IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004601

First-tier Tribunal No: PA/54992/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

20th December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

AQ
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Howard, Fountain Solicitors
For the Respondent: Mr Tan, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 5 December 2023

Order Regarding Anonymity

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

Background

1. This matter concerns an appeal against the Respondent's decision letter of 21 October 2022 ("Refusal Letter"), refusing the Appellant's fresh claim for protection made on 15 October 2019. The Appellant's claim is on the basis that he is a Syrian national.

2. The Respondent did not accept the Appellant was a Syrian national but considered he was likely to be an Iraqi Kurd. This was due to the Appellant's previous claim (made on the same basis) having been dismissed on appeal in a decision promulgated on 17 February 2017 (PA/04782/2016). The identification document he had now produced had been considered but there was no independent evidence that this was an official document from within Syria or that it was genuine and could be relied upon. It was also not accepted that there would be very significant obstacles preventing him from integrating pursuant to immigration rule 276ADE (vi). It was not accepted that return would result in a breach of article 3 ECHR on medical grounds or that there were any exceptional circumstances.

3. The Appellant appealed the refusal decision. The Respondent undertook a review on 24 July 2023 but maintained the refusal position.

4. The Appellant's appeal was heard by First-tier Tribunal Judge Jepson ("the Judge") at Manchester on 22 August 2023, who later dismissed the appeal in its entirety in a decision promulgated on 26 August 2023. I note both parties were legally represented at the hearing and the Appellant gave oral evidence using a Kurdish-Kurmanji interpreter.

5. The Appellant applied for permission to appeal to this Tribunal on four grounds headed as follows:

> Ground 1 – Article 3 ECHR - Failure to apply correct standard of proof
>
> Ground 2 - Refugee Convention - Failure to apply correct standard of proof
>
> Ground 3 - Contradictory findings
>
> Ground 4 - Inadequate/confusing reasoning.

6. Permission to appeal was granted by First-tier Tribunal Judge Robinson on 16 October 2023, stating:

> "1. The application is in time.
>
> 2. The grounds assert that the Judge has failed to apply the correct standard of proof in relation to Article 3 ECHR (medical).
>
> 3. It is arguable that the Judge has made an error of law on this basis, arguably referring to the incorrect standard of proof at [98] and [109].
>
> 4. I am less persuaded by the other grounds; accordingly permission to appeal is granted only on Ground 1."

7. The Respondent filed a rule 24 response on 2 November 2023.

The Hearing

8. The matter came before me for hearing on 5 December 2023.

9. Mr Tan said he did not wish to rely on the rule 24 response and had highlighted this to the Appellant's representative earlier in the week. Mr Howard did not appear to object to this change in position. I noted that the concession in the rule 24 response erroneously referred to the Nationality and Borders Act 2022 such that it was problematic in any case, given that the claim under discussion was made prior to that Act coming into force.

10. Mr Howard took me through the single ground of appeal for which permission had been granted.

11. He said there is a material error of law concerning the Judge's findings in relation to article 3 ECHR. The Judge's comments at [62], [98] and [109] indicate that he applied the incorrect standard of proof to consideration of the article 3 claim. He cited the case of HKK (Article 3; burden/standard of proof) Afghanistan [2018] UKUT 286 (IAC). Had the Judge applied the correct standard of proof, the outcome may have been different.

12. I asked whether Mr Howard was satisfied that, aside from the question of the standard of proof, the Judge had applied the correct six-stage test for suicide cases as confirmed in MY (Suicide risk after Paposhvili) [2021] UKUT 232 (IAC); he said yes.

13. I said, given the narrow grant of permission, the Judge's findings concerning the Appellant not being a Syrian national remain in place. There is therefore no question that he will be returned to Syria. The Refusal Letter and Respondent's review assert that the Appellant is an Iraqi Kurd, which the Judge notes at [59]. I asked Mr Howard whether this was agreed; he said yes.

14. I asked Mr Howard whether there was any evidence before the Judge as to the likely impact on the Appellant's health on return to Iraq; he said no, because the Appellant's position was that he was from Syria.

15. I questioned how, even if there was an error (on which point I did not give a view), it would be material if the Appellant would not be returned to Syria and he had not produced any evidence concerning the position with medical care on return anywhere other than Syria.

16. Mr Howard said he appreciated he was in some difficulty on this point but said there was also the question about whether the Appellant had, or would be able to get, the necessary identification documents for a return to the Kurdish Region of Iraq.

17. Mr Tan agreed that there is no material error of law for the reason that the Appellant will not be returned to Syria. The Appellant's claim to be from Syria had been rejected to the lower standard. Mr Tan considered that, in [98] when the Judge refers to the Appellant falling short to an even greater degree, the Judge is saying that the Appellant fell even further below the lower standard. The Judge referred to the correct test under AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17; and his primary finding is that the Appellant is not a seriously ill person such that he did not even meet the first stage of the relevant test and his claim was bound to fail. Mr Tan submitted that the issue in relation to suicide and medical care had been appropriately considered. However, even if the Judge did apply the incorrect standard to the medical claim, this was

after the Appellant had been found not to be a Syrian national so the point is completely immaterial.

18. As to the alternative of the Appellant being from Iraq and requiring identification documents, Mr Tan said he did not consider this was a point either put into issue or raised in the grounds.

19. Mr Howard said he had no reply other than to repeat the wrong standard of proof was applied. I asked him if he could direct me to those parts of the medical evidence adduced by the Appellant which touched upon a risk of suicide, which he did.

20. At the end of the hearing, I reserved my decision.

Discussion and Findings

21. Permission to appeal has only been granted in relation to ground one of the written grounds of appeal. This refers to [98] of the Judge's decision where he says:

> "Any human rights issues arising from the above are equally rejected, for the same reasons. The standard of proof there is higher, meaning the Appellant's case falls short to an even greater degree".

22. The grounds say that [99] – [109] go on to deal with the medical claim made under article 3 ECHR, such that the Judge incorrectly applies a higher standard of proof than was proper for an article 3 claim, relying on the case of HKK, citation above.

23. Given the narrow ambit of the grant of permission to appeal, the Judge's findings concerning the Appellant's nationality (i.e. that he is not a national of Syria) remain undisturbed. There is therefore no question of the Appellant being returned to Syria.

24. The Judge does not make any explicit finding as to an alternative nationality of the Appellant. Although the Refusal Letter and review assert that the Appellant is from Iraq, I cannot see that the question of whether he was from Iraq was an issue put before the Judge for determination. The Appellant's entire case was founded on the premise that he was a Syrian national. It is therefore understandable that the Judge did not make any findings as to whether the Appellant was from Iraq, or what the position on return to Iraq would be. The Judge therefore assessed article 3 only in relation to return to Syria.

25. Paragraph 11 of the skeleton argument that was before the Judge stated:

> "The Appellant is adamant that he is a Syrian national and not an Iraqi national. Furthermore, the Appellant suffers from mental health issues. He has a self-harmed in the past".

26. At paragraph 13 of the skeleton, the relevant issue to be determined was stated to be:

> "Does the appellant meet the article 3 ECHR threshold in light of his mental health?"

27. The relevant submissions as to this issue are contained later in the skeleton as follows:

> "22. The Appellant suffers from mental health issues. He has previously self-harmed. It will be argued that the Appellant as such is a "significantly ill person".
>
> 23. The Appellant has provided evidence of his current medical position. It will be argued that the background evidence within the Appellant's bundle supports the Appellant's contention that there will be inadequate suitable healthcare for the Appellant on return to any part of Syria. As such, it is contended that the Appellant will face a real risk on the account of the absence of appropriate treatment in Syria, of being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering (as per AM (Art 3; health cases) Zimbabwe [2022] UKUT 00131 (IAC)".

28. The Judge's decision is lengthy, running to 114 paragraphs. The nature of the medical evidence adduced is not in dispute such that I shall not refer to it specifically and shall focus instead on those parts of the decision which go to the burden and standard of proof applied.

29. Early in the decision, the Judge states as follows:

> "Burden of Proof
>
> 14.) The standard of proof for protection claims is the lower one – reasonable likelihood. It is borne by the Appellant.
>
> Human Rights Claims
>
> 15.) Articles 2, 3 and 8 are raised by the Appellant. I need not set them out here.
>
> Burden of Proof – Human Rights Claims
>
> 16.) For a human rights claim, the civil burden applies – balance of probabilities. This is borne by the Appellant."

30. In his discussion of the evidence and submissions in [22]-[61] there is nothing to indicate the Judge was explicitly referred to the standard of proof applicable in article 3 health cases, although the relevant cases were cited to him, and he also refers to them.

31. At [62] the Judge states:

> "I direct myself as to the low evidential standard required for an asylum claim. The civil standard applies to any human rights issues raised."

32. [65] - [97] deal with the Appellant's claim to be a Syrian national. As above, the findings made in these paragraphs stand.

33. At [98] the Judge states:

> "Any human rights issues arising from the above are equally rejected, for the same reasons. The standard of proof there is higher, meaning the Appellant's case falls short to an even greater degree."

34. He goes on to address the medical claim in [99] – [109]. In [99] the Judge states "nothing provided would seem to show the Appellant is a seriously ill person in a

physical sense" and then looks at the Appellant's mental health, recognising at [101] that this forms the thrust of the Appellant's medical claim.

35. At [103] the Judge carries out the correct six-stage test applying to suicide claims as set out in MY (Suicide risk after Paposhvili) [2021] UKUT 232 (IAC), making comments as against the various stages. His analysis leads to a finding in [108] that the Appellant is not a seriously ill person and so does not fulfil the first stage of the test.

36. At [109] the Judge states (my emphasis in bold):

> "For that reason, I cannot find the Appellant would on return be at risk from a serious decline in his health. He does not reach the level of a seriously ill person. **Nor am I persuaded on the balance of probabilities** any decline caused by removal would lead to intense suffering or a significant reduction in life-span. There is not enough medical evidence to support such arguments".

37. MY goes through the case law applicable to suicide cases. The headnote of MY states (my emphasis in bold):

> "Where an individual asserts that he would be at real risk of (i) a significant, meaning substantial, reduction in his life expectancy arising from a completed act of suicide and/or (ii) a serious, rapid and irreversible decline in his state of mental health resulting in intense suffering falling short of suicide, following return to the Receiving State **and meets the threshold for establishing Article 3 harm identified at [29] – [31] of the Supreme Court's judgment in AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17**; [2020] Imm AR 1167, when undertaking an assessment the six principles identified at [26] – [31] of J v Secretary of State for the Home Department [2005] EWCA Civ 629; [2005] Imm AR 409 (as reformulated in Y (Sri Lanka) v SSHD [2009] EWCA Civ 362) apply."

38. MY cites paragraph 112 of the Supreme Court case of AM (Zimbabwe) as follows (my emphasis in bold):

> "**The burden is on the individual appellant to establish that, if he is removed, there is a real risk of a breach of Article 3 ECHR to the standard and threshold which apply**. If the appellant provides evidence which is capable of proving his case to the standard which applies, the Secretary of State will be precluded from removing the appellant unless she is able to provide evidence countering the appellant's evidence or dispelling doubts arising from that evidence. Depending on the particular circumstances of the case, such evidence might include general evidence, specific evidence from the Receiving State following enquiries made or assurances from the Receiving State concerning the treatment of the appellant following return."

39. The Upper Tribunal in paragraph 144 of MY applies this test in making its concluding finding that the Appellant in that case (my emphasis in bold):

> ".. **would face a real risk**, on account of the absence of appropriate treatment in the receiving state or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering and a significant, meaning substantial, reduction in life expectancy."

40. Overall, despite the Judge's otherwise careful and reasoned analysis of the Appellant's health conditions which is undertaken applying the correct six stage

test, I find he does apply the wrong standard of proof. It seems clear to me that he applied the same (civil) standard of proof to all "human rights" claims, or claims made under the ECHR, which included the Appellant's article 3 medical claim, when he should have applied the "real risk" standard in (AM) Zimbabwe. This is an error.

41. However, as discussed at the hearing, I cannot see how this error can be material. The Judge's finding that the Appellant is not a Syrian national stands and so the Appellant will not be returned to Syria. The only evidence adduced relating to medical provision on return related to Syria and nowhere else. There was no explicit finding made as to an alternative nationality for the Appellant. Whilst the Respondent's case was that the Appellant is from Iraq, in the absence of any explicit finding, the question of the Appellant's nationality remains open. The Appellant has not argued that, whatever the location of return, there is a real risk of being exposed to a serious, rapid and irreversible decline etc. His claim is specific to Syria. Having been found not to be a Syrian national, his medical claim could therefore not have succeeded even had the correct standard of proof been applied.

42. As the Appellant did not countenance the argument that he was from Iraq and did not therefore deal with what the position would be on return there, I cannot see that he is now able to challenge the Judge's decision on the basis that the question of identification documentation was not dealt with. This did not form part of the grounds of appeal such that permission has not been granted which would enable the argument to be raised in any case.

43. To conclude, I find the decision is not infected by any material errors of law. The decision therefore stands.

Notice of Decision

1. The appeal to the Upper Tribunal is dismissed. The decision of First-tier Tribunal Judge Jepson promulgated on 26 August 2023 is maintained.

2. An anonymity direction is made due to the nature of the issues underlying the appeal.

L. Shepherd
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
13 December 2023