



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: AA/11457/2012

THE IMMIGRATION ACTS

**Heard at Glasgow
on 17th September and 26th November 2013
and 27 January 2014**

**Date Sent
On 5th February 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

SELMEN MOHAMMED

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: On 17 September 2013, Mr J Bryce, Advocate, instructed by Quinn, Martin & Langan, Solicitors; on 26 November 2013 and 27 January 2014, Mr R Gibb, of Quinn, Martin & Langan

For the Respondent: On 17 September 2013, Mrs M O'Brien, Senior Home Office Presenting Officer; on 26 November 2013 and 27 January 2014, Mr M Matthews, Senior Home Office Presenting Officer

No anonymity order requested or made.

DECISION and DIRECTIONS

1. The Appellant appeals against a determination by First-tier Tribunal Judge Wallace, promulgated on 10th April 2013, dismissing his appeal against refusal of recognition as a refugee from Iraq.

The hearing on 17th September 2013.

2. The Respondent accepted that Judge Wallace erred at paragraph 48 of her determination where she found that in a prior determination it had been held that the Appellant's father, mother and sister had all been killed in Iraq. The determination in question was made by Immigration Judge Kempton in the Asylum and Immigration Tribunal (case reference AA/10282/2008), promulgated on 23rd January 2009. Paragraph 20 thereof records that the judge "simply could not say" whether or not the Appellant's family members were killed in an explosion near the family home in 2003, when the Appellant also said he was injured. (He has lost a leg.)
3. Representatives agreed that Judge Wallace's error as to what had previously been determined amounted to an error of law, on a point sufficiently material for her determination to be set aside. It was also agreed that while Judge Kempton might not have been required to make a finding on whether the incident was proved, in the light of cases on the "tracing duty", a fresh decision should start with a finding on whether the Appellant was telling the truth about that incident. A further hearing was required in the Upper Tribunal, with that point as the initial focus.
4. The Respondent's letter of 26th February 2013 already makes it sufficiently clear what the Secretary of State's position is on the nature and extent of the tracing duty in this case. Mrs O'Brien said that while it was accepted that Judge Wallace erred, the respondent would argue that failure of the tracing duty did not translate into an obligation on the Secretary of State to investigate with a view to possibly undermining the allegations of an asylum applicant. If an applicant said that his immediate relatives were all dead, there was nothing the Secretary of State had to do, and the burden remained on an applicant to prove his case.
5. Mr Bryce submitted that it could not be determined what the proportionate remedy for the Appellant was, if there were any breach of the tracing duty, except on a clear finding on the antecedent facts.
6. By agreement, the case was adjourned for a further hearing in the Upper Tribunal to carry out a fresh fact finding exercise. I observed that such an event as the Appellant claimed to have occurred in 2003 was likely to have been recorded on police records, hospital records, death certificates, and so on and should be capable of being authenticated. The Appellant should have a final opportunity to obtain that, and the Secretary of State should have the opportunity to verify any evidence produced. A date was to be fixed to enable the Appellant to make enquiries with a view to establishing what he said. If he did not show that he had made realistic attempts, or if he did not produce proof that might reasonably be expected, his case was likely to fail. Mr Bryce said that these observations would be borne in mind for the further hearing. To provide reasonable

time for preparation, I advised that the case would be re-listed before me on or after 25th November 2013.

The hearing on 26 November 2013.

7. No further evidence had been filed. I asked Mr Gibb how he proposed to proceed. He said that the appellant had no documentary evidence relating to the attack on his family in 2003. Mr Gibb had consulted a country expert. She was of the view that due to the chaos prevailing in Iraq, then and since, no such evidence was likely to exist. (Mr Gibb did not suggest that evidence from the expert, or any other evidence, would be produced to establish that proposition.) He sought admission into evidence of (a) a supplementary letter from the Medical Foundation, dated 25 November 2013, and (b) information about the “Iraq Body Count Project” and an excerpt from that source regarding violent deaths in Kirkuk in August 2013. No additional statement by the appellant was tendered, although his solicitors had asked for an interpreter. Mr Gibb indicated that he would rely on the evidence and statements the appellant had previously given, but sought to ask him “another couple of short questions”, without indicating what these were to cover.
8. I asked Mr Matthews whether he proposed to cross-examine. He said that he understood from his colleague’s note of the hearing on 17 September that the issue for this hearing was whether the appellant could substantiate events in 2003 by documentary evidence. He pointed out that the appellant previously purported to produce such evidence. The hearing before Judge Kempton took place on 12 January 2009. There was no representation of the Home Office. The appellant then had other solicitors. The determination shows that the appellant produced documents on the day (or the day before). Paragraph 20 refers to the appellant’s renewal certificate of Iraqi nationality; his identity card; and his father’s police identity card. The judge observes that these appear to be very new and never to have been used, that the respondent has had no opportunity to verify them, and that they were produced only the day before the hearing although they appeared to have been sent to the appellant and passed by him to his solicitor prior to the asylum interview. There was accordingly no reason why they could not have been given to the respondent at the time of the interview, and the same applied to death certificates of the appellant’s parents and his sister. It was in those circumstances that the judge said she had no way of knowing whether these were genuine documents, and could not say whether his family members were killed as the appellant claimed.
9. Mr Matthews also drew attention to the respondent’s bundle lodged in the First-tier Tribunal for the present case. This includes at Item 1 the appeal bundle, dated 30 September 2010, lodged for the appellant in respect of another hearing. Item 3 within that bundle is a statement by the appellant, dated 29 September 2010. At paragraph 10 the appellant says,

“The death certificate of my family is available. I have the original copies at my home. A photocopy of the death certificates should be on file with my solicitor. There might be a police report ... I cannot get hold of it because I cannot get in touch with my uncle as he does not have a phone line.” At paragraph 11 the appellant says, “The Home Office has seen the death certificates of my parents and my sister at the appeal stage in court.” Mr Matthews pointed out that the respondent was not represented at any hearing when such documentary evidence may have been produced. He also said that although the appellant has changed his solicitors, and his present solicitors may not have received full papers, they have had access to the previous determinations and to the appellant’s statement. Further, according to the appellant he had the death certificates at home here. Thus, the appellant contradicts himself in a number of obvious ways.

10. (To add to the confusion, the bundle at item I is referenced AA/10282/2008, although it seems to postdate that case. It may relate to another appeal by the appellant, AA/12315/2010, heard by Judge Mozolowski on 4 October 2010 and disposed of by determination promulgated on 11 October 2010, a copy of which is item J. That copy is incomplete. I note at paragraphs 12 and 13 that the Judge shares Judge Kempton’s doubts about the appellant’s evidence, although the conclusion again goes no further than finding it difficult to know where the truth lies.)
11. Mr Matthews did not accept that the appellant would have any case, even if his family was attacked as he claimed in 2003, but he was not prepared to approach the case on the basis that these events could be treated as established.
12. Mr Gibb sought an adjournment. He wished to take instructions from his client regarding documents previously produced. He said his understanding had been that the case now turns only on the credibility of events in 2003, and if that was established the appellant would automatically succeed. If not, there might be a number of complex issues with which he was not ready to deal, and in respect of which his firm might wish again to instruct counsel.
13. Mr Gibb’s understanding did not reflect my record, summarised above, or the Presenting Officer’s note of what transpired on 17 September 2013.
14. This was rather an unsatisfactory position. With hindsight, a decision and directions should have been issued after the hearing on 17 September 2013, to avoid any doubt. However, and notwithstanding change of representatives, it must have been known to the appellant, and should have been clear to his current representatives from the information they had, that he previously tried to support his case with documents.
15. None of the materials in this appeal (up to 26 November 2013) showed what happened to the documents after the hearing in 2009. They might have been left on a Tribunal file (now closed) or they might have been in

the hands of parties. The fact that such documents were produced was of obvious importance given the contradictions which arose, including the appellant saying in 2009 that he could establish events by production of documentary records but in 2013 that no such documentary records exist.

16. While it was unfortunate to delay this case further, it was more important to try to resolve matters in the clearest possible light. Mr Matthews did not oppose an adjournment. I decided that the appellant should have yet another chance to explain his case, his representative being currently unable to formulate what that case might be. I reminded Mr Gibb that the onus remains on the appellant, and if he could not say intelligibly why his case should succeed, it was almost certain to fail.
17. The appellant was **directed** to file by 6 January 2014 (a) any further evidence upon which he proposed to rely, including any further statement, and (b) a written submission on how and why his case should succeed, referenced to the supporting evidence and to case law, including specific passages from country guidance and from any cases on the “tracing duty” on which he relied.
18. The respondent was **directed** to file a written explanation of the respondent’s position in response to any such materials by 20 January 2014.
19. The files for previous appeals having been checked, the Upper Tribunal advised parties on 11 December 2013 that these did not contain original or copy documents exhibited by the appellant at the hearing on 12 January 2009, nor any information on the whereabouts of such documents since that date.

Further evidence and written submissions for the appellant.

20. A letter dated 25 November 2013 from the Medical Foundation confirms the conclusion in the previous report that the appellant is experiencing psychological distress as a result of past traumatic experiences, consistent with a diagnosis of Post Traumatic Stress Disorder (PTSD) and a depressive episode. The author opines that it would be difficult to maintain unprompted the same narrative and presentation of symptoms over such a long period of time.
21. A further letter from the same source dated 16 January 2014 responds to the question from the appellant’s solicitors whether the appellant would have sufficient insight to be able to fabricate symptoms described in the original report. The author states that it is her “... clinical impression that the clinical picture ... built up over the last 5 years of working therapeutically with Mr Mohammed suggests that he does not have sufficient insight to be able to exaggerate or fabricate the symptoms described at paragraphs 26-34 of my original report dated 10 November 2011.”

22. A report by Dr Rebwar Fatah, a recognised country expert, is dated 3 January 2014. Dr Fatah was asked to verify whether there was evidence that the appellant's parents and sister died in an explosion outside their family home in the Rahimawa district of Kirkuk on 8 August 2003. Dr Fatah was unable to trace any written record of such an event. He ascertained from one well informed resident he was not aware of such an event, and that similar events might have occurred at later date, but not in August 2003. Dr Fatah concludes that "... based on the objective evidence available in Arabic and Kurdish language sources ... the event of 8 August 2003, as described in the instructions to me, was not reported."
23. The appellant provides a statement from his partner, a citizen of Burundi. She says that although they separated in the past, they are again in a relationship, and that they have a young daughter. She is not aware of the appellant being in touch with any relatives in Iraq.
24. (I ascertained at the hearing that the appellant's partner has indefinite leave to remain in the UK and that their daughter was born on 13 May 2012. The appellant's current leave to remain runs until 20 March 2015, and if he is not successful in establishing status through these proceedings, he would expect to apply in due course for an extension of that leave.)
25. The written submission for the appellant argues as follows. He should be found to be a credible witness. His physical injuries and psychological condition are consistent with his account. Kirkuk was an epicentre of violence in Iraq, and the claim is consistent with background evidence. Paragraph 12 records that death certificates were provided by the appellant to his solicitor, and sent to an expert for examination. The expert concluded that the documents "... lack the main characteristics of reliable documents." The appellant no longer founds upon them, but that does not indicate that the deaths did not occur as claimed. The appellant had no way of knowing whether documents sent by his uncle were genuine, and believed that they were. From email communications between the appellant's solicitor and Dr Fatah following his report, it remained possible that such events might have taken place but were not reported within the evidential sources available to Dr Fatah. No direct enquiries had been carried out with mortuaries, where some deaths were understood to be recorded. If there is a reasonable degree of likelihood that the appellant's parents and sister were killed in an explosion in Iraq as he claimed, the appellant might fall within the category of those with Ba'ath Party connections at risk of persecution, consistently with HM(2) Iraq [2012] UKUT 00409 (IAC). Internal flight would not be available under the appellant's particular circumstances because he is subject to problems in Kirkuk (paragraph 87, MK (Iraq) [2012] UKUT 00126) and his difficulties would be exacerbated by the fact that he is disabled, suffers from ongoing psychological and physical trauma, is unlikely to be able to work and has not been in Iraq for more than 5 years.

Written submissions for Respondent

26. The respondent points out that the determinations by Judge Kempton and Judge Mozolowski stand. Although the appellant establishes that he is an amputee who lost his leg in an explosion, that does not show that the explosion was targeted at his family. There were significant levels of indiscriminate violence in Iraq around 2003, including bombings in public areas which did not target specific individuals. The appellant might have been the victim of a random act of violence or of an accidental explosion. The appellant's solicitors argued that an 11 year old would not be out without his parents, but that was far from unlikely. Even if his parents died in the explosion, that did not have to indicate a targeted attack. It was not surprising that the appellant might suffer from PTSD, having undergone significant trauma. If the death certificates were not genuine it was not likely that other documents were genuine either, including those sent to establish the appellant's age and his father's position in the Iraqi police. The appellant's evidence contained unexplained contradictions. He prevaricated on whether he had a prosthetic limb or not in Iraq. He had said that he was here because his uncle was no longer able to look after him. There was no evidence to show that those responsible for the bomb in 2003 would remain interested in him, a young child at the time and plainly not a threat now. The evidence fell well short of establishing that the appellant's father was a police officer and a member of the Ba'ath Party, that an incident occurred under the circumstances he claimed, or that he was of any remaining interest to any group in Iraq. The son of a former Ba'ath Party member was not at risk from State or non-State actors 11 years on from the fall of the regime. In any event, internal relocation was available. The appellant is Kurdish and could reside in the area under the Kurdish Regional Government. His disabilities were not such as to prevent him from leading a normal life or such as to require any particular medical or social assistance. Assisted Voluntary Return would be available.

The hearing on 27 January 2014.

27. The Presenting Officer sought to put some further questions to the appellant, to which he consented, having discussed the matter with his solicitor. He gave evidence in English, without difficulty.
28. The appellant confirmed that he had obtained documents from his uncle in Iraq. He thought he last spoke to his uncle in 2010. They used to telephone each other. They both had mobile telephones. However, the appellant lost his telephone. As a result, he did not have his uncle's number, and his uncle regularly changed his telephone number anyway. His uncle could not phone him because he did not have the same number. He did not know how to obtain another mobile number with the same number as before. He had been to the Red Cross in Glasgow 2 or 3 times to try to get in touch with his uncle, but they have been unable to help. It is still his belief that the documents sent by his uncle were genuine.
29. Mr Matthews relied upon the refusal letters previously issued and on the written submissions, summarised above. He said that although it was not

logically impossible that false documents were obtained from Iraq yet the events described took place, the fabrication of documents was a strong pointer that the account was unreliable. It was highly likely that the appellant would have been complicit in such deceit, and the claimed lack of contact with his uncle since 2010 because of a lost mobile phone was a lame excuse.

30. Mr Gibb said that the expert consulted about the documents had been asked to comment only on the death certificates, not on the other documents which went to the appellant's identity and age and to his father's position in the police. Regarding the criticism of alleged lack of telephone contact with the appellant's uncle, it was quite possible that he might lose his mobile phone and if so that he could not retain the same number. A Kurdish asylum seeker from Iraq was not likely to concoct a story of a father allied to the former regime, an extremely unpopular position in his community. Although events as claimed were not the only possible explanation for the appellant suffering from PTSD, his particular symptoms were highly suggestive that his problems did come about in that way. The supplementary reports showed that he was effectively incapable of inventing such symptoms. That enhanced his general credibility and the finding should be reached that he had been the victim of a targeted attack. If he remained a target he could not be expected to return to Kirkuk. As to moving elsewhere, evidence cited in the case law suggested that he would have to go to Kirkuk regularly to renew his documentation. That excluded relocation elsewhere. Alternatively, internal relocation would be unduly harsh in his particular circumstances.

Conclusions.

31. Although failure by the respondent in the "tracing duty" was the original focus of this case at the Upper Tribunal stage, it was not eventually argued that such failure, if there was any, has any bearing on the outcome.
32. The appellant without doubt suffered a traumatic occurrence in Iraq, with serious physical and psychological consequences. Those consequences are no help in resolving his claims about the surrounding circumstances, as similar consequences could be expected whether or not this was a targeted attack. The unlikelihood of fabricating symptoms is not a useful pointer.
33. The violence in Iraq, and the appellant's particular misfortune, no doubt played a large part in his leaving the country at a young age and travelling here, but that does not disclose legal qualification for protection. The nub of the case is straightforward: is there an ongoing risk to the appellant from terrorists who attacked his family with a bomb in 2003 because his father was a policeman and a Ba'athist? Previous judges were not satisfied of the reliability of the appellant's evidence about the circumstances in 2003, but thought they did not have to decide that issue finally, because the appellant did not qualify for protection anyway. Given another chance to establish his case, the appellant has made it

significantly worse. It emerges that he has relied on false documents. He has contradicted himself about whether such occurrences can be documented, and about whether he had any documents. An expert in the sources, both Kurdish and Arabic, finds no record of the claimed event. The appellant offers a poor explanation for being now unable to contact his uncle in Iraq. If he did lose contact, he has not made much of an attempt to re-establish it. The evidence as a whole is not persuasive, even to the lower standard, that terrorists targeted his family, or that terrorists have any interest in targeting him now, in Kirkuk or anywhere else.

34. As the appellant could return to Kirkuk, the viability of internal relocation is not a material issue. However, it would not be unduly harsh to expect him to settle anywhere else in Iraq. The region of the KRG would be the most obvious choice, but there are many other areas where Kurds live.
35. The determination of the First-tier Tribunal is set aside, but the appeal is again **dismissed**.

A handwritten signature in black ink, reading "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

28 January 2014
Upper Tribunal Judge Macleman