



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02275/2017

THE IMMIGRATION ACTS

Heard at Field House
On 18 June 2018

Decision & Reasons Promulgated
On 21 June 2018

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

[L N]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr S. Knight
Counsel instructed by B.H.T Immigration Legal Services

For the respondent: Miss Z. Ahmad
Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appealed the respondent's decision dated 17 February 2017 to refuse a protection and human rights claim.
2. First-tier Tribunal Judge O'Brien allowed the appeal in a decision promulgated on 24 May 2017. He accepted that the appellant came from a 'contested area' and was at risk

of indiscriminate violence, but concluded that the risk was not for one of the five reasons set out in the Refugee Convention. He made the following findings at [50-51]:

“50. Turning to the basis on which the Appellant would qualify for international protection, it is argued that the Appellant fears persecution on the basis of his membership of two PSGs: those who fear persecution from Daesh and being the victim of a blood feud.

51. I accept the appellant’s account of how he came to flee Iraq. It is entirely consistent with background information about Daesh, and also the evidence referred to above about the present extent of Daesh territory and operations in that area against Daesh. Moreover, I find it credible that the Appellant, having heard/seen the intensity of the attack and having been unable to trace his family, would agree to flee with his employer, who was in loco parentis. However, there is no evidence that he was then or would in future be persecuted by Daesh. They did not seek to recruit him or have any personal interaction with him at all; he was just one of the many innocent victims of the indiscriminate violence occurring in the contested area of Iraq. Therefore, I find that the risk to the Appellant from Daesh on return does not engage the Refugee Convention.”

3. The appellant appealed on the ground that the First-tier Tribunal erred in failing to consider the evidence relating to the motivation for Daesh attacks. The evidence showed that the violence was not wholly indiscriminate and that Daesh carried out attacks against communities which it perceived not to support its ideology.

4. Upper Tribunal Judge Pitt granted permission in the following terms:

“It is arguable that mistreatment from Daesh occurs because of imputed political opinion or because of membership of a particular social group and that the appellant was entitled to be recognised as a refugee.”

5. The respondent granted the appellant Humanitarian Protection status on 22 November 2017.

6. The appeal was listed for hearing before Deputy Upper Tribunal Judge Woodcraft on 18 December 2017. The Presenting Officer argued that the appeal should be treated as abandoned by operation of section 104(4A) of the Nationality, Immigration and Asylum Act 2002 (“the NIAA 2002”). The judge made the following findings.

“4. Permission to appeal was initially refused by the First-tier Tribunal but granted by the Upper Tribunal. On 13th November 2017 the Upper Tribunal gave notice of the hearing of the Appellant’s appeal fixed for Monday, 18th of December 2017. On 22nd of November 2017 the Respondent having decided not to appeal the decision of the First-tier Tribunal granted the Appellant 5 years leave to remain on the basis of his successful claim for humanitarian protection. When the matter came before me on 18 December 2017 counsel conceded that there was no longer a valid appeal before the Upper Tribunal notwithstanding the contents of a letter written by the Appellant’s solicitors that he wished to continue with his asylum claim despite the fact that he had now been granted leave. Counsel submitted that once the Appellant was granted leave on 22nd November 2017 his appeal fell away and there was no longer a valid appeal. This was also the view of the

Presenting Officer and in the circumstances, I indicated that I found there was no valid appeal and would give a short written decision to confirm that.

...

6. Whilst the Appellant's representatives in their correspondence indicated that the Appellant did wish to continue with his appeal against the dismissal of his asylum claim that was not the position by the time the matter came before me. It was correctly conceded that by operation of law the Appellant's appeal had in fact fallen away following the grant of humanitarian protection. The Appellant's grounds of onward appeal had not challenged the dismissal of the asylum claim based on the blood feud and the Appellant had been granted leave in relation to his generalised fear of Daesh. Once leave was granted there was nothing further to argue."
7. The case came before Upper Tribunal Judge Finch as a duty matter on 30 January 2018. In a letter dated 23 January 2017 the appellant's solicitors asserted that they had filed a notice under rule 17A(3) of The Tribunal Procedure (Upper Tribunal) Rules 2008 ("the UT Procedure Rules 2008") on 18 December 2017 applying to reinstate the appeal. The judge noted that the letter was not before Judge Woodcraft at the hearing on 18 December 2017. The concession reportedly made by counsel at the hearing needed to be clarified. She directed the appellant to file a statement from counsel as to whether a concession was made in the terms outlined by Judge Woodcraft.
8. A statement from counsel dated 08 February 2018 was filed in accordance with Judge Finch's direction. Mr Stephen Knight confirmed that the letter dated 18 December 2018 from his instructing solicitors making an application to reinstate the appeal was not before Judge Woodcraft when he made his decision at the hearing. Counsel confirmed that his concession was limited to an agreement that the appeal should be treated as abandoned by operation of statute. The letter from his instructing solicitors was not filed until after the hearing. In his view, the decision subsequently issued by Judge Woodcraft confused the chronology of events.
9. Judge Finch considered the statement and issued directions to (i) reinstate the appeal; and (ii) list the appeal for an error of law hearing.

Decision and reasons

Preliminary issue

10. I raised a jurisdictional issue at the beginning of the hearing. Although it seems clear from Judge Finch's order that she was satisfied that the appeal should be reinstated following the application made by the appellant under rule 17(A)(3), her order was made by way of a direction for the appeal to be reinstated. Before the Upper Tribunal was a decision made by Judge Woodcraft, which disposed of the proceedings. Judge Finch did not formally set aside Judge Woodcraft's decision when she made the direction to reinstate the appeal.

11. In light of Mr Knight's statement it would appear that Judge Woodcraft misunderstood the chronology of events. Although he mentioned the letter from the appellant's solicitors in his decision, he failed to note the date of the correspondence. The only letter that was before Judge Woodcraft at the date he promulgated the decision on 09 January 2018 was the letter dated 18 December 2018. The file copy indicates that it was processed and sent to Judge Woodcraft by the Field House administration team on 21 December 2017. This supports Mr Knight's argument that, at the date of the hearing, it would have made no sense for him to concede that the appeal should be treated as abandoned if his instructing solicitor had already sent a letter confirming that the appellant wishes to pursue the appeal. The correct course of events was that the appeal was treated as abandoned at the hearing on 18 December 2017 and an application was made immediately after the hearing to reinstate the appeal.
12. For the avoidance of doubt, I set aside Judge Woodcraft's decision under rule 43 of the UT Procedure Rules 2008 because it is in the interests of justice to do so and there has been a procedural irregularity. If there is any doubt about the correct order in which these procedural steps needed to be taken, I confirm that the appeal is reinstated. The effect of this decision is that there is an outstanding appeal before the Upper Tribunal.

Error of law decision

13. It is trite law that there should be a broad and purposive interpretation of the Refugee Convention to give effect to its humanitarian purpose. The UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status (December 2011) states:
 66. In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above. It is immaterial whether the persecution arises from any single one of these reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail.
 67. It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect. It is evident that the reasons for persecution under these various headings will frequently overlap. Usually there will be more than one element combined in one person, e.g. a political opponent who belongs to a religious or national group, or both, and the combination of such reasons in his person may be relevant in evaluating his well-founded fear.
14. The House of Lords in *Sivakumar v SSHD* [2003] INLR 457 made clear that attention must be focussed on the facts of the case in light of all the available material. The evidence should be considered as a whole. Lord Rodger made the following finding:
 - "40. As has long been recognised, persecutors may act for more than one reason. Dyson LJ was drawing attention to this when he said, at paragraph 22 of his judgment in the Court of Appeal [2001] EWCA Civ 1196; [2002] INLR 310, 317,

that, just because someone had been persecuted for suspected involvement in violent terrorism, it did not follow that he had not been persecuted for his political opinion. In other words, he might have been persecuted for both reasons. In the next paragraph Dyson LJ identified the task of the person considering a claim for asylum as being "to assess carefully the real reason for the persecution". His Lordship was there concerned to make the point that in many cases it is necessary to look below the surface and identify the true reason for any ill-treatment. Of course, there may turn out to be more than one "real reason". The evidence may show, for instance, that an applicant was ill-treated both because he belonged to a particular ethnic group and because he was suspected of taking part in terrorist crimes that were the work of members of that ethnic group. Not only is it often hard to draw the line between legitimate government counter-terrorist activity and racial and political persecution (*Paramananthan v Minister for Immigration and Multicultural Affairs* (1998) 160 ALR 24, 48 per Merkel J), but indeed members of security forces may act for both legitimate and illegitimate reasons. In such a case the appropriate inference may be that, if the applicant returned home, he would be ill-treated for a combination of Convention and non-Convention reasons. If so, the person considering the claim for asylum will properly conclude that the applicant has a well-founded fear of persecution for that combination of reasons."

15. The respondent argued that the grounds amounted to a disagreement with the judge's finding, but for the following reasons I conclude that the First-tier Tribunal findings at [51] of the decision disclose an error of law.
 - (i) The judge failed to consider the individual circumstances of the claim in sufficient detail. The judge accepted the appellant's account of his family background (save for the account claiming to be at risk because of a blood feud) and his flight from his home area following an attack on his village by Daesh. In my assessment, it was insufficient to simply state that that the appellant had not been individually targeted by Daesh and would not be in future. It is not a requirement of the Refugee Convention to show past-persecution. The appellant is a Kurd from a contested area near Kirkuk. His father was a member of the Kurdish Peshmerga who were actively fighting Daesh at the time. The judge failed to consider whether the appellant's ethnicity and family background might give rise to a risk of serious harm for reasons of his imputed political opinion or as a member of a particular social group (family) if he returned to a contested area.
 - (ii) The judge failed to consider whether the motivation for the attacks carried out by Daesh on the civilian population in the area might nevertheless engage a Convention reason. The background evidence showed that Daesh target civilian populations who they perceived to oppose their ideology. The UNHCR position on returns to Iraq dated 14 November 2016 stated that many Iraqis from areas affected by the conflict were likely to meet the criteria of the 1951 Convention. It might well be that some of the attacks carried out by Daesh are indiscriminate, but the evidence supported the contention that at least one of the motivations of the appellant's potential persecutors was likely to be political in nature.

- (iii) The judge only considered whether the appellant would be at risk as a member of a particular social group and not whether he would be at risk for reasons of imputed political opinion [50].
16. To give effect to the humanitarian purpose of the Refugee Convention it is necessary to interpret the Convention reasons in a purposive way. The fact that the Upper Tribunal in *AA (Iraq)* [2015] UKUT 00544 found that the conditions in the contested areas met the threshold under Article 15(c) of the Qualification Directive did not preclude the possibility that many of the same people who were at risk could also meet the requirements of the Refugee Convention given the political dimensions of the conflict. The standard of proof is low in relation to every element. The appellant only had to show that there was a reasonable degree of likelihood that he would be at risk for a Convention reason.
17. The appellant is a young Kurdish man from a village in a contested area. He is the son of a Peshmerga fighter. The Peshmerga were in the process of fighting Daesh at the time. It is not possible to know the exact motives for the attack on the appellant's village. However, the background evidence shows that it is at least reasonably likely that one possible motive for the attack was politically related given Daesh's desire to impose its religio-political doctrine on others or to punish those it perceives to oppose it. The appellant's individual circumstances were such that it is at least reasonably likely that his profile would give rise to risk of serious harm as a perceived opponent of Daesh.
18. For the above reasons, I find that the First-tier Tribunal decision involved the making of an error on a point of law. I remake the decision and allow appeal. I conclude that the appellant's removal from the UK would breach the United Kingdom's obligations under the Refugee Convention. There is a reasonable degree of likelihood that the appellant has a well-founded fear of persecution for reasons of his imputed political opinion and/or his membership of a particular social group (family).

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

The decision is remade and the appeal is ALLOWED on Refugee Convention grounds

Signed  Date 18 June 2018
Upper Tribunal Judge Canavan