the assistance of the former solicitors) were taken as the operative reasons to reject the subsequent, global, findings under phase 2 (substantive credibility findings).
29. Although the judge was entitled to highlight the fact the appellant had not sought to challenge her former solicitors, that was a concern that should have featured as part of a holistic credibility assessment. The judge, of course, accepted that it was "possible" or "a possibility" that dialect difficulties could have infected the process. The appellant herself did not recant the entirety of the statement before the judge (see [33]). Interpreter problems, especially with dialects, are common. The internal inconsistency of the dates in the statement itself, an easy error to make when working across different languages and dialect, tended to support the appellant's view that there had been inadvertent mistakes, rather than an attempt to mislead. Instead of taking these factors into account, the judge elevated his premature conclusions concerning the credibility of the appellant's account of her former solicitors into determinative factors which clouded his subsequent credibility analysis.
30. There are other *Robinson* obvious flaws with the judge's analysis. At [55] to [58] the judge said that he had significant concerns with the plausibility of certain aspects of the appellant's account. Plausibility can play a part in a judge's credibility assessment, but judges must be careful not to impose their own subjective expectations of what is reasonable on appellants who are from, on any analysis, very different cultures and backgrounds to members of the judiciary. Plausibility assessments should take place through the lens of the background materials about what is reasonably likely to take place in the country in question, albeit without the requirement to suspend judgement on matters of common sense.
31. Lord Justice Neuberger summarised the difficulties arising from plausibility assessments in these terms, in HK v Secretary of State for the Home Department [2006] EWCA Civ 1037:

"29. Inherent probability, which may be helpful in many domestic cases, can be a dangerous, even a wholly inappropriate, factor to rely on in some asylum cases. Much of the evidence will be referable to societies with customs and circumstances which are very different from those of which the members of the fact-finding tribunal have any (even second-hand) experience. Indeed, it is likely that the country which an asylum-seeker has left will be suffering from the sort of problems and dislocations with which

the overwhelming majority of residents of this country will be wholly unfamiliar. The point is well made in Hathaway on *Law of Refugee Status* (1991) at page 81:

‘In assessing the general human rights information, decision-makers must constantly be on guard to avoid implicitly recharacterizing the nature of the risk based on their own perceptions of reasonability.’”

32. In Y v Secretary of State for the Home Department [2006] EWCA Civ 1223, Lord Justice Keene said:

“25. There seems to me to be very little dispute between the parties as to the legal principles applicable to the approach which an adjudicator, now known as an immigration judge, should adopt towards issues of credibility. The fundamental one is that he should be cautious before finding an account to be inherently incredible, because there is a considerable risk that he will be over influenced by his own views on what is or is not plausible, and those views will have inevitably been influenced by his own background in this country and by the customs and ways of our own society. It is therefore important that he should seek to view an appellant's account of events, as Mr Singh rightly argues, in the context of conditions in the country from which the appellant comes. The dangers were well described in an article by Sir Thomas Bingham, as he then was, in 1985 in a passage quoted by the IAT in Kasolo v SSHD 13190, the passage being taken from an article in *Current Legal Problems*. Sir Thomas Bingham said this:

“An English judge may have, or think that he has, a shrewd idea of how a Lloyds Broker or a Bristol wholesaler, or a Norfolk farmer, might react in some situation which is canvassed in the course of a case but he may, and I think should, feel very much more uncertain about the reactions of a Nigerian merchant, or an Indian ships' engineer, or a Yugoslav banker. Or even, to take a more homely example, a Sikh shopkeeper trading in Bradford. No judge worth his salt could possibl[y] assume that men of different nationalities, educations, trades, experience, creeds and temperaments would act as he might think he would have done or even - which may be quite different - in accordance with his concept of what a reasonable man would have done.”

[...]

27... **In essence, he must look through the spectacles provided by the information he has about conditions in the country in question...**” (emphasis added)

33. In her submissions dated 30 July 2020, the Secretary of State highlights an additional extract from Y in which Lord Justice Keene said, at [26],

“The decision maker is not expected to suspend his own judgment, nor does [counsel for the appellant] contend that he should. In appropriate cases, he is entitled to find that an account of events is so far-fetched and contrary to reason as to be incapable of belief...”

In her reliance on this extract, the Secretary of State submits that the judge was doing no more than placing permissible reliance on his common sense, rather than suspending judgment.

34. I reject the Secretary of State's submissions that the judge would have had to have suspended his judgment in order to accept this account, especially given the broad consistency of the appellant's case with the background materials. The judge had viewed the appellant's case through the lens of the background materials, finding that it was consistent and plausible from that perspective: see [24] and [25]. By contrast, there were no background materials concerning the likely knowledge of Kurdish women fleeing honour crimes at the point of departure, or the *modus operandi* of the network of agents and criminals who facilitate illicit international travel, for example, concerning whether migrants are told at the outset of their journey what the destination is. Yet at [55] the judge purported to be able to place himself in the shoes of this appellant, at the point of departure, finding that she must have known where she was going. That was the judge's own subjective impression of what would take place and was an impermissible projection of his own concept of reasonableness onto this appellant. The judge made similar plausibility-based findings at [56] concerning the fact that the appellant is now staying with the sister of the woman she initially contacted to arrange her departure from the country. Again, it is not clear how a judge sitting in North Shields would know what the likely actions and attitudes of a young woman fleeing honour crime in Kurdistan would be.

### *Conclusion*

35. While this tribunal will be slow to interfere with findings of fact reached by the First-tier Tribunal, on this occasion (i) the judge made insufficient findings concerning B, (ii) the findings as a whole were infected by the Mibanga error, and (iii) the plausibility-based findings overlooked the judge's own analysis that the appellant's account was consistent with the background materials, instead elevating the judge's own subjective re-characterisation of reasonableness over those considerations.
36. For the above reasons, the decision of Judge Cope involved the making of an error of law such that it must be set aside in its entirety with no findings of fact preserved.
37. In light of the extensive findings of fact that are now necessary, I direct that the matter be remitted to the First-tier Tribunal for a hearing before a judge other than Judge Cope.

### **Notice of Decision**

The decision of Judge Cope involved the making of an error of law and is set aside with no findings preserved.

The matter is remitted to the First-tier Tribunal to be heard by a judge other than Judge Cope.

### **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 18 August 2020

Upper Tribunal Judge Stephen Smith



## ANNEX - NOTE AND DIRECTIONS



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/04840/2019

### THE IMMIGRATION ACTS

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

SA

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

### NOTE AND DIRECTIONS

1. On 19 September 2019, First-tier Tribunal Judge Cope dismissed an appeal by the appellant brought against a decision of the respondent dated 8 May 2019 to refuse her asylum and humanitarian protection claim. On 29 January 2020, Designated Judge Shaerf of the First-tier Tribunal granted the appellant permission to appeal against that decision.

#### *Procedural background*

2. On 7 May 2020, Upper Tribunal Judge Blum directed that his provisional view was that it would be possible to determine whether the decision of Judge Cope involved the making of an error of law and, if so, whether it should be set aside, without holding a hearing. Judge Blum issued directions for an exchange of submissions concerning those issues, and the parties' substantive position in relation to the submissions, the time limit for compliance with which has now passed. The

respondent, in a notice dated 1 June 2020, set out her reasons for resisting this appeal, to which I will turn shortly. The appellant, who is now a litigant in person, did not respond.

3. The matter has been placed before me to consider the responses to Judge Blum’s directions, with a view to either determining the appeal, or giving further directions to aid its subsequent determination.
4. My provisional view is that the decision of Judge Cope may feature some *Robinson* obvious errors which, had the matter been listed for a hearing, I would have raised with the parties directly. As the appellant is a litigant in person who does not speak English, I do not consider that it would be appropriate to list the matter for a remote hearing. Although some face to face hearings are possible in the Upper Tribunal, they are taking a considerable time to list, and the capacity to hold such hearings is limited. That means that waiting for a face to face hearing would entail considerable delay. In turn, that could be incompatible with the overriding objective.
5. I consider that it would be consistent with the overriding objective, in particular with the fairness of the proceedings for both parties, for me to set out my provisional view concerning the additional issues I would invite the respondent to address me upon, in the event the matter was listed for a remote or in-person hearing, and to seek the parties’ observations in response.
6. Accordingly, **within 14 days of being sent these Directions**, both parties (**but in particular the Secretary of State**) are directed to make written submissions concerning:
  - a. My preliminary views concerning possible *Robinson* obvious errors in the decision of Judge Cope, set out at paragraphs 7 to 13; and
  - b. Whether the error of law hearing can be conducted on the papers, without a further hearing, in light of the overriding objective and the need to avoid delay, where compatible with proper considerations of the issues and the need for fairness for all parties. Alternatively, whether it is in the interests of fairness and justice for a hearing to be held, whether remote or face to face.

The Parties should note that I do not invite further submissions concerning the observations of Judge Shaerf when granting permission to appeal. The respondent has already submitted her position in relation to those issues, for which I am grateful.

#### *Preliminary observations*

7. The judge had significant credibility concerns arising from the contents of a statement the appellant made in July 2018, which formed part of her initial application for asylum. Parts of the statement undermined the remaining aspects of her case, mainly due to inconsistencies in the dates of the account given by the appellant in the statement, when compared to the remaining (and largely consistent) accounts she gave elsewhere. The appellant attributed the errors to interpreter

dialect problems, and the fact it was presented to her for signing without being read back to her in a language she understood. Before addressing the details of the remaining accounts, the appellant had given, the judge made discreet findings concerning the credibility of the appellant's account concerning the alleged poor performance by her previous solicitors: see [37] to [41]. Having done so, the judge (at [42] and following) proceeded to examine the remaining aspects of the case.

8. Accordingly, the judge appeared to have reached findings concerning the credibility of the appellant's explanation for the July 2018 statement deficiencies, *before* addressing the wider evidence in the case. So much appears to be clear from [48] where the judge again rejects the appellant's explanations for the inconsistencies in her account:

“given that I have not accepted that it has been shown that the statement was not read back to the appellant before signing it or that it was not translated to her in Kurdish Sorani...”

9. I invite the parties' submissions as to whether the judge fell into the trap identified in Mibanga v Secretary of State for the Home Department [2005] EWCA Civ 367. My preliminary view is that the judge appeared to have rejected one limb of the appellant's case before considering the remaining limbs of it, rejecting those subsequent aspects of the case on account of his initial rejection of the appellant's account concerning the July 2018 statement. See, for example, the approach of Mibanga at [24] to such an approach to the consideration of evidence:

“It seems to me to be axiomatic that a fact-finder must not reach his or her conclusion before surveying all the evidence relevant thereto.”

10. I also invite the parties' submissions as to whether the judge's own approach to the explanation concerning the July 2018 statement proffered by the appellant was itself flawed.
11. The judge opened [48] by noting that the appellant's explanation for the linguistic difficulties she claimed to have experienced when giving the July 2018 statement “may be a possibility”. He made a similar observation at [41]: “I acknowledge that it is possible that the appellant's previous solicitors did not accurately reflect in their drafting of the initial statement what she had told them...” Bearing in mind the lower standard of proof applicable to protection appeals, the judge's acknowledgement of the “possibility” that there had been interpreter problems with the dialect of the interpreter provided by the appellant's initial solicitors may have rendered his conclusion that it was “not reasonably likely” that she had experienced the difficulties she claimed an irrational one (see [41]). The lower standard of proof admits of uncertainty of the sort at play in this case. A finding that something may have been possible is difficult to reconcile with a parallel finding that the very same event was not reasonably likely to have taken place. Merely not demonstrating that something was not reasonably likely to have taken place does not mean it was reasonably likely *not* to have taken place. I invite the parties' representations on this issue, too.

12. I also invite the parties' submissions concerning the judge's assessment of the plausibility of certain aspects of the appellant's account. I note that the judge found that, in broad terms, her account of honour crime and the threat of forced marriage was consistent with the background materials, and therefore plausible: see [24] and [25]. However, at [55] to [58] the judge made significant plausibility-based findings that were adverse to the appellant. I invite the parties' submissions as to whether the judge impermissibly strayed into the territory of recharacterizing the appellant's risk profile based on his own experience of what was reasonable. My provisional view is that it is not clear how a judge sitting in North Shields could purport to know what a young Kurdish woman fleeing honour crime would know, think or do at the relevant times, nor what the likely approaches would be of those she would necessarily engage with during the process .
13. The parties may wish to consider HK v Secretary of State for the Home Department [2006] EWCA Civ 1037 at [29] and following and Y v Secretary of State for the Home Department [2006] EWCA Civ 1223 at [25] and following.

## DIRECTIONS

**Within 14 days of being sent these Directions, both parties (but in particular the Secretary of State) are directed to make written submissions concerning:**

- a. My preliminary views concerning possible *Robinson* obvious errors in the decision of Judge Cope, set out at paragraphs 7 to 13; and
- b. Whether the error of law hearing can be conducted on the papers, without a further hearing, in light of the overriding objective and the need to avoid delay, where compatible with proper consideration of the issues and the need for fairness for all parties. Alternatively, whether it is in the interests of fairness and justice for a hearing to be held, whether remote or face to face.

**The Parties should note that I do not invite further submissions concerning the observations of Judge Shaerf when granting permission to appeal. The respondent has already submitted her position in relation to those issues, for which I am grateful.**

**An anonymity direction was made by the First-tier Tribunal and remains in force.**

Signed *Stephen H Smith*

Date 14 July 2020

Upper Tribunal Judge Stephen Smith