



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00019/2017

THE IMMIGRATION ACTS

Heard at Royal Courts of Justice
On 16 July 2018

Determination Promulgated
On 7 August 2018

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

Z A A

[Anonymity direction made]

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the Respondent: Ms H Short, Counsel instructed by Duncan Lewis, solicitors

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Although an anonymity order was not made by the First-tier Tribunal, as this is an appeal on protection grounds, it is appropriate to make that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

1. This is an appeal by the Secretary of State. For ease of reference, I refer below to the parties as they were in the First-tier Tribunal albeit that the Secretary of State is technically the Appellant in this particular appeal. The Respondent appeals against a decision of First-tier Tribunal Judge Rowlands promulgated on 15 May 2018 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 8 April 2016 refusing the Appellant's protection and human rights claims. That decision was made in the context of a deportation order.
2. The Appellant's appeal was initially allowed but following a successful challenge to that decision by the Respondent, the appeal was remitted. The appeal was on that occasion dismissed but again remitted following a challenge by the Appellant leading to the appeal hearing which culminated in the Decision which is challenged before me.
3. The deportation order was made against the Appellant following a conviction of possession and/or use of a false instrument. The Appellant was sentenced to one year and ten months in prison. The Appellant was also convicted on 13 November 2013 of sexual assault for which he was sentenced to two months' imprisonment suspended for twelve months and ordered to sign the Sexual Offences Register. I do not need to say any more about the Appellant's offending as it is not relevant to the issue I have to decide which concerns only the Appellant's protection claim.
4. The Appellant is a national of Iraq. He is a Kurd from Mosul. He speaks Kurdish. He is a Sunni. He claimed that his father worked for the government in Mosul. The Appellant arrived in the UK on 6 May 2009 and claimed asylum. That appeal was dismissed on 26 August 2009 and onward challenges failed. That is relevant to the Respondent's challenge to the Decision. The Appellant says that he cannot return to the Kurdish area of Iraq ("the IKR") or Baghdad because he has no family there. The Respondent accepts that this was the only live issue before the Judge.
5. The Respondent's grounds are essentially three-fold. First, it is said that the Judge has failed to take into account that Mosul is no longer controlled by ISIS and the Appellant could therefore return there. Second, it is said that the Judge has failed to apply the Devaseelan principles and to take into account as his starting point the 2009 decision of First-tier Tribunal Judge Mark-Bell. Third, it is said that the Judge has failed to have regard to the relevant factors identified in the extant country guidance decisions.
6. Permission to appeal was granted by First-tier Tribunal Judge J M Holmes on 30 May 2018 as follows (so far as relevant):

"... [3] It is well arguable that the Judge's approach to the evidence in this brief decision upon the remitted appeal was flawed. The Judge's starting point

ought to have been the 2009 decision of FtT Judge Mark-Bell, and the adverse credibility findings therein; Devaseelan. Arguably, that was not the Judge's approach. Indeed it is far from clear from the decision that the Appellant produced any new evidence in relation to those adverse credibility findings, as opposed to simply repeating what he had said before. If the latter then the Judge was unable to revisit and go behind the findings of primary fact that were made in 2009. Arguably there is no adequate analysis of the content of the 2009 decision.

[4] There is a further difficulty. Having concluded that he was unable to make any findings as to where the Appellant's family were in truth living [27] the Judge offered no reasons for failing to proceed on the basis that the Appellant knew where they were, was in contact with them, and was able to reunite with them. The finding that the family were not in Iraq [28] is arguably inconsistent with what went before, and, the adverse credibility findings of 2009, and thus perverse.

[5] In any event it is also well arguable that the Judge simply failed to apply the current country guidance to the Appellant; AA and BA. There is no finding that the Appellant was not returnable to Iraq. The Appellant would only be at Baghdad airport in Iraq and facing a decision whether to make a life in Baghdad or the KRG, if the Respondent had been able to obtain either a *laissez passer*, or a passport for him. In either event the Judge ought to have considered, but arguably did not, whether the Appellant could be expected to obtain a CSID either in advance of deportation or within a reasonable period of time of arrival in Iraq. With the latter he could board an internal flight to the KRG, where on the Judge's findings he could apparently live in safety. The ability to internally relocate should have been considered on that basis, and arguably it was not."

7. The matter comes before me to decide whether the Decision contains a material error of law.

Decision and Reasons

8. I can deal very shortly with the Respondent's first ground. At [20] of the Decision, the Judge records that the Respondent relied on the reasons for refusal letter. That letter expressly recognises that the Appellant cannot return to Mosul. The Respondent did not put forward material suggesting that the situation in Mosul was such that the Appellant could now return there, nor such material as would allow the Judge to depart from the extant country guidance in relation to the risk in that area (AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC) - "AA").
9. Mr Tufan also accepted that, in light of the modification to the guidance in AA by the Court of Appeal, and the recent country guidance case of AAH (Iraqi Kurds - internal relocation) Iraq CG [2018] UKUT 00212 (IAC) ("AAH"), there was a need to modify the grounds to some extent because of the impact of the later country guidance to the materiality of any error.
10. Mr Tufan focussed for that reason on the second and third of the grounds concerning the Judge's approach to the factual issue of whether the Appellant has

family remaining in Iraq and the impact of the Judge's finding on the Appellant's ability to return there.

11. As I understood her submissions, Ms Short does not suggest that a previous Judge's finding is not the relevant starting point. That is now an accepted principle. However, she submitted (rightly) that such findings have to be looked at in the light of later evidence.
12. Turning then to Judge Mark-Bell's decision, as both parties (and Judge Rowlands) accepted, the only relevant issue now is whether the Appellant has family remaining in Iraq.

13. Judge Mark-Bell dealt with this aspect of the claim at [17] of his decision as follows:

"I find the Appellant's story that he became separated from his family is not credible because there are contradictions in the accounts he gave of it in his statement of 13 May 2009 and his answers at the asylum interview. If he had become separated from his family, this would be a traumatic event the details of which would be stamped on his mind. Yet in his statement he said that in the course of the journey it was necessary to switch lorries. When the switch-over was to take place the Appellant needed to go to the toilet and agent 'told me to go by the side and then come back when I was ready. When I came back the agent told me to get inside one lorry and he said my family was already inside. I got inside and it was locked shut but my family were not inside. I was banging on the sides and tried to get out but I could not'. In his interview he said 'When we arrived you' (sic) 'were in two lorries and it was too dark and two other lorries were waiting for us. When I went for toilet and came back the agent put my parents in one of the lorries that was waiting and the agent then wouldn't let me go to the one with my parents in..when the lorry stopped I went to toilet and when I came back the door of the trailer/lorry was closed. I asked the people there where is my parents. They said they are inside. You cannot go inside that lorry'. Thus, in his statement the Appellant claimed that he was misled by the agent to believe that his family were in the lorry which he was ordered to enter and only learned when he was inside it that his family were not there. At his interview he claims that he was aware before he got in the lorry that his parents were not in it."

14. Judge Mark-Bell went on at [18] to find the Appellant's account, which included the matters set out at [15] and [16] of his decision, not to be credible.
15. Ms Short directed my attention to Judge Mark-Bell's recitation of the Appellant's case on that occasion as set out at [11] of the decision. I do not set that out. By way of a summary, the Appellant's case at that stage was that he was at risk because of his father's position in Iraq, that he had been separated from his family during the journey from Iraq, and that his immediate family were not in Iraq. The Judge rejected the Appellant's account of having been separated from his parents during the journey. There is no finding whether the Appellant's family were or were not at that time in Iraq.

16. Furthermore, as Ms Short pointed out, there was further evidence before Judge Rowland which was not before Judge Mark-Bell dealing with the Appellant's mental health problems and his poor memory. She also drew my attention to [25] of the Decision which sets out her submissions to Judge Rowlands as follows:

"The Appellant's representative relied on a new skeleton argument. It was argued that the credibility of the Appellant's claim had all been founded on the previous Judge's findings on plausibility. From the outset the Appellant had made it clear that the provision of documents depended on the situation in Mosul improving and identity documents might be available then. It was all that he had been referring to when discussing documents before. As to his dealings with the Red Cross it had never been put to him that he had lied to them about any of the information that he had given and it would be unfair now to suggest that he did. It was accepted on his behalf that there were some low level mental health provision in Iraq the real question here was internal relocation, was it safe for him to go anywhere and was it reasonable for him to do so. The expert report made it clear that returning him to Baghdad was not suitable because of his ethnicity and lack of any family connections there. It was clear that there was some entry requirements placed on people to the IKR and it appeared relatively arbitrary. He would have to register with the authorities and would not be able to work not only because he didn't have any connections there but also because his mental health issues were such that he will not be able to work. He had been away for nearly ten years now and had no support there. The issues over him being able to stay in the IKR were all dealt with in the skeleton argument and in the expert report."

17. I come then to the Judge's findings on the central issue whether the Appellant has family in Iraq and the impact of that finding on his case. Those are set out at [27] to [29] of the Decision as follows:

"[27] Factually, there is little, if any, argument over the facts that apply to the Appellant. He is an Iraqi Kurd from Mosul. He is a Sunni who says that his father worked for the government. He is a Kurdish speaker. The only issue which has to be decided is whether or not he has family in the IKR or Baghdad. I note what the Respondent has said about the credibility of his claim to have lost contact with them during a journey west but I do not believe that his claim is implausible. In my view what I have to decide is not necessarily where his family are but where they are not. They could be in Mosul, they could be in Baghdad, they could be in IKR or even somewhere in Europe but the truth is I cannot be sure where they are.

[28] The likelihood is they fled Mosul in the same way that many thousands of Sunni's have already. The Appellant said they did and took him with them. I find that credible bearing in mind the accepted exodus from there. It is unlikely, bearing in mind their being Sunni that they would have gone to Baghdad. There is no evidence that they are in the IRK [sic]. I am satisfied that the Appellant did co-operate with the Red Cross in an attempt to find them. I am satisfied that I cannot be sure that they are in Iraq at all and I believe that the question of internal relocation should be looked at on that basis. It is accepted that the Appellant cannot be returned to Mosul. The Respondent argues that he should go to the IKR or Baghdad.

[29] As to Baghdad I am satisfied that he would face real problems there without any family support or connections. His family other than a remote uncle who he has not seen since childhood are highly unlikely to be there and I proceed on the basis that they are not. As Judge Baldwin rightly pointed out although he speaks Arabic and a Kurdish dialect there is no suggestion he has ever had any family or contacts in Baghdad and with his psychiatric problems and other issues he would be difficulty [sic]. Neither he would be likely to find particular difficulty [sic] finding work in his condition with no contacts being outside his former home area. As a Kurd in Baghdad he would be part of a minority community and his mental state would not help him to access medical services or survive generally. Add to this the fact that he has been away in the west for nearly eight years now and his health issues and Kurdish ethnicity and lack of contacts in Baghdad would be some very significant obstacles to his integration into the city. His ability to relocate in IKR would highly problematic [sic] given the need to get there with him at present having no travel documents and no likelihood of getting them. For all these reasons this particular Appellant would face a well founded fear of persecution and serious ill treatment if he were to be returned to Iraq and accordingly I allow his appeal."

18. I accept that there is no express reference there to Judge Mark-Bell's decision. The highest any suggestion that Judge Rowlands did take account of that earlier decision can be put is the reference to Ms Short's submission that the Appellant's had been found not to be credible coupled with Judge Rowland's finding at [27] of the Decision that, notwithstanding the Respondent's assertion that the Appellant's claim to have lost his family en route to the UK was not credible, Judge Rowlands found that part of the Appellant's case to be plausible based on the background evidence. I accept it would have been better if the Judge had noted the earlier findings that the Appellant was not credible on this account and to have given reasons for departing from those findings.
19. However, I do not find any error in that regard to be material. The issue which is the central one in this appeal is where the Appellant's family are now not where they were or were not in 2009. The situation in Iraq is one which has been extremely fluid for a number of years as is clear from the number of country guidance cases dealing with the issues which have emerged in recent years. It cannot sensibly be suggested that the Judge should ignore the current situation. Whether or not the Judge should have taken into account the earlier credibility finding when finding it plausible that the Appellant's family left with the Appellant, it was still open to the Judge to find it likely that they had fled Mosul in the same way as many thousands of others in their situation ([28] of the Decision).
20. I accept that the Judge's reasoning at [27] to [29] of the Decision is not without other potential flaws. The Judge should not have had regard to findings of Judge Baldwin whose decision had been set aside ([29]) although those findings are largely uncontroversial.
21. The wording concerning the standard of proof is poorly expressed and not easy to follow. However, read as a whole, the Judge finds at [27] and [28] of the Decision

that it is likely that the Appellant's family in Mosul have fled, that they are unlikely to have fled to Baghdad (because they are Sunni) and there is no evidence that they remain in IKR. The Judge accepts that the Appellant has cooperated with the Red Cross to find his family, but they have not been found. Accordingly, the Judge concludes that the Appellant's family are not in Iraq and proceeds on that basis. As I read it, the reference to not being sure about the whereabouts of the Appellant's family at [27] of the Decision is simply an application by the Judge of the approach advocated in Karanakaran v Secretary of State for the Home Department (referring to the principles set out in Kaja (Political asylum; standard of proof) (Zaire) [1994] UKIAT 11038) which includes the giving of a benefit of the doubt to an appellant where there is uncertainty about an aspect of his case which the Judge cannot resolve.

22. Having made the finding that the Appellant's immediate family are not in either the IKR or Baghdad for the reasons given, the Judge goes on to consider at [29] of the Decision, in effect, whether it is unduly harsh to expect the Appellant to go to Baghdad or IKR without such family support. I accept that the Judge does not make express reference to the country guidance cases, in particular AA and BA (Returns to Baghdad Iraq CG) [2017] UKUT 18. He has nonetheless considered the factors set out in the guidance in those cases and explained why the Appellant could not be expected to relocate to either place. In so doing, the Judge has somewhat presciently anticipated the guidance recently given by the Tribunal in AAH which identifies the difficulty for a person in the Appellant's position of obtaining a CSID and the difficulties in travelling from Baghdad (which is now the only removal destination) to IKR without that document. The guidance there given applied to the facts of this case is further reason for finding that any error in the Decision is not material.
23. For those reasons, I am satisfied that the Decision does not disclose a material error of law and I uphold the Decision. The Appellant's appeal against the refusal of his human rights claim therefore remains allowed.

DECISION

I am satisfied that the Decision does not contain a material error of law. I uphold the decision of First-tier Tribunal Judge Rowlands promulgated on 15 May 2018 with the consequence that the Appellant's appeal stands allowed

Signed
Upper Tribunal Judge Smith



Dated: 1 August 2018