Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06017/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 October 2020 By Remote Hearing	**On 11 November 2020**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M M G F
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Ms C Z Besso, Counsel, instructed by BHT Immigration Legal Services (Solicitors)

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the respondent (also the "claimant"). Breach of this order can be punished as a contempt of court. I make this order because the respondent is an asylum seeker and so is entitled to privacy.
2. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal to allow the appeal of the respondent, hereinafter "the claimant", against the decision

of the Secretary of State on 16 May 2019 refusing him refugee status or any kind of international protection. The claimant had previously claimed asylum unsuccessfully. He was born in January 2000 and claimed asylum in October 2016 when he arrived in the United Kingdom. He is a national of Egypt.

3. He claims that he fears persecution from the authorities in Egypt and from family members of people his father was seen to have wronged. His father worked as a people smuggler and people drowned as a result of his activities.

4. There is an obvious and fundamental difficulty in the decision, namely that the First-tier Tribunal Judge did not identify the Convention reason that had to be present before the appellant could be treated properly as a refugee.

5. It is the claimant's case that if the decision is read carefully and fairly there is no material error.

6. I begin by considering exactly what the First-tier Tribunal decided. It is necessary to state these findings in some detail so that the arguments about them can be tested.

7. The Judge began by summarising the claimant's history and then set out in some detail standard paragraphs on the relevant law.

8. An important and development in his case was the provision of expert evidence from Dr Joffe in a report dated 15 February 2019.

9. The Secretary of State's position was quite straightforward. She said that the claimant had been disbelieved in his earlier application and these that was adverse finding was the starting point in this application. The expert report did not add anything of significance and, in any event, the claimant was not in danger from the Authorities and so internal relocation was an option.

10. The First-tier Tribunal Judge also had a report from a psychologist, a Dr Lisa Morrish, who found the claimant a consistent historian but a little immature.

11. The claimant's case is summarised at paragraph 22 of the Decision and Reasons. He said that his father had not told him about his smuggling activities but he had worked out what his father had done. Someone the claimant's father relied on to inform him about police activity had been arrested and the police had come to the family home looking for his father. He had been slapped on two occasions by police officers.

12. In April 2016 many aspiring refugees were drowned. The claimant's father told him that the family had to remove to Alexandria which they did. However the claimant and his brother did not dare to leave their home in Alexandria during the two months that they lived there because of threatening phone calls directed to their father and his children, that is the claimant and his brother. His father arranged for the claimant to be taken to Italy.

13. The claimant said he did not seek asylum in Italy because that is not what people did and he understood there to be "no human rights there". He travelled to France and then Belgium and ended up arriving in the United Kingdom by lorry.

14. It was his case that the Egyptian Authorities would target him and use him as a hostage to make his father return and face the wrath of the state and/or the relatives of the drowned victims.

15. He said he would have to perform military service and that would involve giving his full identity and therefore he would be recognised by the authorities as the son of a suspected criminal.

16. The claimant was supported by one Sharon Fisk, described as his "personal advisor" who helped him. His caseworker, one Louise Crouch, made a witness statement saying she was aware that the claimant had difficulties obtaining documentary evidence.

17. The Judge referred to the "supplementary report" of Dr Joffe which said that the claimant's home village had been acknowledged as the "smuggling capital of the Nile Delta" and supported the view that if the claimant's father was in Libya it would be difficult to obtain supporting evidence from him.

18. The Judge's findings begin at paragraph 33 of the Decision and Reasons. He acknowledged there had been a previous decision and following, **Devaseelan v SSHD [2002] UKAIT 00072**, that there must be "good reason" to depart from them. In the first decision the claimant had been criticised for failing to produce documentary evidence to support his father's smuggling activities and but in the present appeal the Judge accepted that the claimant, who was 16 years old when then came to the United Kingdom, had never promised to produce an arrest warrant but to try produce an arrest warrant.

19. Dr Joffe had explained that it would be difficult to obtain such evidence from his father and there was other evidence about the difficulty getting help from Egyptian lawyers. The Judge said: "his failure to produce a warrant does not show that his father is not wanted by the Authorities."

20. Paragraph 34 might be particularly important. There the Judge said:

> "Also important in the earlier credibility finding was, as I understand the position, the absence of any objective evidence of a smuggling operation in the area at the time resulting in serious loss of life which could accord with the [claimant's] claim. Information of just such an operation in the same place and time has now been supplied by Dr Joffe and has not been challenged by the respondent. It was evidence which the [claimant] wanted an adjournment to obtain at the previous hearing. Faced with the same situation any Judge might well have decided as then, since there was no reason to suspect that an adjournment would have produced a result, but the position now is different, because it has produced evidence, albeit not definitively confirming the appellant's father's involvement."

21. At paragraph 35 the Judge went on to find it of "equal significance" that independent evidence of the drownings was:

> "…not produced at the earlier hearing, which would appear to show that the [claimant] was not using a real incident he had chanced upon to make an opportunistic false claim of his father's involvement. He specified place and date and a corresponding incident has now emerged which fits with those facts. In all of the circumstances, I find that he has now established, to the lower standard of proof, that his father was involved in a smuggling operation which caused serious loss of life. I find no reason to disagree with Dr Joffe's

reasons for concluding that his father was likely to face serious repercussions not only from the Authorities, who had shown by recent legislation that they were clamping down on such activities but also from the families of those who drowned. Families in that situation might well not distinguish between the father and the son or might try to find the father through the son. Accordingly, I find that the [claimant] will face the real possibility of serious harm on return. I find that the [claimant] will not be able safely to relocate, because at his age he will have to report for military service and provide his personal details. With the personal characteristics set out by Dr Wootton it would in any event be unduly harsh for him to try to live independently in the circumstances."

22. The Judge then said that for the avoidance of doubt he was not allowing the appeal under Article 3 for medical reasons but neither was he endorsing the Secretary of State's view about the claimant's resourcefulness. Although the claimant had managed to travel from Egypt to the United Kingdom and it had been a long journey, he had been under the direction of an agent and the Judge preferred "the evidence of those in whose care he has been since his arrival" which must be a reference to those who provided social and medical care tending to suggest that he was vulnerable.

23. The Judge then allowed the appeal on asylum grounds.

24. The respondent's grounds are summarised as being "material misdirection of law".

25. Unsurprisingly the first complaint in the grounds is that the Judge does not identify a Convention reason.

26. At Point 3, the grounds state:

"It is further submitted that the Judge has failed to adequately reconcile the evidence provided to the Tribunal by Dr Joffe with the negative credibility findings of Judge Iqbal in the previous appeal hearing. Dr Joffe's evidence demonstrates that a smuggling operation took place, but it does not demonstrate, even to the lower standard, that the appellant or his family were involved."

27. The grounds also note that Judge Iqbal found the claimant unable to provide basic details about who he had feared or those involved in the capsize incident which Judge Iqbal found undermined the claimant's case.

28. The grounds assert that the Judge failed to make any findings about whether the claimant would be able to relocate if, contrary to the Secretary of State's case, the claimant was at risk from enemies. It was said that there was no basis for finding that even if at risk in his home area the claimant would be at risk throughout Egypt.

29. The grounds also complain that "the Judge has also failed to address or reason the obvious Section 8 considerations and the fact that the [claimant] travelled through a number of safe countries en route to the UK without claiming asylum at the first opportunity to do so, despite noting it at [15]. This is clearly a reference to discreditable behaviour identified in section 8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

30. Mr Lindsay's arguments before me were closely based on these submissions.

31. However they produced a spirited repost from Ms Besso in the form of a Rule 24 response which I outline below. This identifies the new evidence relied on in support of the fresh claim. It included a psychologist's report by Dr Morrish and a country

expert report by Professor Joffe and witness statements from his solicitor and social worker.

32. The Rule 24 notice contends that, read in context, the Convention reason was clearly being a membership of his family.

33. The Rule 24 notice asserts, with some justification, that it is trite to suggest that membership of a family can constitute membership of a particular social group and supports this assertion with a reference to a speech of Lord Hope of Craighead in **SSHD v K. Fornah v SSHD [2006] UKHL 46**.

34. Ms Besso then asserted at paragraph 7 that it was clearly the claimant's case that he feared retribution because he was a member of a particular family. It was unarguable that the Judge had decided that the claimant was at risk because he was his father's son and therefore it was clear to a fair minded reader that the Judge had found that he was at risk because he was a member of a particular social group, namely his family.

35. The grounds then contend that there was no error in failing to follow the previous decision of the Tribunal. What the Judge had done was look at what was different in the evidence and show how it could support a different conclusion.

36. Dr Joffe had found evidence of a boat capsizing and drowning at least 240 people in April 2016 which fitted completely with the claimant's chronology. Professor Joffe found it "highly possible" that the claimant's father was involved in that tragically unsuccessful smuggling operation.

37. The notice pointed out there was no challenge to Professor Joffe's findings.

38. The Judge had also taken notice that there was evidence that he had been trying or people had been trying on his behalf to get supporting evidence and he should not be disbelieved for failing to find an arrest warrant.

39. The Judge had dealt with the only inconsistency in the core story which related to how many times the claimant had been hit, whether it was once or twice and found that the claimant could be believed. The grounds submit there was no material error in this approach.

40. The response to ground 4 is headed "Internal Relocation". The Judge found that the claimant would not be able to relocate safely because he will have to report to the authorities to carry out military service. The Rule 24 notice contends that it is clear how the Judge had concluded that the claimant would come to the attention of the authorities and be at risk.

41. The grounds also refer rather carefully to the summary of Professor Joffe's evidence.

42. The Rule 24 notice contends that there is a difference between prosecution and persecution (plainly there is). It is not suggested that the claimant has committed any offence, but it was Professor Joffe's evidence that it was possible that the claimant had been put on a "watchlist" because he was his father's son which would involve him coming to light in the event of his return to Egypt which could lead to an interview and that could lead to interrogation and ill-treatment. This was an identified risk quite apart from anything that the relatives of the deceased might seek to do to him.

43. It was said there was no material failure in not setting out "Section 8 considerations". The Judge clearly accepted evidence that the claimant was vulnerable had poor mental health and had been under the direction of the agent after leaving Egypt. The Rule 24 notice then reminds me how the Court of Appeal in **JT (Cameroon) v SSHD [2008] EWCA Civ 878** pointed out that Section 8 requires the listed factors to be taken into account, not necessarily afforded weight.

44. In short, it was claimant's case that, read carefully there was nothing unacceptable in the decision.

45. In his oral submissions Mr Lindsay contended that a claimant's family could not be a particular social group because he was only at risk while the father was "wanted" and that was not an immutable characteristic because he can cease to be wanted, either by reason of being caught or of the authorities losing interest.

46. He then contended that there was a switch in the burden of proof because, by saying that the failure to producing the warrant did showing that the father was not wanted, the Judge had lost sight of the need for the claimant to prove his case.

47. He also criticised the Judge for not at least entertaining the possibility that the accident identified by Mr Joffe was coincidental and not involving the claimant's father at all.

48. He further maintained that there is no basis for finding that the claimant would be at risk from the state because of his father's activities. There was no real risk to him.

49. I am satisfied that the First-tier Tribunal clearly meant that the claimant would be at risk because of his family membership. That does make sense of the decision and although the decision could and really should have been clearer, I am entitled to construe the Decision and Reasons in a way that makes sense of it and that is clearly what the Judge meant.

50. I am also satisfied that the Judge gave proper reasons for parting from the earlier Tribunal's decision. The Judge was faced with was additional evidence from Dr Joffe. The Judge was entitled to consider it high quality evidence, albeit of limited relevance. He had evidence explaining the claimant's vulnerability, he had evidence explaining why the claimant had not been able to find the warrant that he had indicated that he would. The claimant is mentally unstable and young. The Judge was entitled to find that he should not be held too tightly to his promises especially about matters he could not really understand.

51. Further, I find the Judge was perfectly entitled to decide as he did that Dr Joffe's report assisted him. The point is that the claimant, without relying on any background evidence whatsoever, had described a particularly unpleasant and serious incident in which many people died. It was, perhaps, surprising that something so serious was not noted anywhere but it was not in background evidence before the first tribunal. Dr Joffe found appropriate background evidence and the Judge was entitled to find that significant. It may have been a complete coincidence. It may have been a very cynical ploy by the claimant to take advantage of a calamity to prove his case, but not actually produce any evidence of that calamity until the second time round to make it sound more credible and give the impression that he had not just made it up a story to fit the background material, but that would require a very high degree of

cynical dishonesty. The Judge was perfectly entitled to reject that explanation and find the explanation offered a credible one.

52. I do not regard the failure to set out "tick off" each point identified by section 8 as discreditable as a material error of law. Conduct if not discreditable because it is mentioned in section 8 and the Decision and Reasons would not have been improved by a line explaining, for example, that by reason of his youth and mental state the claimant was clearly dependant on the advice of others and nothing can be deduced from his failure to claim asylum on his way to the United Kingdom.

53. There is no difficulty with the finding that the claimant would be at risk from family members in his home village.

54. Neither is there any difficulty with the finding that the claimant would be noticed by the authorities in the event of his return and would be noticed wherever he chose to resettle in Egypt so if he were at risk relocation would not be an answer from the state.

55. I am less comfortable with the conclusion that the claimant would be at risk from the state because of the activities of his father. It really is rather a sweeping claim from western standards to think that anyone, and particularly a young man who was not said to be in any way involved with his father's criminality, risked serious ill-treatment by the state in its efforts to find the father.

56. I have revisited the Judge's findings on this point to see if I can make more sense of the Decision and Reasons. The claimant said in his statement that the police came on about seven occasions to visit the family home and were violent towards him but he insisted that he was only struck twice during one visit.

57. The high watermark of the appellant's case is, I find, at paragraph 97 of Mr Joffe's report. I begin by setting out the opening paragraph. He says:

> "Even though [the claimant] was merely a minor and, according to his own account, unaware of his father's true activities, it is not necessarily the case that the security Authorities in Egypt would accept this. There is, therefore, a considerable risk that he would be arrested and interrogated about the 2016 drownings as a result, especially if, in the intervening years, publicity will have made them aware of what had happened. The evidence of recent years has demonstrated that the authorities are becoming more, not less, vindictive towards any person they perceive as threatening the security of the state. Indeed, if [the claimant] were to be returned to Egypt and his claims about his father's activities are considered to be true, he could then be subjected to serious ill-treatment, as the police might well assume that he must have been aware of them and even complicit in them. He could well be arrested and then could face the danger of severe ill-treatment as the citations below made clear."

58. The citations below are quotations from various reports, including the Bureau of Democracy, Human Rights and Labour Report for 2017 on Egypt which refers to a "spike in enforced disappearances, alleging authorities increasingly relied on this tactic to intimidate critics." It says how proper process was not followed and many were detained in police stations and then places not on official registers. Mr Joffe then refers to torture being "widely used in Egypt police stations and prisons" and gives a reference for that from the same report. The police were described as corrupt so people could be released easily if the right people were known.

59. This I find highlights, rather than illuminates the difficulty. If I read this literally then, with respect Mr Joffe, is just plain wrong. He begins by saying that it was "not necessarily the case" that the security forces in Egypt would accept that the appellant as a minor would not be involved in his father's activities and then moves on seamlessly to say "it is 'therefore, a considerable risk that he would be arrested and interrogated about the 2016 drownings as a result'". The word "therefore" is inappropriate. The fact that something is not necessarily the case, does not lead seamlessly to the conclusion that there is a considerable risk of ill-treatment because the person was assumed to be involved.

60. I note that the claimant was born in the year 2000. He would have been 16 at the time of the drownings or thereabouts. I can see why it might not be thought that he was unconnected. Further the evidence supporting Mr Joffe's conclusion is not compelling. Certainly it would support a suggestion that a person seen as an opponent of the authorities might be in for a very difficult time, but it is not really evidence that a person related to a person engaged in criminal activities would be a target for ill treatment.

61. However Mr Joffe is an expert in the region. He is not saying these things for no reason and it is clearly his opinion that there is a risk. His report should not be construed as statute. It is quite clear to me that this is the part of the report that the Judge had in the mind and it supported his conclusion.

62. I am not allowed the luxury of indecision. I find on a proper analysis the First-tier Tribunal's decision, the Judge has accepted that the claimant's father was involved in people smuggling activities and that this is an activity seen as hostile by the Government of Egypt. Contrary to an earlier finding and based on further evidence the Judge accepted that there was a particularly ugly and serious incident when a lot of people were drowned. The Judge accepted that this would cause outrage amongst the relatives of those who died and they may not be at all forgiving and also that the state of Egypt would be concerned because it does not want to facilitate people smuggling. The Judge accepted that the claimant has attracted the attention of the authorities because he was "roughed up" (my phrase but I think it catches the meaning) during a police visit to his home and the Judge has accepted that the claimant could still be of interest in return and could find himself in trouble for all the reasons given. The Judge has equated this possibility with a real risk. I am not sure that that is the only permissible reading of Dr Joffe's evidence and it is something Dr Joffe might want to think about rather carefully if he gives evidence again because he could have been clearer. Nevertheless, I find that the Judge was entitled to give the evidence the meaning that he did and was therefore entitled to allow the appeal for the reason that he did and there is no error of law.

63. It follows I dismiss the Secretary of State's appeal.

Notice of Decision

64. The First-tier Tribunal did not err in law. The Secretary of State's appeal is dismissed.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 9 November 2020