IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005499
UI-2024-002338
First-tier Tribunal No:
PA/55784/2021
IA/17110/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 October 2024

Before

UPPER TRIBUNAL JUDGE O'BRIEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AK
(ANONYMITY ORDER IN FORCE)

Respondent

Representation:
For the Appellant: Ms S Lecointe, Senior Home Office Presenting Officer
For the Respondent: Ms P Solanki of Counsel

Heard at Field House on 9 August 2024

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

1. For the sake of convenience, I refer to the parties below as they were known in the First-tier Tribunal.

2. The parties each appeal against the decision of First-tier Tribunal Judge Hawden-Beale ('the judge') who, in a decision and reasons promulgated on 19 June 2023, dismissed on protection grounds the appellant's appeal against the respondent's decision to refuse his protection and human rights claim but allowed the appeal on human rights grounds (Article 3 but not Article 8).

3. The respondent appealed on 21 June 2023 on the sole ground that the judge had given inadequate reasons for accepting that the appellant did not have his identity documents and so finding that his return would breach Article 3 ECHR. Permission to appeal was refused in the First-tier Tribunal but granted on renewal by Upper Tribunal Judge Perkins on 26 April 2024.

4. The appellant appealed on 4 July 2023, on the grounds that: the judge had failed to consider material evidence in respect of s72 of the Nationality, Immigration and Asylum Act 2002; failed to make findings on material issues and/ or failed to consider relevant evidence when assessing risk on return; and, failed to take into account material evidence and/or factors when considering Article 8 ECHR.

5. Permission to appeal was refused in the First-tier Tribunal on 19 December 2023 but granted on renewal by Upper Tribunal Judge L Smith on the two then pleaded grounds, namely that the judge had failed to consider material evidence in respect of s72; failed to make findings on material issues and/or failed to consider relevant evidence when assessing risk on return.

6. The appellant pursued the argument that the judge had erred in her Article 8 assessment in his Rule 24 reply to the respondent's appeal. Otherwise, he submitted that the judge's challenged findings were permissible, as did the respondent in her Rule 24 reply.

The Decision

7. The appellant had claimed to be at risk from the family of his girlfriend, with whom he had been intimate. He claimed to have fled Iraq with her when her family arranged for her to have a 'virginity test'. The respondent had certified his claim under s72 of the Nationality, Immigration and Asylum Act 2002, but had rejected in any event his claimed risk on return, a risk arising from any lack of documentation and any claim on Article 3 ECHR (medical grounds). The respondent had also refused the appellant's Article 8 ECHR claim.

8. The judge found that s72 applied to the appellant and that he had not rebutted the consequential presumption. She rejected the appellant's account of being at risk from his girlfriend's family. However, she did accept that the appellant did not have (nor have access to) his identity documents, and allowed the appeal under Article 3 on that basis. She dismissed his appeal under Article 8 ECHR.

Transcript of Proceedings Below

9. Ahead of the hearing, an application had been made for a transcript of the hearing before the judge. In short, it had been suggested in the respondent's Rule 24 reply that the appellant was relying on arguments not advanced before the judge. However, having listened to the recording of the hearing, all agreed

that it was unintelligible, that a transcript was unlikely to shed light on the matter and, in any event, that the point was not going to be taken before me. Consequentially, I was able to proceed without delay.

Submissions

10. Supplementing her grounds of appeal and Rule 24 response to the Respondent's grounds of appeal, Ms Solanki submitted that the judge had failed to taken into account any of the factors positive to appellant when considering whether the s72 presumption had been rebutted. No mention had been made of any of them. The circumstances of his offending had not been properly considered nor the change in circumstances since then, let alone the appellant's evidenced remorse. The judge had rejected without any evidential basis the appellant's account of the events which led him to flee Iraq, and had given no reasons for apparently rejecting country expert evidence on that point. In assessing Article 8, the judge had again failed to take into account any of the factors positive to the appellant.

11. Ms Lecointe submitted that the judge, having made significant adverse credibility findings against the appellant, gave no reason whatsoever for accepting that he did not have (or did not have access to) his identity documentation. The judge's finding on s72, risk and Article 8 were open to her. Reading the decision as a whole, adequate reasons were given for all of her conclusions on those issues.

Conclusions

12. Section 72 of the Nationality, Immigration and Asylum Act 2002 ('Serious Criminal'), as saved for convictions predating the entry into force of s38 of the Nationality and Borders Act 2022, provides:

> (1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from prohibition of expulsion or return).
> (2) A person is convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if—
> (a) he is convicted in the United Kingdom of an offence, and
> (b) he is sentenced to a period of imprisonment of at least two years.
> …
> (6) A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.
> …
> (9) Subsection (10) applies where—
> (a) a person appeals under section 82 of this Act…wholly or partly on the ground mentioned in section 84(1)(a) or (3)(a) of this Act (breach of the United Kingdom's obligations under the Refugee Convention), and
> (b) the Secretary of State issues a certificate that presumptions under subsections (2), (3) or (4) apply to the person (subject to rebuttal).
> (10) The Tribunal or Commission hearing the appeal—
> (a) must begin substantive deliberation on the appeal by considering the certificate, and

> (b) if in agreement that presumptions under subsections (2), (3) or (4) apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a).
>
> …

13. The details of the appellant's criticisms of the judge's conclusions on s72 are to be found at paragraphs 6-10 of his renewed grounds of appeal.

14. The judge is criticised for saying in [60] that the appellant had not offended since 2016, whereas his last conviction had in fact been in 2012. However, the relevant extract from [60] reads, 'The respondent accepted that he had not reoffended since his unlawful return to the UK in 2016…' (my emphasis). This is not incorrect. Moreover, it is clear from the judge's observation at [64] that Dr Boucher had in her report (dated 5 July 2022) considered the appellant still to be a moderate risk of reoffending '11 years after his last conviction' that the judge had not mistaken the passage of time since his last offence.

15. It is submitted that the judge did not taken into account the appellant's age at the time of his offending. However, that submission cannot succeed given what I note above was said in [64] and the judge's express reliance on the report of Dr Boucher which considered in detail the chronology of the appellant's offending.

16. Paragraphs 8 and 9 of the renewed grounds identify matters positive to the appellant which it is argued were left out of account by the judge. Paragraph 8 comprises matters identified in the expert evidence and paragraph 9 those in the evidence of the lay witnesses. As noted above, the judge placed great weight on the report of Dr Boucher. The judge also makes express reference to the witnesses' statements as well as rehearsing in some considerable detail their oral evidence. It is implicit in the absence of a basis to find to the contrary that the judge took all of that evidence into account. A judge is not required to refer expressly to every piece of evidence given on a material issue, provided that their reasons read as a whole explain sufficiently how they reached their decision. I do not find a basis to conclude that the judge 'cherry-picked' Indeed, as I note below, it is not true that the judge failed to mention any factor positive to the appellant.

17. The problem with the appellant's challenge to the judge's s72 conclusion is that Dr Boucher herself found that the appellant to continue to pose a moderate risk of future violence and reoffending, notwithstanding the positive matters identified by Ms Solanki. The judge was unarguably entitled to identify the negative factors which gave rise to such a risk notwithstanding there being only one current clinical risk factor. That in itself was a matter positive for the appellant to which the judge expressly referred.

18. Paragraph 10 argues that the judge failed to take into account the appellant's argument that the respondent's delay in dealing with his fresh claim demonstrated she did not consider him a danger to the community. Again, a judge is not expected to rehearse every argument or piece of evidence considered. With respect, the submission was insufficiently weighty to necessitate mention in light of the appellant's own expert's assessment of future risk.

19. It was entirely open to the judge on that basis alone to find that the s72 presumption had not been rebutted. Indeed, even if the judge had erroneously overlooked any of the factors in paragraphs 8 and 9 of the renewed grounds and Ms Solanki's submissions on the respondent's delay in processing the fresh submissions (which I find she did not), it is inevitable given Dr Boucher's assessment of risk that the judge would have found the presumption to stand unrebutted. In other words, even if I had accepted that the judge had erred as asserted in paragraphs 8 to 10 of the renewed grounds, I would have found them to be immaterial.

20. All that said, I find Ms Solanki's submissions on the judge's assessment of risk on return to be persuasive. The crux of the judge's findings that the appellant would not be at real risk of serious harm can be found in [66-67]:

> '66. The appellant claims to have had an intimate relationship outside marriage with this lady and that he asked twice for her hand in marriage to be rejected because her family considered that they should be the ones who decided who she married. He then says that because of how his girlfriend acted at home, her family became suspicious of her virtue and arranged a virginity test at the local hospital for the day after she and the appellant were intimate, which she did not take because she ran away with the appellant the night before that test was due to be taken. The appellant claims that suspicions will fall upon him as the person with whom she has been intimate because he asked to marry her. Even if he did have an intimate relationship with this girl, just because he asked to marry her, does not mean that the family will suspect him of being intimate with her. Would the family have suspected her of being intimate with someone else, if they had also asked to marry her? I suspect not. I also do not find it credible that within a few hours of his girlfriend arriving home after their one intimate encounter, she was acting so out of character that her parents immediately made assumptions about her virtue and arranged a virginity test the very next day.
>
> '67. He has confirmed that he never had any threats from her family whilst in Iraq, not even a friendly or unfriendly warning not to go near her after his marriage proposals had been rejected nor does he say that the girlfriend was restricted in her movements after his proposals were rejected. He says that he does not know if the family knew where he lived, which I find hard to accept given that he claims that his father's cousin's wife went to the girlfriend's family home twice with the marriage proposal and the family would be unlikely to either accept or reject such a proposal without finding out about his family, including where they lived. I am satisfied that he is speculating that he was being and still is being sought by the girlfriend's family.'

21. The judge gives no reason for finding it incredible that the appellant's girlfriend's behaviour would cause her family to doubt her honour. Nor is her conclusion as to the likelihood of suspicion falling on the applicant at all adequately reasoned. She certainly gives no reason for rejecting the opinion of Professor Joffe, the country expert relied upon by the appellant, who says at para 102(i):

> ‘It does, however, seemed to me that [the appellant] has provided a plausible explanation as to why he fears violent retribution from his partner's family. As I point out above (paragraph (19)), loss of virginity is a very serious matter for a woman in Iraq and it is certainly plausible that this would have been manifest in her demeanour, her families suspicions. She would have been likely to have been anxious and apprehensive that what had occurred might be discovered- as indeed it was. It is also highly plausible that [the appellant] would attract their suspicions as the culprit, given the fact that his father's cousin's wife had, on two occasions, sought to persuade the family to allow him to marry her.’

22. Moreover, given the judge’s view that the girlfriend’s family were likely to know where the applicant lived, she appears to have given no consideration to what conclusions they might have drawn from the fact that he disappeared at the same time as their daughter.

23. Given that these are matters which were to be adjudged to the lower standard of proof, I am persuaded that the judge has given inadequate reasons for her conclusions and thereby erred in law.

24. I turn now to the respondent’s appeal against the judge’s finding at [76] that the ‘appellant clearly did not have’ his identity documentation when he returned unlawfully to the United Kingdom in 2016.

25. In [75], the judge rejects as ‘incredible and implausible’ the appellant’s claim (recorded at [72]) that he had no CSID or INID when he returned to Iraq in 2013, finding instead that he would have needed one to get around, in accordance with his own account. The judge does not record that respondent had conceded that the applicant was undocumented; and no such concession is made in the refusal letter (see in particular [105]). In the circumstances, with the appellant’s possession or not of identity documentation being a key issue (indeed the determinative issue) on which the judge decided to allow the appeal, she was obliged to give adequate reasons for the finding. Instead, she gave none and thereby erred in law.

26. It follows from the above that the appellant’s appeal against the judge’s conclusions on s72 fails, and so her dismissal of the appeal on ss84(1) & (b) grounds must stand. As for the judge’s decision to allow the appeal on s84(1)(c) grounds (Article 3 relating to a lack of documentation), it cannot stand. However, her conclusions on Article 3 arising from his specific claimed risk are similarly vitiated by error of law. In the circumstances, and given the extent of the necessary fact-finding, it is appropriate to remit the case to the First-tier Tribunal to be reheard on human rights grounds alone (both Article 3 and Article 8) with only the s72 conclusions preserved.

Anonymity

27. I maintain the anonymity order made by the First-tier Tribunal.

Notice of Decision

1. The judge's decision on the appeal on s84(1)(a) and s84(1)(b) grounds did not involve the making of an error of law, and to that extent the appeal is dismissed.
2. The judge's decision on the appeal on s84(1)(c) grounds did involve the making of an error of law, and to that extent the appeal is allowed.
3. The appeal is remitted to the First-tier Tribunal to be dealt with by a different judge to decide the appeal on s84(1)(c) grounds with only the findings of fact in [59-64] preserved.

Sean O'Brien

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 October 2024