



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

PA/02050/2017

**THE IMMIGRATION ACTS**

Heard at Glasgow  
on 10 January 2019

Decision & Reasons Promulgated  
**on 31 January 2019**

Before

**UPPER TRIBUNAL JUDGE MACLEMAN**

Between

**MUKHTAR [M]**

Appellant

and

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

For the Appellant: Mr T Haddow, Advocate, instructed by Latta & Co,  
Solicitors

For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. FtT Judge Agnew dismissed the appellant's appeal by a decision promulgated on 28 August 2017.
2. The appellant sought permission from the FtT to appeal on various grounds. That application was refused. By application dated 30 January 2017, the appellant asked the UT for permission to appeal "on the sole ground ... that the FtT has misdirected itself with reference to the tests of reasonableness of return to Iraq".

3. On 11 January 2018, the UT granted permission, on the view that it was “arguable that the FtT erred in its approach to the question of internal flight ...”.
4. The appellant’s skeleton argument seeks to update the appellant’s position by reference to country guidance published after the hearing in the FtT, *AAH CG UKUT* [2018] 00212. It is contended at [23] that the FtT based its conclusions on the appellant’s “inability to adduce reliable or credible evidence”, rather than on “the fact sensitive assessment required”, which is an error of law. From [24] onwards it is argued that *AAH* reinforces the conclusion that the FtT’s decision is inadequate, and that further findings are needed, for which the appeal “should be remitted to a differently constituted FtT.”
5. In a rule 24 response the respondent says that the findings on return come after unchallenged adverse credibility findings; at [69] the judge was not satisfied that the appellant had no family members to support him regarding documentation; that finding was open on the basis of no credibility; the judge at [72] referred to *AA*, and at [73] to the appellant having fortitude and family support; and those amount to sustainable findings on internal flight.
6. The main points which I noted from the submissions for the appellant were these:
  - (i) The country guidance, both before and after amendment, prescribes a detailed list for factors affecting risk on return, on each of which a tribunal is bound to make reasoned findings.
  - (ii) The FtT’s decision deals principally with the appellant’s account, up to [69]. That account is found not credible, a matter not now in issue. Thereafter, at [70 - 71], the judge refers correctly to the framework for a further decision, as the case law then stood. The resolution, found only at [73], is inadequate in terms of what those templates required.
  - (iii) It is not clear whether when referring to documents the judge meant a CSID. If she did, the finding that he could obtain one is irrational, or inadequate. If she did not mean a CSID, there was a failure to apply country guidance.
  - (iv) The exact nature of identity documents is crucial to feasibility of return and risk of destitution. The reasoning is so confused as to amount to error of law.
  - (v) It was irrational to infer from the appellant’s evidence, otherwise rejected, that he had family in Jalawla.
  - (vi) “In the absence of any accepted evidence from the appellant, the FtT has simply decided the case on the basis that the appellant has failed to displace the assumptions it has created. It is accepted that where the appellant has been unable to adduce any reliable or credible evidence, it would take little to entitle the FtT to find that ... travel

and employment might be feasible. However, making such a decision in the absence of any evidence on those points is not the fact sensitive assessment required by AA (*Iraq*). This is an error of law.” - Skeleton argument, [22 -23].

- (vii) Anticipating the reply that it was for the appellant to prove his case, and the finding that he was not credible was fatal, the FtT in a human rights appeal had a responsibility to ensure there was no breach. An “argument from silence” was insufficient. It might not take much to justify a negative outcome, but there had to be something.
  - (viii) The decision was inadequate, as guidance stood at the time, and was even more so on light of the further guidance, which required more detailed findings on ability to obtain documents. An “omnibus finding” did not suffice.
  - (ix) The FtT’s finding at [73] that the appellant had shown “considerable personal fortitude” was perverse. The evidence showed the contrary, that he was vulnerable. That point was implicit in the grounds going to the reasonability of return.
7. Having considered also the submissions for the respondent, I find that it has not been established that the making of the decision of the FtT involved the making of any error on a point of law.
  8. In terms of the main heading of the grounds, the FtT did not misdirect itself about the tests of reasonability of return. It was accepted in submissions that the FtT set those out correctly.
  9. The argument for the appellant was presented clearly and in detail but, at bottom, the case turned simply on onus. Mr Govan submitted that the appellant was seeking the benefit of the doubt, to which he was not entitled. Mr Haddow in his reply said that was a variation on an “argument from silence” which did not apply to an article 3 case, where the FtT is under a positive duty and bound to make findings.
  10. The SSHD has of course a responsibility to consider all claims, and to apply known background information - see paragraphs 339HA, 339J, and 339JA of the immigration rules. Although proceedings are primarily adversarial, tribunals also have a limited inquisitorial capacity, being under a duty of fairness - see e.g. *Macdonald’s Immigration Law and Practice*, 9<sup>th</sup> ed., 20.101.
  11. Paragraph 339I of the immigration rules provides thus:

When the Secretary of State considers a person’s asylum claim, eligibility for a grant of humanitarian protection or human rights claim it is the duty of the person to submit to the Secretary of State as soon as possible all material factors needed to substantiate the asylum claim or establish that they are a person eligible for humanitarian protection or substantiate the human rights claim, which the Secretary of State shall assess in cooperation with the person.

The material factors include:

- (i) the person's statement on the reasons for making an asylum claim or on eligibility for a grant of humanitarian protection or for making a human rights claim;
- (ii) all documentation at the person's disposal regarding the person's age, background (including background details of relevant relatives), identity, nationality(ies), country(ies) and place(s) of previous residence, previous asylum applications, travel routes; and
- (iii) identity and travel documents.

12. The responsibility may be on the respondent or on a tribunal to justify a human rights decision, but that does not involve an obligation to bring evidence to establish the primary facts. The responsibility for establishing those remains with the appellant.
13. The appellant claims that his case was decided on his "inability to adduce reliable or credible evidence". More accurately, it was decided on his positive choice not to provide evidence of that nature. That is a position from which an appeal fails, not from which an obligation on a tribunal to seek out a case for an appellant begins.
14. It was far from irrational to accept that part of the appellant's evidence which was to the effect that he had family in the IKR. An admission against interest may well be true, and does not automatically fall to be rejected because other claims have been found to be invented.
15. The FtT did not have to make point-by-point findings. The appellant's failure to substantiate his claim, as found at [73], covers all relevant matters.
16. If error had been shown in terms of the grounds, there would, as Mr Govan argued, be no need to remit to the FtT. There was no scope for revisiting the adverse credibility findings. The appellant did not apply to lead any further evidence. It would have been apt for the UT to make a fresh decision, based on everything before it. I would have had no difficulty in finding that based on all that he has disclosed, the appellant may reasonably be expected and required to return to Iraq. There would be no sensible reason to make findings in his favour on his claim not to have a CSID, not to have the information or family contacts to assist him in obtaining one, or otherwise to be at disadvantage compared to other returnees.
17. The decision of the First-tier Tribunal shall stand.
18. No anonymity direction has been requested or made.

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

22 January 2019  
UT Judge Macleman