



IAC-FH-CK-V1

**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02379/2020 (V)**

THE IMMIGRATION ACTS

**Heard at Field House
On 27th August 2021 via Teams**

**Decision & Reasons Promulgated
On 23rd September 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

**SOA
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs J Heybroek, Counsel instructed by Leonard Solicitors

For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

The appellant is a citizen of Iraq who made an application to remain in the UK on protection and human rights grounds. His appeal against the refusal of his claim on 23rd February 2020 by the Secretary of State was dismissed by First-tier Tribunal Judge Raymond on 18th January 2021. The appellant appeals against that decision on the grounds:

- (i) that the judge failed to comply with the Surendran guidelines.**

It was not the role of the First-tier Tribunal Judge to “descend into the arena” by cross-examining an appellant or raising matters in cross-examination which had not been challenged in the respondent’s decision. The challenges to the appellant’s asylum narrative and credibility were set out in the Secretary of State’s reasons for refusal as follows:

An inconsistency in the appellant’s account of when he was apprehended by the authorities is “noted” at paragraph 29.

The plausibility of the appellant telling hospital staff he had attended a demonstration is challenged at paragraph 31.

The lack of objective evidence of demonstrations in August 2018 is “noted” at paragraph 33.

The lack of objective evidence that the authorities were arresting and questioning low level protesters and children following the demonstrations is also noted at paragraph 34.

The respondent therefore does not accept that the appellant was of interest to the authorities at paragraph 35.

The inconsistency in relation to the appellant’s bullet wound is noted at paragraph 37.

The respondent concludes that the appellant’s perceived risk on return is based on speculation at paragraph 40.

At paragraph 42 the respondent concludes that even if the appellant did attend the demonstrations he will not be of interest to the authorities upon return.

Further, in response to the appellant’s skeleton argument the respondent stated in her review dated 29th September 2020:

The appellant’s account of events before he left home were not credible and continued to be maintained as per the reasons in the reasons for refusal letter.

The photographs supplied will be examined in more detail during the hearing, paragraph 4(v).

Inconsistencies with regard to the dates of protests will be subject to cross-examination – paragraph 5(ix).

The appellant will be cross-examined on the whereabouts of his CSID (paragraph 5(x)) and his ability to obtain a CSID from the Iraq authorities.

The respondent did not attend the video hearing before the First-tier Tribunal and it was submitted in the grounds for appeal to the Upper Tribunal that the judge went beyond his duties as an independent adjudicator and adopted the mantle of the absent Home Office Presenting Officer, his questions going

beyond mere clarification. In particular, attention was drawn to paragraphs 14, 56, 70 and 71.

(ii) There were irrational findings in respect of the appellant's interview.

At the end of the appellant's substantive interview his social worker raised an issue as to the way in which it had been conducted. The respondent noted on the final page of the SEF Form "social worker - may be legal reps correspondence regarding the appropriateness of having an adult interview for someone who has just turned 18 after two weeks."

The social worker, Mr Jacob McKay, had provided a letter outlining his concerns and those instructed contacted the respondent by email on 15th January 2020.

The judge's findings were irrational in relation to the interview at 77 to 81 in relation to the state of mind and reasoning behind Mr McKay's opinion that the interview was conducted in an overly oppressive manner for an Unaccompanied Asylum-Seeking Child ("UASC"), particularly as the finding is that Mr McKay believed the appellant's account,

There were multiple and quick-fire questions in the interview and questions within questions that had been recorded in what seemed an annotated form.

It was submitted that these errors of law were material, particularly where the entire case turned on the credibility of the appellant's account.

The Hearing

At the oral hearing before me Mrs Heybroek expanded on her written grounds.

Mr Lindsay submitted that there were clear credibility issues and had the judge not asked for clarification he would have been criticised. Given the judge had concerns about the appellant's case, he was merely seeking to explore or clarify the issues raised and he was giving the appellant every opportunity to address those issues. He proceeded without any procedural impropriety.

Mrs Heybroek pointed out that the First-tier Tribunal decision reflected that the appellant had given his evidence-in-chief and further questions were asked at that stage, and see paragraph 56. It was clear from the record of the proceedings within the decision that the appellant struggled to understand, and she again stated that she had previously, at the start of his evidence, asked questions for clarification and an explanation of the discrepancies had been put in the statements. Further, as stated in her grounds, there were questions on the photographs.

Mr Lindsay responded by submitting that the questions could not be characterised as cross-examination and were sensitive and non-leading and open-ended questions and appeared extensive because the judge was careful to set out all the questions that had been asked. There are two possibilities,

either the appellant was nervous and could not get the words out or not telling the truth.

In relation to ground (ii), the judge dealt with care with the status of the interview and did consider the concerns raised and took a fair approach. He had due regard to the fact that the appellant was a minor, as could be seen at paragraph 95 of the decision, and I was referred to paragraphs 78 and 80.

Mrs Heybroek responded that it was rare for a social worker to make the comments that were made in relation to the interview.

Analysis

The **Surendran** guidelines specifically at paragraph 4 state:

- “4. *Where matters of credibility are raised in the letter of refusal, the special adjudicator should request the representative to address these matters, particularly in his examination of the appellant or, if the appellant is not giving evidence, in his submissions. Whether or not these matters are addressed by the representative, and whether or not the special adjudicator has himself expressed any particular concern, he is entitled to form his own view as to credibility on the basis of the material before him.*
5. *Where no matters of credibility are raised in the letter of refusal but, from a reading of the papers, the special adjudicator himself considers that there are matters of credibility arising therefrom, he should similarly point these matters out to the representative and ask that they be dealt with, either in examination of the appellant or in submissions.*
6. *It is our view that it is not the function of a special adjudicator to adopt an inquisitorial role in cases of this nature. The system pertaining at present is essentially an adversarial system and the special adjudicator is an impartial judge and assessor of the evidence before him. ...”*

As identified above there were clear issues of credibility raised by the Secretary of State in her refusal letter. The respondent’s review prior to the First-tier Tribunal hearing clearly confirmed that the appellant’s credibility was central to this appeal and confirmed “this will be explored further and subjected to cross-examination at the oral hearing (sic)”. That review also confirmed that the enquiries were made of the decision-making team who confirmed that the interviewer and decision-maker of the substantive asylum interview were both “minors-trained” and that Section 55 of the Borders, Citizenship and Immigration Act was taken into consideration when the refusal decision was made. The same burden of proof applied to the appellant as would be to an adult although greater dispensation was given to the appellant throughout the asylum claim as a result of the understanding that he was a minor. It was also confirmed that the photographs would be explored during further cross-examination at the oral hearing.

In the event, there was no attendance by the Home Office Presenting Officer at the First-tier Tribunal hearing. The Record of Proceedings show that the judge asked in total 28 questions between evidence-in-chief and re-examination by Mrs Heybroek and many of these questions are recorded at paragraphs 56, 70 and 71. The judge was clearly in a difficult position because he was left with no Home Office Presenting Officer and First-tier Tribunal Judges are aware of the need to avoid delay in dispensing justice. Nonetheless, in the context of this appeal the extent of the questions trespassed on areas which the Secretary of State had specifically identified as being questions on which the appellant would need to be cross-examined fall outside the scope of the **Surendran** guidelines. The guidelines were approved in **NS (Iran) v Secretary of State for the Home Department [2009] EWCA Civ 914**, particularly at paragraph 9:

“9. Ms Patel’s submission is based upon the Surendran guidelines. Those were guidelines issued by the tribunal with the case of MNM v SSHD [2000] INLR 576, dated 31 October 2000, the judgment of Collins J. The submission is that the tribunal should not have made those adverse findings on credibility without itself having questioned the applicant on the matters about which findings were made. Particular importance is attached to paragraph 6. Paragraph 6 begins with the sentence: ‘It is our view that it is not the function of a special adjudicator [or the judge] to adopt an inquisitorial role in cases of this nature’; that is, when the Home Office presenting officer has not appeared. There is, however, a qualification to that later in the paragraph. Having stated:

‘...nor is it his function to raise matters which are not raised in it [that is, representations], unless these are matters which are apparent to him from a reading of the papers, in which case these matters should be drawn to the attention of the appellant’s representative who should be invited to make submissions or call evidence in relation thereto.’”

The First-tier Tribunal judge from the decision appears not to have referred the matters to the representative to clarify. I can understand that it is for the judge to clarify issues but the nature, subject and extent of the questioning appear to fall within the realm of cross-examination. For example, at paragraph 56 the judge recorded:

“56. After the appellant had given his evidence-in-chief I asked him why his brother would be reluctant to help him obtain the medical records? He replied that he did not remember exactly, the wound was not serious. I asked if he could help me understand why his brother was reluctant? He replied because he provided his full name to the hospital. I asked if he had asked his brother to get the medical records? The appellant replied that his brother got him a cream. I explained the question to the appellant and observed it was a simple one? He replied that he had asked his brother. I asked what his brother had said to this? The appellant replied that he asked his brother but he could not get it. I asked why his brother was unable to get it? The appellant replied that he went to the hospital and asked, and they said they did not

have the file anymore, because it was old. I asked the appellant why then he said that his brother was reluctant to get the medical records? The appellant replied that he still did not understand what is meant by medical records of what happened. I observed to the appellant that these would be medical records of his having been treated for a bullet wound? He replied that he asked his brother, but he did not know, his brother has not answered his query yet, and he did not know if his brother had been to the hospital yet. ..."

Not least, the observation that the question the judge was asking was a simple one may indeed have been justified had it emanated from a Home Office Presenting Officer, but it has an overlay and tone of cross examination.

A further example is at paragraph 70:

"70. After his evidence-in-chief I asked the appellant who had taken the photograph of the demonstration (17)? He replied that he could not remember if it was from Shaho, or other people. I asked if the appellant could not remember how it is that he has this photograph?"

The reason for the **Surendran** guidelines is to ensure that the judge appears impartial and although the questioning suggests that the judge was understandably enthusiastic about the efficiency of the hearing the extent and nature of the questioning indeed suggests that the judge "descended into the arena".

The critical issue is that the system pertaining at present is essentially an adversarial system and it is important that the judge remains and is perceived to remain as an impartial judge and assessor of the evidence before him.

Owing to my finding on the first ground, which is fundamental to the decision of the First-tier Tribunal, and the consequent disposal, it is not necessary for me to proceed to the second ground, but I wish to set out my findings for the benefit of any future tribunal.

I am not persuaded the second ground is sustainable in relation to the criticism of the asylum interview and the judge's approach thereto.

The judge pointed out that the appellant was in fact 18 before the date of the asylum interview and he had made reference to the Children's asylum claims dated 31st December 2020, which stated that the best practice for children's claims is that the interview be conducted by someone who has completed a minors' training where a child has claimed asylum but has become legally an adult before the substantive asylum interview was concluded. The judge did note from paragraph 77 onwards, that the frequent use of "why?" as a question was said not to constitute sensitive questioning and reliance was placed on the view of the social worker who attended that the appellant also felt overwhelmed with all the questions, that his mind was really confused and that the representatives asserted that they had been informed that the questioning was relentless.

The judge recorded the objections and observations of Mr McKay, the social worker, but it was open to the judge to find that the concerns of the social worker turned upon an explicit assumption that the appellant provided a credible and true account of what he claimed to have experienced. The judge was right to point out that the question of determining whether his asylum narrative was credible rested with the Tribunal on the appropriate standard of proof and the letter from the social worker tended to pre-empt that exercise. The judge accepted that his observations were in keeping with his role as a social worker but that these did not undermine the interview overall. It was open to the judge to find at paragraph 80, where inconsistencies arose which resulted from what would seem to be conflicting strands to the same asylum narrative, that

“it seems almost inevitable that the question ‘why?’ is used in making a claimant aware of difficulties that may need to be addressed, and by those representing his or her interests as well. With the avoidance of questioning that could be oppressive being a constant in any case, although more so with younger persons”.

The judge reasoned that in his view there was a proper use of the interrogative adverb “why?” because of obvious discrepancies in the asylum narrative and it would have been unfair of the interviewer not to make the appellant aware of those questions.

The judge also noted that the interviewer enquired into the health and mental health of the appellant at the outset but there was a pause after 145 questions, that the appellant was a young adult who was accompanied by a social worker and the appellant confirmed that he was fit and well at the close of the interview. I conclude the judge was entitled for the reasons which he gave, and which were sound, to find there was no substance to the concerns raised in connection with the substantive asylum interview. However, because of the fundamental nature of the error found and its impact on the credibility findings overall, none of the decision can be preserved.

For those reasons, and on the first ground alone, I find that the decision contains a material error of law and should be set aside, and the matter referred to the First-tier Tribunal. No findings are preserved.

Notice of Decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Directions

- (ii) **Any further evidence should be filed and served at least 14 days prior to any further substantive hearing.**
- (iii) **The parties must file and serve composite skeleton arguments at least 7 days prior to the substantive hearing which should comprise no more than 6 pages of A4.**

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Helen Rimington

Date 20th September 2021

Upper Tribunal Judge Rimington