**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/00554/2012

**THE IMMIGRATION ACTS**

| **Heard at Bradford Magistrates' Court** | **Determination Promulgated** |
|---|---|
| **On 8 May 2013** | **On 24 June 2013** |

**Before**

**UPPER TRIBUNAL JUDGE CLIVE LANE**
**UPPER TRIBUNAL JUDGE REEDS**

**Between**

**ARFAN ABDULRAHMAN (AKA ASO ALI)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: *Mr N S Ahluwalia*, instructed by Paragon Law
For the Respondent: *Mr M Diwnycz*, a Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant, Arfan Abdulrahman, was born on 29 November 1980 and is a citizen of Iraq. On 9 August 2012, a decision was made to deport the appellant. The appellant appealed against that decision to the First-tier

Tribunal which, in a determination promulgated on 18 December 2012, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. The appellant entered the United Kingdom clandestinely on 26 June 2001. He made a claim for asylum on or shortly after arrival and that claim was refused in September 2001. His appeal to an Adjudicator was dismissed on 23 September 2002. The appellant was convicted of wounding with intent contrary to Section 18 of the Offences against the Person Act 1861 having pleaded guilty at Sheffield Crown Court on 4 January 2005. On 2 March 2005, he was sentenced to ten years' imprisonment for this offence.

3. There are three grounds of appeal. First, the appellant seeks to rely upon new evidence (dated 2 January 2013, that is following the date of promulgation of the First-tier Tribunal determination) from a Consultant Psychiatrist, Dr Bowen, which seeks to correct an error in Dr Bowen's earlier report which had been before the Tribunal. The grounds assert:

> "A central feature of the reasons used to support [rejection of the appellant's account of past events in their entirety] that the core of his claim was that the panel found that A's sister told Dr Bowen that A had been hospitalised for a period of four years after the death of his brother when A was aged 13-14 (para 44(ii)); this was completely contrary to his claimed involvement with the PKK after he was 13, undermining the entirety of his claim."

4. Dr Bowen's new addendum report explains that the appellant's sister had not told him that the appellant had been hospitalised for four years but rather that he had been confined to hospital for a period of time and had then received follow-up treatment (i.e. as an outpatient) for the next four years [ground 3.3]. The grounds rely upon a variety of jurisprudence including **Begum v London Borough of Tower Hamlets [2003] UKHL 5;**

> 7. Although the county court's jurisdiction is appellate, it is in substance the same as that of the High Court in judicial review: *Nipa Begum v Tower Hamlets London Borough Council* [2000] 1 WLR 306 . Thus the court may not only quash the authority's decision under section 204(3) if it is held to be vitiated by legal misdirection or procedural impropriety or unfairness or bias or irrationality or bad faith but also if there is no evidence to support factual findings made or they are plainly untenable or (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1030, per Scarman LJ) if the decision-maker is shown to have misunderstood or been ignorant of an established and relevant fact. In the present context I would expect the county court judge to be alert to any indication that an applicant's case might not have been resolved by the authority in a fair, objective and even-handed way, conscious of the authority's role as decision-maker and of the immense importance of its decision to an applicant. But I can see no warrant for applying in this context notions of "anxious scrutiny" (*R v Secretary of State for the Home Department Ex p Bugdaycay* [1987] AC 514 at 531G, per Lord Bridge of Harwich)

or the enhanced approach to judicial review described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 546-548. I would also demur at the suggestion of Laws LJ in the Court of Appeal in the present case ([2002] 1 WLR 2491 at 2513, [2002] EWCA Civ 239 , paragraph 44) that the judge may subject the decision to "a close and rigorous analysis" if by that is meant an analysis closer or more rigorous that would ordinarily and properly be conducted by a careful and competent judge determining an application for judicial review.

5. The grounds also rely on **E v Secretary of State for the Home Department [2004] EWCA Civ 49**;

Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontentious and objectively verifiable. Thirdly, the appellant (or his advisers) must not been have been responsible for the mistake. Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning. [66]

6. Finally, the grounds also rely on **Haile v Secretary of State for the Home Department [2001] EWCA Civ 663**:

25. Powerful though these arguments are and ably though they were presented, in my judgment they cannot carry the day. This was really a most regrettable mistake for the special adjudicator to have made. True, it produced only one of six reasons for disbelieving the appellant, but it must inevitably leave a sense of deep injustice in the appellant and it cannot confidently be said to have made no ultimate difference to the result. It is of course most unfortunate that this mistake was not uncovered until it was when and plainly it could and should have been. Were the old Ladd v Marshall principles to be strictly applied, then surely the appellant would fall at this first hurdle. The fact is however that these principles never did apply strictly in public law and judicial review. As Sir John Donaldson MR said in R v Secretary of State for the Home Department ex parte Ali [1984] 1 WLR 663, 673:

"... the decision in Ladd v Marshall [1954] 1 WLR 1489 has as such no place in that context,"

although he then added:

"However, I think that the principles which underlie issue estoppel and the decision in Ladd v Marshall, namely that there must be finality in litigation, are applicable subject always to the discretion of the Court to depart from them if the wider interests of justice so require."

26. Nor am I persuaded that the House of Lords' decision in Al-Mehdawi precludes this Court having regard to the wider interests of justice here, not least given that this is an asylum case rather than a student leave case as was Al-Mehdawi. Aspects of that decision may in any event now need to be reconsidered in the light of the House of Lords' speeches in R v Criminal Injuries Compensation Board ex parte A [1999] 2 AC 330.

27. What then do the wider interests of justice require in this case? I have no doubt that they require the IAT's refusal of leave of 28th March 2000 to be quashed and perhaps even the appeal to the IAT itself to be allowed so that there would need to be yet another special adjudication, a fourth, unfortunate though plainly that would be. That, therefore, seems to be the necessary outcome of this appeal.

28. I would allow in the fresh evidence, set aside the judgment below (purely because of the fresh evidence) and quash the IAT's refusal of leave (again purely because of the fresh evidence). I would add just this. Although, as I have indicated, it is not impossible that on a fourth appeal to the special adjudicator the appellant may finally achieve a different result, he should certainly not count on that. He has indeed little ground for optimism. I would, nevertheless, allow his appeal.

7. The respondent filed a reply under Rule 24 on 15 February 2013. This reply asserts:

> "However, it is submitted ground 1 is disputed. Dr Bowen changed the report post hearing to purportedly reflect an error of drafting in the report. Dr Bowen failed therefore in the duty to the court and the client. The report can't have been put to the appellant by his advisors, or surely the mistake would have been notice pre hearing? Therefore, the advisors are responsible for the mistake and it falls outside the E and R principles. This is no error of fact."

8. Dr Bowen attended the Upper Tribunal initial hearing at Bradford. We understand that he had done so in order to refute the suggestion contained (so the appellant's representative appears to have believed) in the reply from the Home Office that he had in some way deceived either the appellant or the First-tier Tribunal. Mr Diwnycz, for the respondent, confirmed that no implication had been intended. For our part, we are satisfied that Dr Bowen has acted in accordance with his duty to the Tribunal as an expert witness. He considered that his first report had been inaccurate so he had amended it. We released Dr Bowen and he was not required to give evidence to the Tribunal.

9. We have set out above the conditions concerning the admission of fresh evidence relating to errors of fact and as enunciated by Carnwath LJ (as he was then) in **E & R**. In the present appeal, there appears *prima facie* to have been a mistake as to an existing fact although we note that what Dr Bowen said in his first report was hearsay, recording what he had been told the appellant's sister, Ada, had, in turn, told medical staff treating her brother, the appellant. The problem for the appellant in seeking to admit this evidence, in our opinion, relates to the alleged mistake on the part of the Tribunal as to "the availability of evidence on a particular matter". This is a problem which also engages the third of Carnwath LJ's conditions, namely the responsibility of the appellant or his advisers for the occurrence of the mistake. There is, of course, no suggestion that the Tribunal misunderstood or ignored the evidence that was before them whilst the "correct" evidence from the appellant's sister was "available" at the date of the First-tier Tribunal hearing and could have been brought to the

Tribunal's attention had the appellant, his representative or Ada identified the inconsistency in the evidence. Mr Ahluwalia, for the appellant, submitted that the appellant, who is suffering from mental difficulties, was in no position to scrutinise in detail Dr Bowen's report (written in a language that he did not understand) and point out to his advisers any errors contained in it. We reject that submission because (i) there is no evidence to indicate that the appellant lacked the cognitive ability to understand the contents of the report or to identify any errors and (ii) the importance of the report in the appellant' appeal was such that its contents should have been explained to the appellant and his instructions on the report obtained. Moreover, a further problem for the appellant's advisers is that evidence which they had collated and presented to the First-tier Tribunal was plainly inconsistent; indeed, when those inconsistencies were pointed out by the First-tier Tribunal in its determination, the representatives immediately sought to clarify the contents of Dr Bowen's report. This is not a case where completely new evidence regarding matters unknown to any of the parties, the witnesses or the advisers has come to light only after the promulgation of a determination. The fact that Dr Bowen had inaccurately recorded the appellant's sister's comments regarding the appellant's "hospitalisation" in Iraq could and should have been detected by the appellant himself (if his instructions on the report had been sought) or his advisers in their preparation of this appeal. We take the view, therefore, that the appellant and his advisers in this instance cannot satisfy the test enunciated by the Court of Appeal in **E & R**.

10. We also find that the "mistake" in this instance fails to satisfy the second pert of the test in **E & R**. The new evidence which the appellant seeks to adduce asserts that the appellant, although he was still receiving treatment for his mental condition, was not in hospital during a period when he claims to have been active with the PKK. That evidence cannot, in our view, be properly described as uncontentious let alone objectively verifiable. It is contentious because the respondent submits that the appellant and his sister are witnesses wholly without credibility and it is plainly incapable of being verified by reliable third party sources.

11. The fourth **E & R** test relates to the materiality of the mistake as part of the Tribunal's reasoning. We are aware that the test doesnot require the mistake to relate to a "necessarily decisive" part of that reasoning. However, the role played by the (mistaken) evidence in the analysis of credibility by the First-tier Tribunal needs to be considered.

12. First, this was a case which the Tribunal correctly observed that the principles of **Devaseelan (Sri Lanka) [2002] UKIAT 00702 (starred)** applied because there had been a previous determination concerning similar facts (the appellant's claimed membership of the PKK) by Adjudicator Spencer in 2002. The First-tier Tribunal determination contained an lengthy quotation from Adjudicator Spencer's determination:

The findings made by Adjudicator Spencer relating to this appellant are set out at Paragraphs 14 – 18 of his determination as follows:

“14. I have to judge the Appellant's claim against the background evidence. I am sceptical of his claim to have been a member of the PKK. In answer to question 12 in his interview he was asked “What did you do for the PKK?” and he said “My job was to distribute publications of PKK and also to advise people, normal people and to discuss PKK programme and opinion to them. We tried to bring more people into the party and tell public about the fact of what is happening in the region". The PKK finds no mention in the list of major political parties at Annex B of the Country Assessment. Paragraph 3.16 says that on several occasions in 1996 Turkish armed forces entered northern Iraq in pursuit of members of the Kurdistan Worker's Party (PKK), (a Turkish terrorist organisation whose members had been driven into northern Iraq from Turkey and Iran) and their bases. Terrorist activities in northern Iraq and Turkey by the PKK terrorist organisation also resulted in the death of both fighters and civilians. In part of his answer to question 29 in the course of the interview, he indicated that if the PKK knew a person had taken information to the Kurdistan area they would kill him straight away as they wanted to be secret. It seems to me that there is some contradiction here in the Appellant's description of what he said he did for the PKK and the desire of the PKK to be secret. In view of the reputation the PKK acquired for terrorist activities, which involved the killing of soldiers and civilians, it is surprising that, if the Appellant ever was a member of the PKK, he should have become disillusioned only at the beginning of 2001.

15. Nonetheless if the Appellant's account is true it is clear that he has become disillusioned with the PKK and has no intention of resuming his activities on its behalf. Since the PKK are not state agents the question therefore is whether or not there is in the KAA an adequate system of state protection which meets the test in **Horvath v Secretary of State for the Home Department [2000] Imm AR 552**. As Lord Clyde put it “There must be in place a system of domestic protection and machinery for the detection prosecution and punishment of actings contrary to the purposes which the Convention requires to have protected. More importantly there must be a readiness to operate that machinery"He quoted with approval the statement by Stuart-Smith LJ in the Court of Appeal "It will require cogent evidence that the state which is able to afford protection is unwilling to do so...." At paragraph 3.7 of the Country Assessment it says, in relation to northern Iraq, that each of the regions administered by the KDP and PUK has a system of justice based on Iraqi legislation with police to enforce public order. There are also hospitals, schools and universities. Both regions have their own administrations in which several parties have seats". At paragraph 3.22 mention is made of reports of hostilities in 2000 between the PUK and the PKK and also between the KDP and the PKK. Paragraph 3.25 mentions that in July 2000 the PUK attempted to push the PKK out of its territory and fighting ensued. It seems to me in these circumstances there would be no unwillingness on the part of the authorities either in the KDP area or the PUK area of the KAA to afford the Appellant the protection that he would require from the PKK, if his claims are true.

16. There remains the question of whether the Appellant would be safe from the PUK if he were returned to the area controlled by the PUK. On the Appellant's account he and his father were arrested by the PUK in September 2000 following an attack on the PKK by both the PUK and the KDP in 2000. They were detained for three months and released on condition that they would not

support the PKK and they signed documents to that affect. As Mr Johal submitted there is no evidence whatsoever to show that the PUK, or the KDP for that matter, know that the Appellant joined the guerrilla movement in the mountains at Qandil. I agree with that submission. If returned to the KAA the Appellant would not, as I have indicated, continue his activities on behalf of the PKK because he has become disillusioned with them. Accordingly in my view he would not be at risk of persecution by the PUK. In these circumstances no question of internal flight to the area controlled by the KDP arises.

17. So far as the claim, put forward on the Appellant's behalf, that his rights under Article3 of the ECHR would be likely to be infringed on his return to the KAA, because of his mental condition is concerned, the position is that there is simply no evidence. whatsoever which indicates that the Appellant is suffering from a mental condition. Mr Moore in his report indicates that there was no suggestion that the Appellant had had an epileptic fit neither was there any mention of mental health problems when he was seen in hospital on 1st December 2001. The single entry on the ambulance record sheet "? epileptic" is not a sufficient basis to conclude that the Appellant suffers from epilepsy. I notice from the file that the hearing of the Appellant's appeal was adjourned from 4th April 2002 so that medical evidence could be obtained. That had not been obtained by 27th May 2002 when the matter was listed for mention. A further period of three months was allowed for medical evidence to be obtained The absence of medical evidence may be attributable to the behaviour of the Appellant but, as Mr Khan indicated, another adjournment would not have been justified since it was unlikely that any further medical evidence would have been forthcoming. In these circumstances there is no medical evidence to confirm Mr Khan's impression that the Appellant is suffering from mental health problems and may have epilepsy. Therefore there is no basis upon which an argument that the return of the Appellant to the KAA would involve an infringement of his rights under Article 3, by reason of his mental condition, could possibly succeed.

18. For the reasons given, therefore, I am not satisfied to the requisite degree that there-is a real risk of persecution for a Refugee Convention reason if the Appellant were to be returned to the KAA. Since the factual situation which gives rise to the appeal on human rights grounds is identical to that on which the Refugee Convention grounds are based it follows that I am not satisfied that the Appellant has shown that there would be a real risk that any of his human rights would be infringed if he were to be returned to the KAA. Accordingly I dismiss the appeal on both grounds."

43. Having noted the previous determination findings and having considered all of the further evidence now before us, we are able to make our own findings upon the appellant's claim for international protection.

13. It may be said that Adjudicator Spencer's findings on credibility are not particularly trenchantly expressed; he appears to have been more concerned with the nature of any future risk to the appellant in Iraq rather than determining the credibility of the appellant's account of past events. However, Adjudicator Spencer was "sceptical of [the appellant's] claim to have been a member of the PKK". He also noted "some contradiction" in the

appellant's evidence. It was against the background of those findings and observations that the First-tier Tribunal commenced its own analysis of credibility. That analysis is very extensive and detailed but we consider that we should quote it in full:

> We are satisfied for the following reasons that the appellant has not been truthful about his associations with the PKK:
>
> i) The appellant has not been internally consistent. In his initial interview in 2001 the appellant claimed that his activities with the PKK involved him distributing publications, advising people and discussing the PKK programme. When he was later interviewed in 2008, the appellant claimed to have been an intelligence officer and that this had been found out in 2000. The appellant also initially claimed that he joined the PKK in 1996, but in later interviews said that he joined the party in 1993. The appellant also has given differing accounts relating to the two arrests. In interview in September 2009, the appellant claimed that on the first occasion he was arrested at a KDP checkpoint in 1997 and was detained for seven months. He was released on condition that he severed his relationship with the PKK. He then said that he was detained in the PUK area in September 2000 and held for three months. However in interview in October 2010, the appellant said that he was first arrested in the autumn of 1995 and was detained without trial for seven months before being released in the spring of 1997 in an exchange of prisoners. He was then arrested again in the autumn/winter of 1996 and detained for three months. The appellant claims that these discrepancies are due to the period of time that has elapsed, his health condition and the drugs that he has taken. However having considered all the evidence in the round, we are satisfied that the appellant has not been consistent because he has been lying about these core events.
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> ii) According to the medical evidence, the appellant began experiencing distressing psychiatric symptoms from an early age. According to Dr Bowen, the appellant said this began when he was 14 and resulted in him being hospitalised and receiving depot antipsychotic medication at the age of 17. Dr. Bowen's initial report indicates however that the appellant's sister Ada told medical staff in the UK that the appellant began to experience problems at the age of 13 or 14 after the death of his brother. She said to the medical staff that the appellant was badly affected by the death and spent four years in hospital being treated for what was believed to be depression with depot and oral medication. We see no reason why those charged with the appellant's medical care in the UK would not have correctly recorded what they had been told both by the appellant and his sister, particularly as this related to his medical history. The account given by the sister would mean that the appellant spent four years in hospital from the age of 13 or 14. This runs completely contrary to what the appellant has said about his continuing involvement with the PKK during these years. We also do not find it remotely credible that somebody manifesting such psychiatric problems from an early age would have been considered a suitable candidate to be an intelligence officer for an organisation such as the PKK as he would not have been trusted. Against the background of the appellant's mental health problems, which according to the evidence became apparent at an early age, we also find the appellant's claims to have been gathering intelligence for the PKK by planting listening devices and also handling information which had come from spy satellites to be nonsense.

iii) We also do not find it credible that if the appellant had been detained by the PKK having refused to carry out orders to plant a bomb, that he would thereafter have been released and trusted to resume his activities such as carrying out guard duty whilst others were asleep. The appellant had a telephone interview with Dr. Fatah. We note from his report at paragraph 24 that the appellant must have given a different account of how he was able to escape the PKK. Dr Fatah refers to how the appellant was detained and held for 15 days, but managed to escape by untying ropes that bound him and avoiding a sleeping guard. We are therefore drawn to the inevitable conclusion that the appellant has again lied about core events.

iv) The appellant's case is supported by statements from his brother Nawshiran Barzinje in Switzerland and his sister Eda Abdulrahman Aziz in Germany. They both refer to the family having close ties to the PKK. The appellant's brother refers to how he was sent for training at the age of 13, but was not as heavily involved as the appellant. He says that his brother went to training at the age of 13 and became more involved as he grew older. He also says that the appellant and their father were arrested and tortured by the PUK. He also refers to another brother having been killed in military operations for the PKK and says that the family were told this in 1999. The appellant's sister describes how she was working with the PKK and was a journalist. She refers to a brother who was killed whilst in the military section of the PKK and also how the appellant became involved with the PKK between the ages of 13 and 16 going on training during holiday periods from school. She also refers to how the appellant was receiving medical treatment in hospital. We bear in mind that these two witnesses have both claimed asylum. The appellant's brother says that he claimed asylum in Switzerland on account of his own connections with the PKK and that he subsequently married a European citizen and has status to remain in Switzerland on that basis. He makes no mention of his asylum claim ever having been accepted. Likewise, the appellant's sister in Germany says that she claimed asylum there in 2006 and says she is still awaiting a decision on her claim. There is no evidence that either of these witnesses have had their accounts accepted by the relevant authorities in the countries in which they now reside. We also bear in mind that what the sister now says in her witness statement about the appellant's activities as a teenager is not consistent with what she told medical staff about him spending four years in hospital. Having considered the statements of the brother and sister in the round, we attach no weight to them as we are satisfied that they have merely sought to bolster the appellant's claim with false evidence.

v) We have also noted that according to the medical report from Wathwood Hospital (appellant’s bundle page 136) the appellant said that he had seven siblings one of whom was in Germany and another in Switzerland, but the remaining siblings were all in Kurdistan. The appellant told medical staff that one of his brothers suffered from mental illness and had killed his grandfather and a cousin whilst psychotic and had apparently committed suicide whilst in prison. In his witness statement, the appellant refers to only having four sisters and two brothers. His case is that one of his brothers was killed whilst working for the PKK and indeed in his witness statement he gives further evidence about how this brother reached the rank of Baluk Commitant before disappearing in 1998. The appellant makes no mention in his witness statement of the suicide of another brother after he had killed two family members. Again the appellant has not been consistent about important events in his family life.

vi) Further according to the Wathwood Hospital report, the appellant's sister had confirmed that the appellant had been a member of the PKK between the ages of 14 and 19. However, she had also said that the appellant began to experience problems at the age of 13 or 14 after the death of his brother who had been the head of their close-knit family after their parents had died. He had been badly affected by the death and had spent four years in hospital being treated for depression with the depot and oral medication. After the onset of his illness the appellant had become violent times towards his family. If as the appellant's sister said to the doctors, the appellant's brother died when the appellant was about 13 or 14 (i.e. in about 1993 or 1994) and this was after the death of the appellant's parents, then this would make it impossible for the appellant's father to have been arrested with him in or about 1997.

vii) In assessing the evidence, we have given careful consideration to the report from Dr. Fatah and note that he was reasonably convinced that both the appellant and his sister were affiliated to the PKK. We note that he interviewed both the appellant and the appellant's sister and refers to background evidence about the PKK. Dr Fatah was able to confirm the appellant's fluency in Kurmanji, which Dr Fatah said the appellant was able to speak with a more ideological vocabulary than is normal. There is however no evidence before us to suggest that Kurmanji is only spoken by persons with connections to the PKK, and we do not find it reasonably likely that this would be the case. There is no evidence before us to suggest that the language is uncommon within the region. The appellant may well have had an ideological vocabulary, but we bear in mind that the appellant has had several years to develop and embellish his claim and indeed has done so for example by latterly claiming to have been a PKK intelligence officer. He has several years to learn about the subject. There is a reference to the appellant's sister having been a journalist and a quotation within the report about this newspaper having a woman journalist. There is however no evidence that this relates specifically to the appellant's sister. In considering the expert report, we also bear in mind that Dr. Fatah does not appear to have been fully aware of all of the inconsistencies both in the evidence of the appellant and what has been said by the appellant's sister. We do not accept his conclusions that the appellant and his sister were affiliated to the PKK.

viii) Claims are made about various family connections through marriage to the leadership of the PKK. The appellant says that his sister Njo is married to the cousin of the leader of the PKK and that another sister Heseba is married to the leader's bodyguard. No cogent documentary evidence of these marriage connections has however been provided. We also note that according to his statement, the appellant says that Heseba is a police officer, which does not suggest that she has had any problems on account of who she is married to. In view of our other concerns about the veracity of the evidence given to us, in the absence of supporting documentary evidence supporting documentary evidence, we do not accept what the appellant or his witnesses say about the connections of his siblings to high-ranking PKK members.

45. We find that the appellant has not shown to the standard that either he or any members of his family have had involvement with or connections to the PKK. We do not accept that the appellant has ever been detained or arrested by the KDP or PUK, or that he has ever come adverse attention of the authorities in the Kurdish region. We do not accept the claims that anyone has ever come looking

for the appellant at his family home. We also do not accept that the appellant is of any interest to the PKK.

46. In any event, even if we are wrong in this, we note that Dr. Fatah says that it is not possible to categorically state that a low-level member of the organisation such as what the appellant claims to have been would be at the same risk from the PKK as high level officials who had been killed for dissenting. Dr Fatah also indicates that he cannot comment on whether or not the appellant would still be at risk from the KDP or PUK. Dr. Fatah is frankly equivocal about the risk that the appellant would face even taking his claim at its highest. We therefore conclude that even if there were any truth in the appellant says about his involvement with the PKK the appellant would not now be at risk of ill treatment because of this.

14. Paragraphs 47-58 of the determination concern the appellant's claim to have converted to Christianity. The Tribunal rejected that claim as untruthful. It found at [58] that it did "not accept that the appellant has any sincere Christian belief or that he would continue to express an interest in Christianity upon his return to Iraq". We note that none of the findings of the Tribunal relating to the appellant's claimed conversion to Christianity have been challenged in this appeal to the Upper Tribunal. The First-tier Tribunal, therefore, was examining the appellant's claimed membership of the PKK against a background of (1) the scepticism or misgivings on that issue expressed by Adjudicator Spencer in 2002 and; (2) an entirely fabricated claim by the appellant to have converted to Christianity. It is clear that the Tribunal considered that the appellant was not likely to have taken the trouble of fabricating the conversion claim if he had considered his claim to have been involved with the PKK was sufficiently compelling to lead to a grant of refugee status. Whilst the materiality of the "mistake" as to the appellant's hospitalisation must be examined carefully, the appellant's bogus claim to have converted to Christianity together with Adjudicator Spencer's findings were discrete parts of the evidence before the Tribunal which were not connected with the "mistake" in any way and which *per se* would have given the Tribunal good reason to doubt the reliability of the appellant as a witness.

15. It is true that the Tribunal refers more than once to the appellant's apparent hospitalisation at a time when he claimed to have been active with the PKK. They note that the sister's evidence (recorded by Dr Bowen) "runs completely contrary" to what the appellant had said regarding his involvement with the PKK. They also considered that the inconsistency between the sister's evidence and that of the appellant undermined the credibility of the sister, as well as the appellant. However, the Tribunal also made other findings as to the appellant's account and his credibility which are not connected with the "hospitalisation". The appellant's own evidence was internally inconsistent (see paragraph 44(i)). We also observe, at paragraph 42(ii), that the Tribunal, immediately after recording the inconsistency between the evidence of the appellant and his sister, went on to note that it was not "remotely credible that someone

manifesting such psychiatric problems from an early age would have been considered a suitable candidate to be an intelligence officer for an organisation such as the PKK...". The Tribunal is referring there to the appellant's psychiatric problems (which are not disputed) rather than the fact that he was in hospital for a number of years. Further, the Tribunal continued by finding that, "against the background of the appellant's mental health problems... we also find the appellant's claims to have been gathering intelligence for the PKK by planting listening devices and also handling information which had come from spy satellites to be nonsense." Again, that finding does not arise from a misapprehension on the part of the Tribunal as to the appellant's detention in hospital. The language used here is also important. We have no doubt that the Tribunal has (as it stated it would at [3]) considered the appellant's account of past events according to the standard of proof of a reasonable likelihood or real risk. However, it is an indication of just how incredible the Tribunal found much of the appellant's evidence that it should use expressions such as "nonsense" and "not remotely credible".

16. We consider that the "mistaken" evidence did play a part in the Tribunal's reasoning but we find that Mr Ahluwalia's submission, that it is impossible "to assert that the Tribunal would have reached the same conclusion but for the mistake" is not made out. Mr Ahluwalia submitted that, "the Tribunal may not have reached the same conclusion on A's credibility had it not been mistaken [as regards the appellant's hospitalisation]." We disagree. The Tribunal has given ample reasons, wholly unconnected with the "mistake" for rejecting the appellant's credibility.

17. Finally, we note the question posed in **Haile** regarding the requirement of the "wider interests of justice". We are well aware of the importance of the outcome of this appeal to the appellant but, following much consideration, we are satisfied that the Tribunal's findings on credibility can and should stand. For the reasons, we have given we find that the evidence purportedly clarifying the appellant's sister's evidence should not be admitted and that the First-tier Tribunal did not err in law in finding her evidence and that of the appellant himself to be untruthful.

18. The second ground of appeal concerns the application of **J [2005] EWCA Civ 629** to the facts in the appeal and, in particular, the appellant's mental condition. It is submitted that the panel irrationally concluded that Dr Bowen was of the view that the appellant's deportation was not causally connected to a risk of suicide. The grounds also challenge the Tribunal's finding that the appellant's mental illness was not the direct or indirect responsibility of the respondent; the Tribunal had referred to Dr Bowen's assessment that the appellant would attempt to commit suicide wherever he might be living. Thirdly, it is submitted that the mistake as to the appellant's sister's evidence led the Tribunal wrongly to conclude that the appellant did not have a genuine and subjective fear of return to Iraq. In the light of our findings regarding the appellant's credibility set out above, we reject that submission. It is also submitted that the appellant's numerous acts of self-harm and attempted suicide should have led the

Tribunal to assess the risk to the appellant particularly carefully but that the Tribunal failed to do so. As to that submission, we find that the First-tier Tribunal carried out a detailed and exhaustive examination of the appellant's risk of committing suicide at paragraphs 59-72 of its determination;

> 59. We have considered the appellant's mental health problems and the risks of him committing suicide. Dr. Bowen in his report of 21 November 2012 says that the appellant has complex dual diagnosis presentation of schizophrenia and an emotionally unstable personality disorder. We see no reason not to accept this diagnosis. Dr. Bowen does not however consider that the appellant's symptoms have worsened due to fear of deportation.
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> 60. There have been a number of reported instances of self harm by the appellant. These have included him stitching up his lips and eyes. He has made superficial cuts to his arms, stomach, throat and wrist which have not required treatment, but has also cut himself with a razor across the abdomen. This injury required six stitches at a local general hospital. On one occasion he prepared a noose, but did not make any attempt to hang himself. The appellant's medical treatment has been punctuated by episodes of him deceiving medical staff by not taking his medication and by his use of illicit drugs.
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> 61. Dr Bowen's report sets out the appellant's complex regime of medication which includes two antipsychotic medications, an intramuscular depot preparation of Haloperidol and oral Aripiprazole which have reduced his psychotic symptomology and behavioural disturbances to a degree. He is also prescribed an antidepressant Lofepramine and a mood stabiliser Lamotrigine which have positively reduced the appellant's depressive episodes. The appellant is also prescribed a laxative.
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> 62. We note that at paragraph 3 under the heading of his opinions, Dr. Bowen says that on occasion the appellant appears to experience fleeting suicidal ideation although there has been no evidence of a sustained intention to commit suicide. However at paragraph 8, when asked if the appellant is likely to commit suicide if deported to Iraq, Dr. Bowen indicates that he believes that there is a high risk of completed suicide in the medium term irrespective of where the appellant is. This is in view of his self harm history, his severe emotionally unstable personality disorder, psychotic illness, use of illicit drugs, poor compliance with medication and poor response to stressors.
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> 63. In his addendum to this report of 6 December 2012, Dr Bowen indicates that if Ariprazole and Lamotrigine are not available in Iraq it is uncertain how the appellant would respond if alternative medication had to be substituted. He considers that there would be a risk that his mental illness would relapse at least for a period of time during the changeover resulting in increased psychotic ideation. This would lead to an increased risk of self harm. Any relapse would be likely to necessitate admission to hospital to stabilise his mental state on new medication.

64. Dr Fatah deals with the Iraqi health care system in section 7 of his report which runs between paragraphs 98 and 168. Iraq has one of the poorest medical systems in the region and has suffered ever since UN sanctions were first imposed in 1991 and the Baath regime cut funding by 90%. Years of conflict have also had a negative impact. Foreign aid money has arrived since 2003 funding 240 hospitals and 1200 primary health clinics. There has however been a dramatic decrease in the number of doctors in Iraq. Since 2003 to 75% of nurses, doctors and pharmacists have left the country. Dr Fatah refers to the humiliation and taunting in public of those with psychological illnesses and for example in Sulalmaniyah there are a large numbers of people with severe mental disabilities just walking the streets. There is a high percentage of Iraqis suffering from mental health conditions and the available care is said only to scratch the surface of the population's need. There are three mental health hospitals in Iraq, two in Baghdad and one in Sulalmaniyah and 36 psychiatric units throughout Iraq with one psychiatric doctor for every 150,000 of the population. Dr Fatah does refer to evidence of some progress in the country at paragraph 142. Since 2009, the Ministry of Health has opened mental health units in all hospitals and health centres-approximately 3500-across the country and is putting in place steps to train staff to cope with the increasing demand. In January 2009 a two-year WHO endorsed and Dutch funded project began focusing on the provision of psychological and mental health services for people in Iraq's Northern provinces. The impact of these initiatives was said however to be as yet unknown.

65. As regards the available medication in Iraq, Dr Fatah indicates that the health service is free to users in Iraq meaning that anyone can access free medication however there are often shortages. The cost of antipsychotic medication for anyone paying privately was three Iraqi dinars per day the equivalent of 10% of one-day's minimum wage at 2006 levels. Medication is free in public mental health hospitals. However, shortages of medicines continue to be experienced in some hospitals and health centres. Dr Fatah says that according to psychiatrist Dr. Rizgar Amin, who is also the President of the Kurdish Medical Association in the UK, Ariprazole and Lamotrigine may be difficult to get hold of in Kurdistan and their authenticity may be doubted because they are expensive drugs. He says that there are alternatives that are similar in efficacy but are now much cheaper because they are not under patent. Dr. Amin also said that Haloperidol and Lofepramine might be available as these are cheaper drugs. A doctor in Iraq told Dr. Fatah in July 2012 that Chlorpromazine and Haloperidol were the only antipsychotic drugs available in the country and that the new generation of drugs are not available in Iraq. He considered that the side effects of these two drugs are wide-ranging and can be serious. There appears to be conflicting evidence as to what psychiatric drugs are actually available in Iraq. Dr Amin's evidence suggests that un-patented generic alternatives to Ariprazole and Lamotrigine are available. Although Dr Bowen has in his most recent addendum report expressed concerns about changing the appellant medication, he does not appear to have considered what adverse effect there would be if the appellant is treated with generic substitute drugs for Ariprazole and Lamotrigine.

66. We also bear in mind that according to the medical evidence, the appellant's psychiatric condition manifested itself in Kurdistan during his early teenage years. The appellant was able to obtain treatment for this notwithstanding the pressures on medical facilities in Iraq following the imposition of sanctions. We say this because according to what his sister told doctors, the appellant was admitted to hospital for four years as a teenager and received depot and oral medication. According to her chronology this all happened after the death of the appellant's parents. He was therefore able to access this treatment without parental support.

67. The appellant claimed in oral evidence that he was estranged from his three sisters in Iraq. The statements of his brother and sister however make no mention of this and bearing in mind the other credibility concerns over the appellant's evidence, we do not accept what he says about this. It is also clear that the appellant's sister living in Germany has shown a clear interest in the appellant by having contact with medical staff. Further, Mr. and Mrs Routledge referred to the appellant's brother from Germany having visited the appellant and indeed they had visited him in Germany. In his witness statement, the appellant refers to his sisters in Iraq saying that Njo was previously a psychologist but is now a housewife, Heseba is a police officer and the other sister Nejeba is a prison officer. According to this evidence, two of them have good jobs and the other is likely to have links through her previous career to the Iraqi medical system. We do not therefore accept that practical family help would not be available to the appellant upon return to Iraq. With such help, the appellant has in our view a better prospect than most with mental health difficulties of accessing the available health care and we bear in mind that he has successfully accessed such treatment previously.

68. It is submitted that the appellant would be at greater risk to his mental health because of what would happen to him immediately on return to Iraq. This submission is based on the claim that the appellant would be detained upon arrival in adverse conditions and that these would in themselves lead to a deterioration in his condition, not least because he would be denied access to medication. We have however carefully considered what Dr Fatah has said about what would happen upon return. The KRG does not allow direct re-entry of returned asylum seekers from Europe. Return would therefore be to Baghdad airport. Dr. Fatah refers to the Iraqi parliament having banned the forced return of asylum seekers. It remains to be seen however whether or not this policy will be continued. Returnees from Europe need a guarantor present at the airport who can confirm their identity. Dr. Fatah does however say that in some circumstances, guarantors have been able to convince officials at Baghdad to transfer a returnee to Erbil where the family can then obtain the appropriate civil status ID and confirm his identity. Dr. Fatah does say that all the returnees he had spoken to were detained at the airport until their identity was proven, some for a few hours, but others for up to 10 days. Returnees without a guarantor present had remained in airport detention facilities for up to 15 days. At the start of Mr. Ahluwalia's submissions, there was some discussion as to whether or not the appellant has his birth certificate from Iraq. He denied that he has this document. We

do not accept this however because the appellant clearly had a telephone interview with Dr Fatah, and in his report Dr. Fatah says at paragraph 251 "*Mr. Ali arrived in the UK with no identification document except a birth certificate with a photograph of him as a baby attached*". We do not accept that Dr Fatah would have said this unless he had been told about this by the appellant. Dr Fatah goes on to say at paragraph 255 that if the appellant's birth certificate is deemed to be reliable by the authorities in Iraq he should be able to obtain replacement ID documents when he returns there. The birth certificate contains the holder's details in the civil register and these can be used to prove his identity. We also bear in mind that the appellant has close family members in Iraq one of whom is a police officer and we find that there ought to be no difficulty in a guarantor demonstrating the appellant's identity. We do not accept therefore that the appellant needs to be detained at Baghdad airport for more than a few hours.

69. We have also considered what Dr Fatah says in section 10.4.1 about the procedures at Erbil airport. Each failed asylum seeker is investigated for insurgent activities and other crimes. We have already explained why we do not accept that the appellant has had any involvement with the PKK. He therefore has nothing to fear from this process. Release only occurs once it has been established that the returnee is not accused of any outstanding charges and is not a criminal. We have no doubt that the appellant's police officer sister will be able to assist in this process. The only other obstacle to release at Erbil is if a returnee cannot show that he is from the IKR and is registered as such. Again, the appellant's birth certificate and the help of his family will all assist in this process.

70. We have noted the risk posed by the appellant that he may commit suicide. We confirm that we have considered the guidance offered in **J v SSHD [2005] EWCA Civ 629** and **Y (Sri Lanka) [2009] EWCA Civ 362**. We find however that the appellant will not however suffer ill treatment on account of this if removed from the UK for the following reasons:

(a) Firstly, the evidence before us shows that there is access to medical treatment and medication for mental health issues in Kurdistan and Iraq. This can be sought out by the appellant.

(b) Secondly, we find that there is no causal link between the act or threatened act of deportation and the inhuman treatment relied on as violating the applicant's Article 3 rights. We say this because according to Dr Bowen, the threat of deportation was not causing any deterioration in the appellant's mental health condition. The Doctor also took the view that there was a high risk of completed suicide in the medium term irrespective of where the appellant is. Further, the appellant can receive the treatment he requires whilst in the UK awaiting removal. Those charged with his care in detention can be made aware of any possible reaction to arrangements for his removal and can take appropriate steps to avoid the risk of suicide.

(c) Thirdly, in the context of what the appellant does, and what happens to him after his deportation, this is a 'foreign case' and the threshold is high. The risk of suicide comes largely from the appellant's mental illness and is not the direct or indirect responsibility of the respondent. This is clear from what Dr. Bowen says about the appellant posing a high risk of completed suicide wherever he may be.

(d) Fourthly, we accept that a risk of suicide can be sufficient to pass the Article 3 threshold.

(e) Fifthly, we find that there is no real risk of the appellant being subjected to persecutory or other ill-treatment in Iraq. Not only do we find that objectively his claimed fears are without foundation, but we also do not accept that the appellant has a genuine subjective fear of ill-treatment upon return to Iraq. We say this because we are satisfied that the appellant has sought to embellish his account of his involvement with the PKK to bolster his claim and has made false claims about the sincerity of his conversion to Christianity. We find that he has also taken steps to secure assistance from his brother and sister to bolster his claim and we are satisfied in particular that the appellant's sister in Germany has altered her evidence by giving a different account about the appellant's history to what she told the medical staff here in the UK. This all demonstrates that the appellant has behaved deviously in his efforts to construct his case. Further, in as much as it has been suggested that the appellant may react badly the loss of hope of ever having contact with his son, the appellant has already been separated from his son because of his imprisonment and because there is a Prohibited Steps Order in force preventing any direct contact between them. We therefore find that any future risk of suicide because of the inability of the appellant to have access to his children is not well founded.

(f) Sixthly, we do not accept that there not are mechanisms to reduce the risk of suicide in Iraq or that mental health services and appropriate drugs are un-available. The appellant can, with the assistance of his family access appropriate medical treatment to see him through any hiatus in his medication. The respondent cannot be held responsible for the appellant's actions which are entirely unconnected with his removal. We find that any risk of the appellant committing suicide in connection with or as a consequence of his return to Iraq by the respondent does not cross the Article 3 threshold.

71. We have taken account of the opinions of the House of Lords in **N [2005] UKHL 31**. Taking account of the principles referred to by their Lordships, and having considered all of the available evidence we find that returning the appellant to Iraq would be no breach of Article 3, because we find the appellant does not have any form of illness which has reached such a critical stage that there are compelling humanitarian grounds for not removing him to a place which lacks the medical and social services which he would need to prevent acute suffering.

72. In summary therefore we find that the appellant has failed to show to the low standard that there is a real risk of him suffering serious harm

or in-human or degrading treatment upon return to Iraq. The appeal under Article 3 of the ECHR is therefore dismissed.

19. Although the Tribunal found that the appellant could access medical treatment and medication for mental health upon his return to Iraq, it also correctly found that the appellant had been able to access treatment in the past.

20. We find that there was no error in the Tribunal's application of the principles of **J** to the facts as they found them in this appeal. It was open to the Tribunal to find that the appellant did not have a genuine and subjective fear of returning to Iraq. Further, the Tribunal recorded Dr Bowen's opinion that the appellant was at risk of suicide wherever he might be and found that Dr Bowen's opinion, coupled with the appellant's lack of any genuine fear of returning to Iraq, indicated that the fear of deportation to that country would not increase the risk of the appellant 's committing suicide. We do not accept, as Mr Ahluwalia submits, that the Tribunal has misunderstood Dr Bowen's report. Moreover, whilst accepting the appellant does suffer from mental illness, the Tribunal was aware of his ability and tendency to behave deviously "in his efforts to construct his case". The Tribunal was right also to find that adequate steps would be taken both in the United Kingdom and during the appellant's journey back to Iraq to prevent or minimise the risk of suicide. The Tribunal's findings as to the availability of treatment for the appellant's mental illness in Iraq were also well-reasoned and based on the evidence before it. The Tribunal has not misunderstood or ignored evidence of relevance nor has it taken into account evidence which is not relevant. The finding that the appellant could not succeed in his appeal under Article 2/3 ECHR as regards the risk of suicide was plainly open to the Tribunal. In particular, there is nothing in Dr Bowen's reports or the evidence as a whole which should have compelled the Tribunal to find that appeal should be allowed.

21. Thirdly, the appellant asserts that the Tribunal erred in its analysis of the expert evidence of Dr Fatah. It is submitted that the panel made no findings as regards Dr Fatah's recording in his report that the appellant and his sister had a detailed knowledge of the leaders of the PKK in their region and that the appellant's mental health problems would have prevented him from learning the Kurmanji language "with the level of ideological vocabulary noted by Dr Fatah".

22. Dealing with that latter point first, we find that it is without merit. The Tribunal found that the appellant had constructed his claim to have been involved with the PKK and it was clearly open to the Tribunal to conclude that the appellant would have been likely to have taken the precaution of learning words and terms associated with PKK ideology. We also do not see anything wrong with the Tribunal's finding that the use of the Kurmanji language was not restricted to members of the PKK. Further, we find no

obligation upon the Tribunal to deal with each and every item of Dr Fatah's report; for example, the Tribunal's findings regarding the credibility of the appellant's claim is not undermined by the fact that it did not make any specific findings regarding the appellant's claimed detailed knowledge of the leaders of the PKK in his region. The Tribunal had already noted that it was likely that the appellant had learnt facts about the PKK in order to support his fabricated claim to have been a member of that organisation.

23. In conclusion, we find that the thorough and detailed determination of the First-tier Tribunal does not contain any error of law such that the determination falls to be set aside.

**DECISION**

24. This appeal is dismissed.

Signed Date 9 June 2013

Upper Tribunal Judge Clive Lane