Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/06808/2016**

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 22 August 2017	**On 7 September 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

BA
(ANONYMITY DIRECTION MADE)

Appellant

and

TEH SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Alban of Fountain Solicitors
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I make an anonymity order under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) in order to protect the anonymity of the appellant who claims asylum. This order prohibits the disclosure directly or indirectly (including by the parties) of the identity of the appellant. Any disclosure and breach of this order may amount to a contempt of court. This order shall remain in force unless revoked or varied by a Tribunal or court.

Introduction

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2. The appellant is a citizen of Iran of Kurdish ethnicity. His date of birth has been assessed as 10 June 1998. He entered the United Kingdom on 27 August 2014, aged 16, and claimed asylum on 17 October 2014. An asylum interview took place on 12 January 2015. On 13 February 2015, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and on human rights grounds. However, because of his age, the appellant was granted discretionary leave until 9 February 2015.

3. The appellant's (then) solicitors made further submissions on 8 February 2016. On 14 June 2016, the Secretary of State again refused the appellant's claims.

The Appeal to the First-tier Tribunal

4. The appellant appealed against the decision of 14 June 2016 to the First-tier Tribunal. The appellant's claim is that he is wanted by the Iranian authorities and that he has witnessed an 'incident' whilst in Iran when three men visited a shop in June 2015 and, it was said, had killed three security officers. The judge (Judge Frazer) did not find the appellant to be credible and dismissed his appeal.

The Appeal to the Upper Tribunal

5. The appellant sought permission to appeal to the Upper Tribunal and permission was granted by the First-tier Tribunal (Judge Hodgkinson) on 10 May 2017. On 31 May 2017, the Secretary of State filed a rule 24 notice seeking to uphold the decision.

The Grounds of Appeal

6. Ms Alban, who represented the appellant, sought permission to amend the grounds of appeal upon which permission was granted. She relied upon the grounds as set out in her skeleton argument. She reminded me that the appellant had not been legally represented before the judge; he had a McKenzie friend (a social worker) who had also assisted the appellant in drafting the grounds of appeal upon which permission was granted.

7. Although it is somewhat unusual to permit the amendment of the grounds at this late stage, there is a discretion to do so under rule 5(3)(c) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) applying the overriding objective set out in rule 2 of dealing with a case "fairly and justly". I bear in mind that the appellant was not previously legally represented and some of the amended grounds are no more than an elaboration of the original points raised. Mr Diwnycz, who represented the Secretary of State, did not actively oppose the application and was in a position to make submissions in relation to them. In the circumstances, applying the overriding objective, I exercised my discretion to allow the amendment. As I have indicated, in any event, dealing with the grounds *de bene esse*, I heard submissions from both representatives in respect of those grounds.

The Submissions

8. First, Ms Alban submitted that the judge had been wrong to discount the evidence before her from the McKenzie friend (social worker) who had real concerns about the appellant's mental health. Also, Ms Alban submitted that as a consequence, the judge had failed to factor in the appellant's mental health problems when assessing discrepancies in his evidence.

9. Secondly, Ms Alban submitted that the judge had been wrong to take into account, in assessing the appellant's credibility that he had not previously mentioned or obtained a letter which he said his father had received from the authorities asking him (the appellant) to surrender. Ms Alban relied upon the Strasbourg Court's decision in JK v Sweden (Application No 59166/12) at [92] that: "the lack of direct documentary evidence thus cannot be decisive per se".

10. Thirdly, Ms Alban submitted that the judge had wrongly identified a discrepancy in the appellant's evidence when he had said in his interview that, when he heard the shooting outside the shop, he "went to look outside" as being inconsistent with his evidence at the hearing that he had not gone outside but rather had seen the incident through the glass window of the shop. Ms Alban submitted that what the appellant had said at interview was ambiguous; it was equally consistent with what the appellant said in his oral evidence that he had looked outside through the window.

11. Fourthly, the judge had been wrong to discredit the appellant's evidence as implausible in para 31 when the judge had stated that, because of the brutal state machinery in Iran such as the Etelaat, it was "incredible that Etelaat officers who were intent on apprehending someone in connection with the murder of police officers would have taken a father's word that he did not know the whereabouts of his son at face value". Ms Alban drew my attention to, and relied upon, the well-known passage in the judgment of Neuberger LJ (as he then was) in HK v SSHD [2006] EWCA Civ 1037 at [29] on the dangers of relying upon plausibility as a reason for disbelieving an individual.

12. Fifthly, Ms Alban submitted that the judge erred in law in failing to consider the appellant's claim outside the Rules under Art 8 when she stated that she did not consider there were "any compelling circumstances" to warrant consideration of his claim based upon his private life outside the Rules. Ms Alban relied upon his attachment to his foster family and his education and mental health problems.

13. On behalf of the respondent, Mr Diwnycz relied upon the rule 24 notice. In addition, Mr Diwnycz candidly accepted that given what was said by the social worker, a professional representative would likely be seeking a medical report on the appellant's mental health. He also accepted that there was some merit in the argument that it was unreasonable to expect the appellant to provide the letter from his father. Overall, however, Mr

Diwnycz submitted that the judge had been entitled to reach her adverse finding and dismiss the appellant's appeal on asylum grounds.

14. In respect of Art 8, he contended that the judge's approach in para 34 was just sufficient not to amount to an error of law.

Discussion

15. There are a number of matters raised in the grounds and Ms Alban's submissions which lead me to conclude that the judge's decision cannot stand.

16. First, I accept the submission that the judge was wrong to identify a necessary inconsistency in the appellant's evidence in his interview and oral evidence. It is clear from his interview that he said: "I heard shooting. I went to look outside". Without further clarification, and there was none at the interview, that statement is equally consistent with his having looked through the window to see what was happening outside as it is with (as the judge assumed) him saying that he went outside to see what had happened.

17. Secondly, however, and most significantly, is the judge's approach to the appellant's claimed mental health difficulties. It is clear that before the judge the social worker, acting as his McKenzie friend, raised concerns based upon her professional experience. The appellant was plainly a potentially vulnerable witness and should have been treated as such. The judge went to some length, it is true, to satisfy herself that the logistics of the hearing were conducive to any vulnerability by the appellant. Also, at para 7 of her determination, she said this:

> "As the Appellant was only just eighteen I queried whether any adjustments should be made to the hearing. Mrs. Morgan, the Appellant's current social worker, indicated that it would be sufficient for the Appellant to be allowed to have breaks in his evidence if he required them. I allowed this. I also permitted Mrs. Morgan to act as a McKenzie Friend insofar as she was able to assist him to make submissions in closing. The Appellant, Mrs. Morgan and Ms. Rawlings made oral submissions in closing".

18. However, what was being said on behalf of the appellant, by his McKenzie friend, was that there were concerns about his mental health and memory which were relevant both to the conduct of the hearing but also in the assessment of his evidence given previously in interview and orally before the judge. In relation to that, the judge dealt with it at the end of the concluding substantive paragraph of her determination. At para 34, the judge said this:

> "On his behalf his social workers have drawn my attention to their concerns about his mental health and memory. I do place some weight on their professional observations and I have read their case notes which record that they have observed that he has been distressed in the lead up to the hearing. However, I have no medical evidence from a qualified physician concerning his mental health and any possible causes thereof. Without such evidence I am unable to reach any firm conclusions about his mental health or any other

> vulnerabilities that he may have. I noted that he was able to respond well to questions in cross-examination".

19. Whilst it is, of course, true that the evidence from the social worker was not that of a health professional, nevertheless it is readily apparent that social workers have considerable experience in dealing with young or vulnerable people. Whilst what the social worker said did not establish that the appellant had mental health problems that evidence did raise a 'red flag' which might require, as a matter of fairness, investigation.

20. The importance of dealing fairly with children and vulnerable people has recently been considered, and positively reaffirmed, in the Court of Appeal's decision in AM (Afghanistan) v SSHD and Lord Chancellor [2017] EWCA Civ 1123. At [27], the Senior President of Tribunals (Sir Ernest Rider) identified the obligation of a Tribunal and the parties as follows:

> "It is accordingly beyond argument that the Tribunal and the parties are required so far as is practicable to ensure that an appellant is able to participate fully in the proceedings and that there is a flexibility and a wide range of specialist expertise which the Tribunal can utilise to deal with a case fairly and justly".

21. The Court of Appeal was not only concerned with the procedure to be adopted at a hearing but also in respect of the assessment of a young person or vulnerable person's evidence.

22. Whilst in the ordinary course of events where an individual is legally represented, issues relating to an individual's vulnerability (including mental health issues) are likely to be at the forefront of that legal representative's mind and drawn to the Tribunal's attention. The judge can, in such circumstances, adjust both the procedure and also consider whether further evidence, such as evidence concerning mental health, is required applying the overriding objective of being "fair and just". As the Senior President points out in AM (Afghanistan), these are matters which can appropriately be dealt with in case management hearings and may engender a less favourable response from a judge if the legal representative waits until the substantive hearing and seeks an adjournment, for example to adduce further evidence (see [28]–[29]).

23. Here, however, the obligation of the parties to "co-operate" with the Tribunal, has less practical impact where the appellant is not legally represented. The onus that might be placed upon a legal representative to prepare in advance of a hearing his or her client's case, including supporting medical evidence such as that relating to the client's mental health, has less of a bearing.

24. Yet, the professional view of an experienced social worker was that there were issues relating to the appellant's mental health. The appellant's credibility was in issue and the judge analysed his evidence disbelieving him, in part, on the basis of inconsistencies in his evidence. Whilst the judge did not have the benefit of the Court of Appeal's judgment in AM (Afghanistan), its strictures should have led the judge to consider whether an opportunity should be given to the appellant to seek medical evidence

concerning his mental health. She did not do so and that, in itself, was in my judgment, a material error of law. Further, one of the reasons given by the judge for, not having regard to what was said by the social worker, was that the appellant was "able to respond well" to questions in cross-examination. The fact that he answered coherently – which is perhaps what the judge is identifying – did not mean that his recollection could be expected to be consistent. Nor did it necessarily mean that, because of vulnerabilities such as mental health problems, it must be taken that he had disclosed throughout his account each and every specific detail such as mentioning the letter from his father and that he had run out of the back door.

25. It is not necessary for me to reach a conclusion on the remainder of Ms Alban's submissions. Suffice it to say, for the reasons I have given, I am satisfied that the judge erred in law and that her decision cannot stand.

26. In my judgment, since sustainable factual findings must be made, the decision in respect of Art 8 must be re-made also. The Judge's reasoning is brief. It would not be just to allow the Art 8 decision to stand alone in those circumstances.

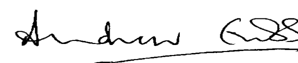
<u>Decision</u>

27. For these reasons, the decision of the First-tier Tribunal is set aside and must be re-made.

28. The proper disposal of this appeal is, having regard to para 7.2 of the Senior President's Practice Statement, to remit it to the First-tier Tribunal for the decision to be re-made *de novo* before a judge other than Judge Frazer.

29. On remittal, the First-tier Tribunal, in advance of any listed hearing date, may wish to consider a case management review on the basis that the appellant's now legal representatives, Fountain Solicitors, may wish to obtain evidence relating to the appellant's mental health in advance of the hearing.

Signed



A Grubb
Judge of the Upper Tribunal

6 September 2017