



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005210
First-tier Tribunal No:
PA/50801/2023
LP/00825/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 04 September 2024

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

BM (IRAQ)
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Islam, Counsel, instructed Qualified Legal Solicitors Limited

For the Respondent: Mr S Walker, Home Office Presenting Officer

Heard at Field House on 16 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

Introduction

1. The appellant appeals a decision of First-tier Tribunal Judge Lester (“the Judge”) dismissing his international protection and human rights (articles 3 and 8 ECHR) appeals. The decision of the Judge was sent to the parties on 1 November 2023.
2. Consequent to a direction of Upper Tribunal Judge Mandalia dated 5 July 2024, Mr Islam and the appellant attended the hearing remotely via CVP. Mr Walker attended by telephone.

Anonymity Order

3. The Judge issued an anonymity order. No party requested that the order be set aside. I observe that the appellant seeks international protection.
4. I consider that at the present time the appellant’s private life rights protected by article 8 ECHR outweigh the public interest in knowing his identity in these proceedings, as protected by article 10 ECHR. In the circumstances the anonymity order is properly to continue.
5. The order is detailed above.

Relevant Facts

6. The appellant is a national of Iraq and presently aged 26. He hails from Sulaymaniyah, a city situated in the Kurdistan Region of Iraq (“KRI”). He arrived in the United Kingdom in 2018 and asserted that he possessed a well-founded fear of persecution on the ground of honour-based violence. He explained that consequent to the father of his girlfriend refusing, on her behalf, his marriage proposal he was subject to death threats. He detailed that his girlfriend’s father is a prominent local politician.
7. The respondent refused the application for international protection by a decision dated 25 September 2020.
8. First-tier Tribunal Judge Napier dismissed the appellant’s appeal by a decision sent to the parties on 31 August 2021. Judge Napier found the appellant to be “heavily inconsistent with major parts of his account.” At [44] of his decision, Judge Napier concluded that the appellant was not in a relationship in Iraq as claimed and consequently had not experienced difficulties with a local politician. Judge Napier further found that the appellant could be returned by the respondent to Erbil in the KRI and so would therefore not be required to travel through Iraqi Government-controlled territory to return to Sulaymaniyah.
9. On 7 July 2022, the appellant filed further representations asserting a continuing fear of persecution on return to Iraq. Reliance was placed, in

part, upon a medical report prepared by Professor M R Graham, dated 28 June 2022.

10. By a decision dated 17 January 2023 the respondent considered the appellant to have made a fresh claim under paragraph 353 of the Immigration Rules but concluded that leave to remain was not properly to be granted. The appellant exercised statutory appeal rights.

Decision of the First-tier Tribunal

11. The appeal came before the Judge sitting in Newport on 1 September 2023. The appellant relied upon GP medical records and two reports prepared by Professor Graham: the original June 2022 report accompanying the further representations, and a second report dated 17 July 2023. The appellant relied upon Professor Graham's diagnosis that he suffers from a chronic and persistent state of anxiety and moderate depression, the latter resulting in PTSD, arising out of his personal experiences in Iraq. Professor Graham's opinion was also relied upon by the appellant in respect of scarring upon his body.
12. Upon assessing the GP notes, the Judge concluded, at [22] - [23] of his decision:
 - "22. I have seen the GP and medical notes. They all overwhelmingly relate to the treatment and ongoing issues the Appellant has with his kidneys and urology. I accept that within the extensive pro forma relating to his medical examination and assessment on 17 August 2021 which predominantly concerned his kidney and urology issues there are two references where the Appellant self-reports forgetfulness. I accept that in his GP notes for 18 August 2021 which again predominantly concerns his kidney and urology issues there is a reference to self-reported poor memory and concentration.
 23. I find that when the GP notes are considered in the round that these few references which occur within notes predominantly concerned with kidney issues and urology do not even to the lower standard overcome the concerns raised in the findings of the 2021 tribunal."
13. The Judge addressed Professor Graham's reports at [25] - [27]:
 - "25. At para 2.1 in both reports the same paragraph is repeated. Namely that the Appellant told the Professor 'in broken English, with impaired comprehension of the English language, but with the support of his partner, who attempted to act as an interpreter, that he is a citizen of Iraq'.
 26. It is also clear from the 'Sources of Information' section at the start of the reports that the Professor was not provided with the GP notes or medical history of the Appellant.
 27. While I note the comments of the Professor at para 9.4 (report 17 July 2023) that the psychological findings are consistent with the alleged incidents. I also note the comments at para 9.9 (17 July

2023 report) that fabricating and the anxiety of repeating falsehoods in a court setting could also have led to weight loss.

28. I find that the lack of proper interpretation during the meeting plus the lack of medical history/ GP notes are factors which when considered in the round reduce the weight that I can give to the report.”
14. The Judge reasoned that Judge Napier’s conclusion as to the non-existent relationship in Iraq was not disturbed by the new evidence.
15. The Judge addressed article 3 and the appellant’s concerns as to his ability to secure mental health treatment in Iraq. At [43], the Judge concluded that the appellant came nowhere close to satisfying to the lower standard that he would be unable to obtain adequate mental healthcare or suffer inhuman or degrading treatment consequent to mental health concerns upon being returned to Iraq.
16. The appellant’s article 8 appeal was also dismissed, at [45], with the Judge reasoning that the appellant was no longer in a relationship with a named British citizen. The Judge found that they were not living together, there was no evidence of shared bills or expenditure, and on the appellant’s own evidence he had only seen his purported partner once between mid-July and September 2023.
17. In respect of the appellant’s private life rights, the Judge concluded that there were no very significant obstacles to the appellant returning to Iraq.

Grounds of Appeal

18. The appellant relies upon seven grounds of appeal prepared by Counsel, not Mr Islam, who appeared on his behalf before the First-tier Tribunal.
19. At their core, six of the grounds are concerned with one issue: the Judge’s approach to Professor Graham’s reports. In essence, the same challenge is repeated in six different ways, namely the Judge materially erred in concluding that Professor Graham had not been provided with the appellant’s GP medical records.
20. The final ground is a broad contention that the Judge “has failed to provide any adequate reasons for dismissing [the appellant’s] appeal on protection and humanitarian grounds”.
21. By a decision sent to the parties on 8 December 2023, First-tier Tribunal Judge Robinson granted the appellant permission to appeal on grounds one to six. Permission to appeal was refused on ground seven.
22. At [3] of her grant of permission, Judge Robinson reasoned:
 - “3. It is arguable that the Judge has erred in his assessment of the medical report of Professor Graham. His finding that Professor Graham was not provided with the GP medical records when this was stated to be the case in the medical report was a factor which

caused the Judge to place little weight on the medical report which in turn affected his assessment of the Appellant's medical condition and credibility."

Discussion

i. Mistake of fact

23. The challenge advanced is one as to a mistake of material fact being a material error of law: *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982. It is incumbent upon the appellant to establish that unfairness resulted from a mistake of fact having been made.
24. In considering the appropriate weight that could properly be placed upon Professor Graham's reports if relevant GP medical records were not considered by him at the time the reports were prepared, the Judge was mindful of the guidance provided by the Upper Tribunal in *HA (expert evidence; mental health) Sri Lanka* [2022] UKUT 00111 (IAC), [2022] Imm AR 809.
25. In both of his reports Professor Graham included a section titled "Sources of Information". Unhelpfully, in neither report does this section record that GP medical records were provided to him. However, the Judge read both reports and they both reference at §5.3 that Professor Graham had "seen the GP medical records". Whilst the Judge may have been influenced by the fact that beyond confirmation that they were "seen" the contents of the GP medical records were not addressed at all, his conclusion that the records were not provided to Professor Graham is clearly a mistake of fact. There was no proper basis for the Judge to conclude that "the Professor was not provided with the GP notes or medical history of the Appellant", at [26].

ii. Materiality

26. It remains for the appellant to establish, and for this Tribunal to be satisfied, that the mistake of fact results in a material error of law.
27. Ultimately, for the reasons addressed below, the question of materiality is tied to an assessment of Professor Graham's expertise.
 - a. *Expert evidence*
28. The stark question in this appeal is a simple one: is Professor Graham an expert in respect of the issues addressed within his report. Unfortunately, it was not a question expressly addressed by the Judge.
29. It is well-established that it is for a tribunal to consider what weight should properly be placed upon evidence, and the approach to expert evidence is no different. Ultimately, it is a judicial decision as to whether

opinion evidence can properly be considered “expert” and it is a matter that should properly be addressed by a judge at first instance.

30. In *Kennedy v Cordia (Services) LLP (Scotland)* [2016] UKSC 6; [2016] 1 WLR 597, at [43] – [44], the Supreme Court approved a section of the South Australian decision in *R v Bonython* [1984] 38 SASR 45 from which it distilled four key considerations which govern the admissibility of expert evidence, which in Scots’ law is known as “skilled evidence”:
 - (i) whether the proposed skilled evidence will assist the Tribunal in its task:
 - (ii) whether the witness has the necessary knowledge and experience:
 - (iii) whether the witness is impartial in his or her presentation an assessment of the evidence: and
 - (iv) whether there is a reliable body of knowledge or experience to underpin the expert’s evidence.
31. The Upper Tribunal confirmed in *MH (review; slip rule; church witnesses)* [2022] UKUT 125 (IAC); [2020] Imm AR 983, at [39], that whilst no question of admissibility arises in the Immigration and Asylum Chamber these criteria are nevertheless relevant in deciding whether evidence is properly to be described as “expert evidence”.
32. Expert witnesses can give factual evidence on matters that they are not qualified to give expert evidence upon. Opinion evidence will only be admissible on any relevant matter on which they are qualified to give expert evidence: *Re: C (Parental Alienation: Instruction of Expert)* [2023] EWHC 345 (Fam); [2024] 1 WLR 1.
33. Relevant rules regarding expert witnesses were summarised by Sir Peter Cresswell in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd’s Rep 68, at [81] – [82]. The duties and responsibilities of expert witnesses in civil cases include the following:
 1. Expert evidence presented to a court or tribunal should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
 2. An expert witness should provide independent assistance to the court or tribunal by way of objective, unbiased opinion in relation to matters within his expertise. An expert witness should never assume the role of an advocate.
 3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.

4. An expert witness should make it clear when a particular question or issue falls outside of his expertise.

34. I observe that Professor Graham does not expressly acknowledge the guidance provided in the *Ikarian Reefer* in his declaration, a step taken by many experts who prepare reports for this Chamber. Though an expert's duties in civil proceedings are now embodied in CPR 35, PD 35, the two tribunals of the Immigration and Asylum Chamber have their own procedure rules, which do not directly address expert evidence, and so the guidance of Sir Peter Cresswell remains a starting point when considering such evidence.

b. Professor Graham's expertise

35. Information as to Professor Graham's expertise is absent from his June 2022 report. Indeed, his name is missing from the document. An unintelligible signature alone is provided as establishing that he is the author of the document.

36. The July 2023 report records Professor Graham's qualifications as MBChB and PhD. He is a member of several medical associations and societies. He does not set out the institution that awarded him his professorship. Save that the report is headed "Llantarnam Health Care", no other detail is provided as to his professional work. No qualification in psychiatry or psychology is identified within the second report, nor is any detail provided as to professional experience in the field of mental health.

37. Professor Graham's medical qualifications may possibly result in his being able to provide informed opinion as to scarring, though in the absence of any identification of his professional work it is not presently possible to say that it would be expert opinion. In any event, whether expert or not, Professor Graham's opinion in this matter does not aid the appellant. The conclusion that the scars on the appellant's body are consistent with "the alleged incidents", namely hitting his arm against a sharp wall, would be incapable on its own of permitting a judge properly directing themselves and applying the appropriate standard of proof to conclude that the appellant is a credible witness as to his history of being targeted by the family of a girlfriend, being mindful of the significant discrepancies in his evidence.

38. I turn to whether Professor Graham is an expert in psychiatry, psychology or through professional experience in the field of mental health. Having read the various educational qualifications and professional memberships provided by Professor Graham in his second report, it is clear, as accepted by Mr Islam before me, that Professor Graham is not a qualified psychiatrist or psychologist.

39. In respect of the mental health assessment addressed within both reports, I find that Professor Graham does not, on the evidence placed before me, have the requisite necessary knowledge and experience to provide expert evidence in respect of the appellant's mental health

capable of assisting the First-tier Tribunal and this Tribunal. None of the four considerations addressed in *Kennedy v Cordia* can properly be said to be satisfied.

40. Whilst it is open for Professor Graham to establish the requisite expertise by providing a more detailed curriculum vitae in respect of his educational and professional experience in psychiatry, psychology, or in mental health matters generally when preparing future reports, on the information presently placed before this Tribunal, Professor Graham cannot properly be considered an expert in these areas. To all intents, that is the end of this appeal before me.

c. Concerns of the Upper Tribunal

41. There is concern as to whether Professor Graham has a clear understanding as to the boundaries of his role when writing a medical report.
42. Expert or other evidence produced in asylum and immigration matters should not encroach on a tribunal's identification of whether a well-founded fear of persecution and/or the risk of a breach of protected rights under the Human Rights Act 1998 arise. The answers to these questions are a mixed question of fact and law and in the context of a statutory appeal are reserved for the tribunal. That Professor Graham opines at §9.6 of his June 2022 report, and again at §9.10 of his July 2023 report, that the appellant "satisfies a claim for asylum, under article 2 and 3 of the ECHR" is a significant concern. Placing to one side that he appears not to understand that asylum and human rights claims are different matters, he was content to opine on mixed question of fact and law, thereby singularly failing to exhibit the required understanding of his role.
43. Without relevant letters of instruction being placed before the Upper Tribunal, or at least clarity as to instructions provided in the reports, it is not presently possible to understand whether Qualified Legal Solicitors erroneously requested an opinion on what is a mixed question of fact and law, or whether Professor Graham went beyond his instructions in seeking to opine without understanding that he was addressing such a question. Both possibilities are impermissible.
44. The failure to provide clarity as to instruction impacts upon a clear understanding of the second report. Whilst there is no objection, without more, to two similar reports prepared by an expert being filed in proceedings before the Immigration and Asylum Chamber, there is an expectation that details of relevant instructions are provided. Mr Islam accepted that no letters of instruction were placed in the appellant's bundle. An outline of the solicitors' instructions is detailed on the first page of the June 2022 report. The same instructions are repeated in the July 2023. Consequently, there is no explanation before this Tribunal as to why some thirteen months after the original report was prepared, and in the

absence of any further meeting with the appellant, Professor Graham was instructed to provide a second report.

45. On careful consideration, the contents of the two reports are presented in very similar terms and follow one consultation held in June 2022. I have concluded that, in part, the second report seeks to address at §§9.4 the absence in the original report of diagnostic reasoning as to the appellant suffering PTSD. Additionally, a confused consideration at §§9.7 to 9.9 is added addressing whether the appellant's notable weight loss prior to the hearing before Judge Napier was consequent to the impact of kidney stones, gastro-oesophageal reflux, anxiety induced by the prospect of examination or whether having previously been untruthful in his claim the appellant was anxious that falsehoods could be discovered in cross-examination. Having identified these various possibilities, no cause is identified as more likely than the others. There is no indication within the second report that the appellant was ever asked about his weight loss in consultation nor is any explanation as to why it was addressed for the first time in the second report some thirteen months after the original. I am concerned that it was added to the second report as the appellant intended to raise as an issue at his second appeal hearing that he suffered poor concentration before Judge Napier consequent to his weight loss. This contention was advanced in the skeleton argument drafted by (another) Counsel on 16 March 2023, approximately four months prior to the second report.
46. I am satisfied that the report of July 2023 does not identify the appellant's medical condition as at that time. It can properly be considered an update of the June 2022 report, with a refinement of diagnostic reasoning and the addition of opinion on further issues.
47. An additional concern is Professor Graham's willingness to opine in general terms on facts outside his purported area of expertise with no explanation as to the foundations of his opinion. In the "Executive Summary" at the beginning of his June 2022 report, he states *inter alia*:
 - "3. [The appellant's] PTSD is *diagnostic* of an individual with a psychological and psychiatric history, who will potentially be returned to a country, Iraq, with very poor human rights and limited general medical and psychiatric services."
48. This paragraph is amended in the July 2023 report:
 - "3. [The appellant's] psychiatric health would be seriously compromised, if he is returned to his home country, Iraq, with very poor human rights and limited general medical and psychiatric services."
49. In neither report does Professor Graham explain his reasoning as to his conclusion that there is inadequate provision of medical and psychiatric care in Iraq. He provides no insight into why he considers himself capable of presenting factual evidence to a tribunal on the provision of health care

in a country in which he does not work, it is understood he has never visited and upon which he does not assert that he has expert knowledge. I am satisfied that on this issue, Professor Graham has not identified with clarity that his observations as to the Iraqi healthcare system are outside his expertise.

50. As addressed above, Professor Graham is not considered by this Tribunal to be expert on issues of psychiatry or psychology. The lack of expertise is identifiable as significant concern arises in respect of the approach adopted by Professor Graham to various questionnaires completed by the appellant.

51. Professor Graham records in his June 2022 report:

“The following report is based upon information provided to me by [the appellant], his partner/interpreter [...] (a mental health support worker) and by my own expert observations of his psychiatric history and physical injuries.”

...

“2.1 [The appellant] informed me, in broken English, with impaired comprehension of the English language, but with the support of his partner, who **attempted** to act as an interpreter, that he is a citizen of Iraq.”

‘8. Mental health Assessment was **compromised** by [the appellant’s] incomprehension of the English language.”

“8.9 A Mini-Mental State Examination (MMSE) questionnaire provided a score of 21/30 and a Montreal Cognitive Assessment (MOCA) questionnaire provided a score of 18/30. These scores were lower than expected because of [the appellant’s] difficulty in understanding the English language. However, an Abbreviated Mental Test score ... provided a result of 9/10 which is considered normal.”

“9.4 ... [The appellant’s] cognitive capacity appeared consistent and did not appear to demonstrate any memory dysfunction, for dates ... The MOCA ... and MMSE ... questionnaires would be considered failures, however, can be explained by his lack of understanding of the English language. The Abbreviated Mental Test score would be considered normal.”

[Emphasis added]

52. The same headnote and sections are placed in the July 2023 report.

53. Both reports fail to identify with clarity the language in which the appellant completed the questionnaires. It is implicit that in the absence of an interpreter they were completed in the English language. Observing that his level of English is identified as ‘impaired’, it is noted that the appellant’s partner aided him in his responses. It is not detailed as to

whether she has a working knowledge of Arabic. It is therefore implicit that the partner was required to understand the appellant's answers provided in the English language and to formulate her own understanding of what he was endeavouring to say before providing the answers required by the various questionnaires.

54. Psychiatric assessments of non-English speaking patients facilitated by an interpreter pose specific communication challenges to all participants. There will be concern that important diagnostic and relational cues are lost because of the way original speech is rendered by language interpreters. Such concern can be addressed by the use of appropriate strategies. In this matter, Professor Graham did not have the aid of an interpreter, so proceeded with the appellant's partner likely seeking to improve the substance of the English language answers provided. The extent to which the eventual answers provided are the appellant's own, or a hybrid coupled with his partner's personal understanding of his circumstances and her understanding as to what he was endeavouring to say, is not engaged with in any detail by Professor Graham. There is a significant likelihood that the partner was using inferences to make sense of the appellant's answers, and reorganising disorganised responses. Such process would properly cause concern as to the accuracy of the answers provided when completing the questionnaires.
55. A tribunal can properly expect Professor Graham to have explained why the questionnaire scores were considered reliable in the circumstances.
56. It is a concern the Professor Graham discounted test scores which did not accord with his expectation as to their likely outcome because of the appellant's limited English language skills but was content to rely upon others where conclusions were favourable to the appellant's case. My finding as to his lack of expertise in this field flows into this concern. It is difficult to ascertain how a psychiatrist or psychologist would consider any of the scores arising from the assessments reliable in the absence of a qualified interpreter, being aware of the appellant's poor level of English. The approach adopted is entirely contradictory to the duties and responsibilities of expert witnesses identified in *The Ikarian Reefer*. It would not have been adopted by an expert.
57. As observed above, this appeal enjoys no merits and permission to appeal should not have been granted.
58. I conclude by thanking Mr Islam for the help he provided to the Upper Tribunal and his efforts on behalf of the appellant.

Directions

59. I direct:
 - i. Qualified Legal Solicitors Limited, 76 Caerau Road, Newport, NP20 4HJ are to write to Upper Tribunal Judge O'Callaghan

within 14 days of the sending of this decision and confirm that a copy of the decision has been sent to Professor M R Graham.

- ii. Permission is granted for this unreported decision to be relied upon by a tribunal or the respondent in appeals where Professor M R Graham seeks to provide expert evidence on psychiatric, psychological and general mental health matters, subject to Professor Graham being entitled to provide cogent evidence as to having the requisite expertise.

Notice of Decision

60. The decision of the First-tier Tribunal sent to the parties on 1 November 2023 does not contain a material error of law. The decision stands.
61. The anonymity order issued by the First-tier Tribunal is confirmed.

D O'Callaghan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 August 2024