



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/01904/2017

**THE IMMIGRATION ACTS**

Heard at Newport  
On 3 May 2018

Decision & Reasons Promulgated  
On 5 June 2018

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MIH  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr F Magennis, instructed by Migrant Legal Project (Cardiff)  
For the Respondent: Mr P Duffy, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

**Introduction**

2. The appellant is a citizen of Iraq who was born on 26 June 1995. He is of Kurdish ethnicity and comes from the village of Dara in the Daquq district in the Kirkuk Governorate. The appellant's village is about 40 kilometres south of Kirkuk.

3. The appellant arrived clandestinely in the UK on 1 August 2016 and claimed asylum on that day.
4. The basis of his claim was that his father had been a member of the Ba'ath Party and had spied upon the Kurds. His father had disappeared in May 2015. The appellant also claimed that in July 2015 the Al-Hashab Al-Shaabi had come to his village and abducted a number of youths. The appellant's claim to fear the Peshmerga as a result of his father's activities and also Al-Hashab Al-Shaabi on his return. In addition, the appellant claims to fear Daesh (aka ISIS) who were operating near his village and they had killed his mother with a mortar in August 2015.
5. On 24 January 2017, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and on human rights grounds.

### **The Appeal**

6. The appellant appealed to the First-tier Tribunal. In a determination sent on 22 May 2017, Judge O'Rourke dismissed the appellant's claim on all grounds.
7. First, the judge made an adverse credibility finding and rejected the appellant's account based upon a risk as a result of his father's claimed involvement with the Ba'ath Party. Secondly, the judge found that the appellant could safely return to his home area where there was no longer an Art 15(c) risk from Daesh. Thirdly, the judge found that the appellant could return to his home area via the IKR.

### **The Appeal to the Upper Tribunal**

8. The appellant sought permission to appeal to the Upper Tribunal on a number of grounds challenging the judge's adverse credibility finding. Further, he was wrong to depart from the country guidance case of AA (Article 15(c)) CG [2015] UKUT 544 in finding that there was no Art 15(c) risk in the appellant's home area. Also, the grounds argue that the judge failed properly to consider whether the appellant could safely return to his home area via the IKR.
9. Initially, the First-tier Tribunal refused permission to appeal. However, on 23 October 2017, the Upper Tribunal (UT Judge Perkins) granted the appellant permission to appeal on all grounds.
10. On 16 November 2017, the Secretary of State filed a rule 24 response seeking to uphold the judge's decision.

### **The Grounds**

11. Mr Magennis, who represented the appellant relied upon the grounds of appeal as developed in his skeleton argument. Those grounds numbered (a) to (i).
12. Grounds (a), (b), (c), (f), (g), (h) and (i) relate to the judge's adverse credibility finding. Mr Magennis indicated that he no longer wished to rely upon ground (h).

13. Ground (d) challenges the judge's decision to depart from the country guidance decision in AA concerning the Art 15(c) risk in, or around, Kirkuk.
14. Ground (c) challenges the judge's decision that the appellant could return to his home area via the IKR.

### **Discussion**

15. Mr Magennis began his submissions by relying upon ground (d) which he describes as his strongest ground. He submitted that the judge had erred in law in departing from the UT's country guidance case of AA. (Judge O'Rourke's decision arose before the Court of Appeal 'amended' the country guidance in its decision dated 11 July 2017 and reported at [2017] EWCA Civ 944 so the UT's decision contained the relevant country guidance.) Mr Magennis submitted that the judge had erred in law essentially on two bases.
16. First, he had relied upon news reports which were not in evidence and upon which neither party had an opportunity to make representations. He submitted this was unfair following AM (fair hearing) Sudan [2015] UKUT 00656 (IAC) and EG (post-hearing internet research) Nigeria [2008] UKAIT 0015.
17. Secondly, Mr Magennis submitted that the judge had failed properly to consider the background evidence that was before him. He submitted that there was a "voluminous bundle" from the appellant to which the judge gave insufficient consideration. Further, Mr Magennis submitted that the judge had only relied upon six pages of the respondent's Country Policy and Information ("CPI") document handed to the judge at the hearing. He submitted that the evidence itself showed, for example, that Daesh remained in control of parts of the western Kirkuk Governorate (see para 2.3.21). He drew my attention to a graph at para 11.4.1 which, he submitted, showed, if anything, that since AA the violence had increased in the Kirkuk Governorate.
18. Mr Duffy, on behalf of the Secretary of State accepted that only a partial copy of the CPI document had been produced by the Presenting Officer on the day of the hearing and it was problematic that the judge had, as a result, not had an opportunity to consider the whole document and to hear submissions upon it. He also accepted that it was problematic that the judge had relied upon news reports which were not in evidence before him and which he had consulted after the hearing. Mr Duffy accepted that both probably amounted to errors of law.
19. The judge's reasoning in relation to the Art 15(c) risk can be found at para 24 of his determination as follows:

"24. Threat from ISIS/Shia Militias/Article 15(c). I don't consider that there is a currently an Article 15(c)-level risk to the Appellant, in Kirkuk from either ISIS or a Shia militia, for the following reasons:

- i. I note AA in which the Upper Tribunal stated, in October 2015, in relation to evidence it heard in May 2015 that Kirkuk is a 'contested area', to which therefore Article 15(c) applies. I am conscious also of the guidance in SG

(Iran), as to the cogent evidence needed to depart from Country Guidance, but consider that such cogent evidence does exist in this appeal before me.

- ii. Kirkuk has been under control of the Kurdish Peshmerga since 2014 and despite extensive ISIS attacks in 2015, was held by them. Those attacks lead to the conclusion in AA that Kirkuk was a disputed area and which finding was not contested by the Home Office at the time. Since that time, however, the situation has greatly changed. ISIS has come under sustained assault from a combination of Iraqi regular and militia forces, supported by Coalition firepower and the focus of the conflict has shifted to Mosul, approximately 150km away, with much of that city already having fallen to government forces [Country Policy and Information and routine news reports, of which I take judicial notice]. The statistics provided in the Country Policy [11.3 and 4] indicate relatively low levels of security incidents and civilian fatalities in Kirkuk, certainly in relation to Ninewah province (in which Mosul is located) and Baghdad.
- iii. Much of the objective evidence provided by the Appellant is either dated, not related to Kirkuk city or environs, or where it is, indicates a relatively low-level of violence, insufficient to engage Article 8, 15(c). Examples are as follows:
  - a. A19 to 23 – newspaper accounts of Peshmerga operations in Dukuk in 2015.
  - b. B1-66 – a 2016 human rights report, with general information as to the humanitarian situation in Iraq, but little if anything about the situation in Kirkuk.
  - c. CA1 to 33 – the two UN Security Council reports from early 2016 are very general and Kirkuk gets very little mention, and then only in relation to isolated attacks by ISIS. The reports refer to a humanitarian crisis in Iraq generally and in those provinces near to Mosul, in particular, but that is not sufficient to engage Article 15(c) and the Appellant would not be returning to Kirkuk as a lone person, but to re-join at least one relative, who has provided support for him in the past. Also, as young fit man, he is better placed to provide for himself than many others. The reports at CB1-36 and CC1-58 convey the same message (the latter relating to the economic situation in the Kurdish Region of Iraq (KRI)).
  - d. CD1-2 – there are Shia militias fighting against ISIS, as are the Peshmerga, but there is no evidence that they are a threat to Kirkuk.
  - e. CD3-9 – news reports that there was an ISIS counter-attack against Kirkuk in October 2016, killing dozens, but it was defeated. Once ISIS is defeated/driven back there is speculation that there will be a power struggle between Kurdish and Arab interests over Kirkuk.
  - f. C10-20 – ISIS continue to control Hawija district, in the Kirkuk governorate and carry out atrocities there. One report [CD15] states that ‘... it is expected that the government will move to clear Islamic State pockets across Iraq after finishing with its campaign to expel the group from neighbouring Mosul, the group’s largest bastion in Iraq.’
  - g. CE1-1 20 either relates to Baghdad, or human rights issues related to abuse of IDPs by government or Kurdish forces, because they may be

perceived, by being Sunnis from former ISIS-controlled areas, as ISIS supporters. However the Appellant is not an IDP and would be returning, as a Kurd, to a Kurdish-controlled area.

h. D1-23 – the UNHCR advise against the return of any Iraqis who originate from areas of Iraq that are affected by military action or remain fragile or insecure after having been retaken from ISIS. This situation does not apply in Kirkuk.

iv. The expert report provided is of little assistance. It is poorly structured, being quite repetitive and makes only one reference to the security situation in Kirkuk, in which it states, without any source material, detail or dates, that *‘ISIS has also launched attacks in other towns and cities, including Kirkuk.’* Instead, the report goes into great detail about the humanitarian situation in Iraq overall (to include the IKR); the security situation in Baghdad, Basra and other areas unrelated to Kirkuk; human rights abuses in the IKR; Shia militia attacks on Sunnis in or around Baghdad, none of which apply to the Appellant. If returned, he has the option of going to Kirkuk city to live again with his uncle, or with his support, or, if not, as a lone-adult male. Undoubtedly, there is a humanitarian crisis in much of Iraq, but that does not engage Article 15(c) and the Appellant will not, in any event be an IDP.”

20. It was common ground before me that the decision in AA identified that Kirkuk was in a “contested area” and that an Art 15(c) risk applied in such an area. On that basis, unless the judge was entitled to depart from AA, his failure to follow it would amount to an error of law. It is clear that a judge must follow a country guidance case unless there are: “very strong grounds supported by cogent evidence”. That was established by the Court of Appeal in R (SG) (Iraq) and Another v SSHD [2012] EWCA Civ 940 at [47]. That was common ground between the parties before me.

21. The judge was required to treat AA as ‘authoritative’ unless there were “very strong grounds” which was “supported by cogent evidence” (necessarily postdating AA) which entitled the judge to find that there was no longer a real risk of such indiscriminate violence in the appellant’s home area.

22. It is clear from para 24(ii) that the judge rested his departure from AA on a combination of the *CPI* and “routine news reports”. As regards the latter, Mr Duffy did not seek to resist Mr Magennis’ submission that it was unfair for the judge to rely upon news reports which were not in evidence and upon which the representatives (particularly the appellant’s representatives given his decision) were unable to make submissions. Both the decision in EG and AM make it plain that post-hearing research by a judge is likely to give rise to a procedural irregularity and result in unfairness to the parties. For these purposes, it suffices to set out the head note in AM which is in the following terms:

“(i) Independent judicial research is inappropriate. It is not for the judge to assemble evidence. Rather, it is the duty of the judge to decide each case on the basis of the evidence presented by the parties, duly infused, where appropriate, by the doctrine of judicial notice.

(ii) If a judge is cognisant of something conceivably material which does not form part of either party’s case, this must be brought to the attention of the parties at the

earliest possible stage, which duty could in principle extend beyond the hearing date.

- (iii) Judges are entitled to form provisional views in advance of a hearing provided that an open mind is conscientiously maintained.
- (iv) Footnotes to decisions of the Secretary of State are an integral part of the decision and, hence, may legitimately be considered and accessed by Tribunals.
- (v) Fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, in fulfilment of each party's right to a fair hearing."

23. The dangers of relying upon evidence gleaned by a judge as a result of post-hearing research or otherwise is that it denies the parties an opportunity to make such representation as they wish on its relevance and applicability to the case. In this case, the judge does not disclose precisely what the "routine news reports" were – whether newspaper, internet or other media reports. Their content is also not disclosed. It is not possible to discern the substance of their content.
24. In my judgment, the judge did act unfairly in relying upon news reports, not in evidence before him, to support his conclusion that AA should be departed from. As I have said, Mr Duffy did not seek to resist Mr Magennis' submissions on this point.
25. Likewise, and again it was not resisted with any force by Mr Duffy, the judge's reliance upon the *CPI* was, it would seem, far from comprehensive. It does appear that he consulted the report beyond the six pages produced by the Presenting Officer. The statistics to which he referred at paras 11.3 and 11.4 of the *CPI* would appear to be consistent with that. But, these paragraphs were not in the 6 pages produced by the Presenting Officer at the hearing. However, as Mr Magennis' submissions illustrated, there are arguments that can be made as to the implications of the statistics. Although the *CPI* is, in effect, a public document, it was only relied upon before the judge in a six page extract produced on the day and, in this case, that had the effect of depriving Mr Magennis of the opportunity to deal with it any other parts of the *CPI* which the judge then chose to rely on in his post-hearing consideration in preparing his determination.
26. The dangers of relying upon evidence, upon which the representatives had not had the opportunity to make submissions, is well illustrated by this case since the appellant was not from Kirkuk city itself but from a village some 40 kilometres south of Kirkuk. The background evidence, even produced by the respondent, required a nuanced analysis of whether the appellant in his home area (namely his village) would be safe. That arose even if, as was being put forward by the respondent, that Kirkuk itself was not any longer a "contested area" – and it far from clear, in the absence of knowing the content of the evidence, that the whole of the Governorate was now 'safe'.
27. In this case, of course, the judge was seeking to depart from the CG decision in AA. In those circumstances, he could only do so if he had "cogent evidence" that, in effect, the position 'on the ground' had sufficiently changed in the appellant's home area to justify a finding that there was no longer a real risk of indiscriminate violence falling

within Art 15(c). In concluding that “cogent evidence” existed to justify departing from AA, I accept Mr Magennis’ submission that the judge materially erred in law in taking into account evidence that was not submitted by the parties at the hearing and also in failing to take into account the totality of the evidence, in particular the *CPI* and upon which the appellant had no opportunity to make submissions given the late production of only an extract from the *CPI*.

28. For those reasons, therefore, I accept ground (d) is established and the judge’s decision in relation to Art 15(c) is flawed and cannot stand.

29. It is convenient, at this point, to deal with ground (c) concerning the route of return to the appellant’s home area via the IKR.

30. At para 26, the judge dealt with that issue as follows:

“26. Return via the IKR. I find, applying AA that the Appellant could return via the IKR, for the following reasons:

- i. While not a former resident of the IKR, he is a Kurd and will therefore be permitted to enter by the authorities there, for an initially limited period, allowing him to travel in relative safety to Kirkuk. He could fly direct to Erbil or via Baghdad to Erbil, with, if he chooses, some financial assistance from the UK Government.
- ii. He is young and fit and has his uncle in Kirkuk, who has previously supported him. He speaks Kurdish Sorani.”

31. It was common ground before me that the judge was required to reach a finding on whether the appellant could safely reach his home area. In his skeleton argument and grounds, Mr Magennis submitted that the respondent had never suggested that the appellant could return via the IKR. His route of return was via Baghdad which, Mr Magennis submitted, would have required the judge to consider whether the safety of return through the ‘Baghdad Belt’.

32. It is not entirely clear what route the Secretary of State relied upon for the appellant’s return at the hearing before Judge O’Rourke. The only two possibilities, given that the appellant was a Kurd, was either that he was returned to Baghdad and made an internal flight to Erbil in the IKR or he flew directly to Erbil in the IKR. Of course, the appellant is not from the IKR although he is Kurdish. He comes from the Kirkuk Governorate and a village, some 40 kilometres south of Kirkuk. Whilst AA might well have supported the judge’s conclusion that the appellant could, at least, safely return to the IKR, there remained the issue of whether the appellant could travel from the IKR to his home area outside it some 40 kilometres south of Kirkuk. The judge made no reference to that potential risk perhaps because he had already determined that the appellant was not at risk of indiscriminate violence contrary to Art 15(c) in his home area. However, that finding cannot stand and there would still remain the possible risk en route.

33. In this regard also, the judge failed properly to consider the risk to the appellant on return. For these reasons, therefore, the judge’s decision to dismiss the appellant’s appeal on humanitarian protection grounds cannot stand and must be remade.

34. That, then, leaves the remaining grounds concerning the appellant's asylum claim and, in particular, the judge's adverse credibility finding.
35. The judge's findings and reasoning in relation to the appellant's asylum claim are found at paras 23 and 25.
36. At para 23 under the heading "Credibility" the judge made an adverse finding based upon three "glaring inconsistencies" in the appellant's account. The judge reasoned as follows:

"23. Credibility. I don't find the Appellant a credible witness, for the following reasons:

- i. He gave a false name and age when registering for asylum. I don't see any satisfactory reason for doing so, or why an agent would advise him so.
- ii. There are glaring inconsistencies in his account, as follows:
  - a. That he either was, or wasn't in his home village when his mother died in the ISIS bombardment. This event is not likely to be something he would forget, or be confused about. He described in one account [Q.42] leaving the village towards the end of August 2015 and in another [Q55 and in his statement] he described where mortar bombs fell outside and inside the village and that he '*fled the village*' as a consequence. However, today in evidence he has directly contradicted that account, stating that he had actually been in Kirkuk with his uncle at the time.
  - b. His uncle's business is twice described as a 'mini-supermarket/supermarket' [Q.5 & Q.67] and that description was not corrected in correspondence following the interview, or in his witness statement. However, today he describes this location as a food-store, which would have had less public 'footfall' than a supermarket supporting his argument as to why he didn't come to the adverse attention of anybody during that time.
  - c. He described himself, in interview, as being 'kicked/thrown out' by his uncle to explain his apparent lack of communication with him over the six-month period he had been in UK, but contradicted that account today, when challenged as to why somebody who kicked him out would arrange an agent, at no doubt great expense, to get him to UK. He was also quickly able to make contact with his uncle following his interview, in which contact he was able to obtain further information to support his account. I don't consider that he's telling the truth about the previous lack of contact."

37. As regards this reasoning, Mr Magennis submitted that the judge's reasoning was unsustainable.
38. First, as regards para 23(ii)(a) Mr Magennis set out at para 15 of his skeleton argument his note of the appellant's evidence at the hearing concerning where he was when his mother was killed as a result of a Daesh bombardment. The inconsistency is said to be that the appellant said, prior to the hearing, that he fled the village as a result of the bombardment whilst, in his oral evidence at the hearing, he contradicted that by saying that he was actually in Kirkuk with his uncle at the time.



39. Counsel's note set out at para 15 of Mr Magennis' skeleton argument is as follows:

"15. Counsel's note, which is annexed to this skeleton, provides the following information on what was said at the hearing:

H: After father disappeared in May 2015, continued live with mother, only went live with uncle after mother died, correct isn't it?

A: As I mentioned earlier, my mother and uncle where advised me to stay with my uncle's home, because it's much safer for me. Much safer when staying with my uncle as well.

J: Not directly answer Q, did he continue living with mother until she herself sadly killed?

A: Not always, no

J: For how long?

A: During these 3 months, I stayed most of the time with my uncle.

J: In home village when mother killed?

A: I went to open my shop, but I wasn't there.

J: Either he was there or he wasn't. Listen to Q and answer Q asked.

A: Wasn't in home village when she was killed.

H: W S p 18, felt vulnerable, working did not feel safe. You were working to support you and mother?

A: Yes."

40. Mr Duffy did not suggest this was anything other than an accurate record.

41. I accept Mr Magennis' submission that it is not clear whether the appellant was working outside the village (for his uncle) but still living there or had already moved to his uncle's. His oral evidence combines answers saying that he stayed with his uncle "most of the time" with that he went back to his own village to "open my shop" with an answer that he was not in his "home village" when his mother was killed. In his asylum interview he said in answer to a question at question 42 that he left his village "for the last time ... never went back" towards the end of August 2015 which is the time of the Daesh bombardment. In his statement (at para 20) following that bombardment, he says he "fled the village" because "there was no life left for me". It is not entirely clear to me that the evidence identified the inconsistency relied upon by the judge. An alternative reading of the evidence is that the appellant 'finally' left the village never to return following the bombardment that killed his mother but that prior to that he had moved (albeit on a temporary basis) to live with his uncle and return to his home village to open his shop. He was not, in fact, in the village when she was killed. The alternative reading of that evidence would be that he only 'left for good' and therefore 'fled' following the bombardment. However, given the ambiguity in the appellant's evidence I am not persuaded that the judge's reasoning is legally flawed in the sense that his conclusion is irrational.

42. That said, however, I accept Mr Magennis' submissions in relation to the judge's reasoning in paras 23(ii)(b) and 23(ii)(c).
43. As regards the former, it is clear that the appellant at question 5 and question 67 of his asylum interview describes his uncle's business as respectively a "mini-supermarket selling food" and a "supermarket". In his oral evidence, the appellant described it as a "food-store" which operated on a wholesale basis. In my judgment, it was not rationally open to the judge to conclude that this was an inconsistency which, in effect, had been the result of the appellant changing his account in order to explain why, when working at his uncle's store, he had not come to the adverse attention of anyone. The appellant has never said that he worked in a supermarket of the sort that might immediately spring to the mind of a person living in the UK with experience of domestic supermarkets: (with a level of public "footfall") The notion of a wholesale market or supermarket is far from implausible.
44. As regards para 23(ii)(c), the judge, in my view, placed undue weight upon the English idiomatic expression used in the appellant's answer at question 75 of his interview that his uncle "kicked me out" or "threw me out". There was nothing inevitably inconsistent in the appellant saying that his uncle wished him to leave and at the same time assisted him, by paying an agent, to facilitate his travel out of Iraq. There is nothing to suggest that the appellant was saying that his uncle forcibly removed him from his home. The idiomatic translation would equally cover, for instance, a situation in the UK where a parent felt it was time for an adult child to 'fly the nest' and that child describing the experience as his parents 'throwing or kicking him out'.
45. Consequently, two of the three reasons given by the judge for his adverse credibility finding in para 23 are unsustainable and, at least in some regard, the third reason is far from solid. That, in my judgment, materially undermined the judge's overall adverse credibility finding.
46. Mr Magennis also challenged the judge's reasoning relating, specifically to the appellant's claim based upon his father's involvement with the Ba'ath Party. At para 25 the judge said this:

"25. Direct threat because of his father's past. I do not accept that there is a real risk to the Appellant because of his father's past, for the following reasons:

- i. He was unable to provide any corroborative evidence whatsoever as to his father's activities and indeed, even reliant on his own evidence, could not provide details of a single incident involving his father that might inspire such revenge against him. His information was entirely second-hand from his uncle and even then sketchy in the extreme. That information was only expanded upon following his contact with his uncle after his asylum interview, when, strangely, he would have had ample opportunity while in Kirkuk, living with his uncle, to discuss such matters, implying to me that he felt, following the interview that more material was needed on this issue. I note my findings above as to his credibility.
- ii. On his own evidence, his father had no position of real rank. As a shepherd, it would seem implausible that he could have attained a position that would

mark him out. No information was provided on what or whom he was 'spying' on.

- iii. The fact that his father's alleged activities took place at least over twelve years before his disappearance and if based on the dates of the Anfal Campaign, even longer ago than that. It seems inherently unlikely therefore that if there were persons who wished him harm for such activities that it would have taken them at least fifteen years to put such wishes into effect, or at least to have threatened him before then. The explanation as to the local politician protecting him only came to light after the asylum interview and I again query the credibility of that account, both because it would seem to have been something that the Appellant should have become aware while living with his uncle and therefore information he could have given in interview and also because I find implausible that anybody in Iraq could provide such effective protection against determined assailants.
- iv. The fact that despite the appellant's distinctive appearance and living (at least on and off) in his home village after his father's disappearance and working in a shop there, he was never approached or threatened. Also, he spent nine months in Kirkuk, working and living in a position as I find more likely, in a supermarket and therefore again if there were those who wished him harm, they had ample opportunity, but did not take it, or even threaten him. The Appellant did not elaborate on the concerns his uncle felt at the point it was decided he should leave Iraq, but it is clear that no specific threat was made, or incident occurred."

- 47. Mr Magennis submitted that the judge had been wrong to expect the appellant to obtain corroboration of his father's activities as a spy: that was unreasonable (see ground (f)). Secondly, Mr Magennis submitted that the judge had placed too much weight upon the "rank" of the appellant's father as exposing him to a well-founded risk of persecution. And that it was implausible that his father would be both a "shepherd" and a "spy" (see grounds (a) and (g)). Thirdly, the judge had been wrong to conclude that, as the appellant had not experienced persecution in the past, then he had not established a well-founded persecution fear in the future (ground (b)). Finally, Mr Magennis submitted that the judge had failed to find whether or not he believed that the appellant's father had disappeared as he claimed in May 2015 which was relevant to the factual matrix giving rise to the claimed risk to the appellant.
- 48. Mr Duffy submitted that the judge gave reasoned findings which were properly open to him.
- 49. In my judgment, some of Mr Magennis' points are persuasive whilst others are not.
- 50. First, the judge was entitled to take into account the vagueness of the appellant's knowledge about his father's claimed activities as a spy. It was not just that his father had not told him but, it would appear, had not shared any information with the appellant's uncle with whom the appellant lived on his own evidence for some time.
- 51. Secondly, I do not accept Mr Magennis' submission that the judge reasoned that simply because the appellant could not establish any past persecution against himself then he could not establish a real risk of persecution in the future. The point being made by the judge in para 25(iv) was that those whom the appellant now claimed to fear had not previously threatened or taken any action against him even though they

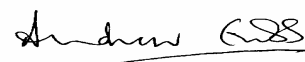
had “ample opportunity” to do so. That is a perfectly proper factor to take into account – namely whether the claimed persecutors given past opportunity have shown no interest in the appellant – in assessing whether they would show any interest in him in the future.

52. Thirdly, however, it is not clear to me on what basis the judge found that it was “implausible” that a “shepherd” would not also be a “spy” as a member of the Ba’ath Party spying on Kurds nearby. Is that so inherently implausible such that the judge’s reasoning was rationally open to him? A “spy” or a person “spying” may be no more than an informant passing on what he learns in his everyday life without embodying the grandeur of a “spook” or “007” figure. In the absence of any background evidence, the judge’s reasoning is unsustainable since it does not inexorably follow as a matter of course without evidential support (see HK v SSHD [2006] EWCA Civ 1037).
53. Finally, although the judge made no specific finding on whether he accepted that the appellant’s father had disappeared, his findings in paras 23 and 25 when combined to reject the appellant’s account would only be consistent with a rejection of it looking at the totality of the evidence.
54. If the appellant’s challenge to the rejection of his account was limited to a challenge to the judge’s reasoning in para 25, I would not be persuaded that the challenge was sustained. The reasoning, although not without some difficulty, would not, read as a whole, be irrational. However, the judge’s reasoning in para 23 is flawed and I am not persuaded that that reasoning leading to an adverse credibility finding was not material to the judge’s overall rejection of the appellant’s account.
55. For these reasons, therefore, I also accept that the judge materially erred in law in reaching his adverse factual findings.

### **Decision**

56. For the above reasons, the decision of the First-tier Tribunal to dismiss the appellant’s appeal involved the making of a material error of law. That decision is set aside.
57. Having regard to the nature and extent of fact-finding required, together with para 7.2 of the Senior President’s Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge O’Rourke.

Signed



A Grubb  
Judge of the Upper Tribunal

5, June 2018