



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: PA/09919/2019 (V)

**THE IMMIGRATION ACTS**

Heard Remotely at Manchester CJC

Decision & Reasons Promulgated

On 10 November 2020

On 16 November 2020

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

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(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the appellant: Mr D Ball of counsel, instructed by Duncan Lewis & Co

For the Respondent: Mr A Tan, Senior Presenting Officer

**DECISION AND REASONS (P)**

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote

hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who claims to be a citizen of Iran of Kurdish ethnicity, with date of birth given as 1.1.92, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Gibbs) promulgated 5.2.20, dismissing on all grounds his appeal against the decisions of the Secretary of State, dated 2.4.19 and 25.9.19, to deport him from the UK and to refuse his claims for international protection and human rights claim.
2. The appellant had claimed that he was at risk on return to revenge killing in a feud arising out of his illicit relationship with a young woman. He also claimed to have been identified to the authorities as being involved in distributing PJAK literature, resulting in the issue of a warrant for his arrest. More recently, he claims to have denounced Islam and begun studying Christianity, so that he is at risk of punishment by death on return to Iran.
3. Referring to his answers in interview, his Kurdish Sorani language and inability to speak Farsi, and the absence of Iranian identity documentation, the respondent refuted his claim of Iranian nationality, stating in the 2016 refusal decision, *"It is instead believed that you are a national of Iraq based on your language used."* This was considered in the previous First-tier Tribunal decision promulgated 8.5.17 (Judge Meah), where he was found to have failed to demonstrate that he was a national of Iran and not Iraq. This judicial finding was relied on the most recent refusal decision of 25.9.19, together with language analysis from May 2019 in which his linguistic background was assessed with a high degree of certainty to be Iraq, with the respondent concluding, *"it is not accepted that you are national of Iran. Rather, you are believed to be a national of Iraq."* In consideration of the issues addressed below, I am satisfied that the respondent's position was a positive assertion that the appellant is Iraqi rather than merely not accepting that he is Iranian, or that his true nationality is uncertain. Mr Tan confirmed at the hearing that this remains the respondent's position.
4. In summary, the grounds of application for permission to appeal to the Upper Tribunal are as follows:
  - i. That in considering the appellant's nationality, the First-tier Tribunal misapplied the burden of proof in disputed nationality cases;
  - ii. That in considering the appellant's claim to be a Christian, the First-tier Tribunal erred at [44] of the decision in finding an inconsistency between the appellant's oral evidence and the consultant psychiatric report;
  - iii. That in considering the psychiatric report, the First-tier Tribunal erred in rejecting the consultant's assessment that the appellant presented a high risk of suicide because the respondent did not consider he presented such a risk;

- iv. That in considering the deportation decision, the First-tier Tribunal took into account irrelevant factors and failed to consider sections 117B and 117C of the 2002 Act, as amended, and paragraph 398(c) of the Immigration Rules.
5. Permission to appeal to the Upper Tribunal was refused by the First-tier Tribunal on 5.3.20, with the judge stating that there was nothing in the grounds and, in respect of the first ground, that it was for the appellant to establish that it was reasonably likely that he was from Iran. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Allen granted permission on 10.5.20, considering the grounds to have identified arguable points of challenge to the decision of the First-tier Tribunal.
6. On 7.7.20 the Upper Tribunal issued directions proposing that the error of law issue be determined in a remote hearing, providing for written submissions of objections. In response and by letters dated 14.7.20, the appellant's and the respondent's representatives and consented to a remote hearing.
7. In summary, the respondent's Rule 24 response, dated 4.8.20, made the following points in relation to each of the four grounds of appeal:
  - i. It is accepted that the burden of proof was on the appellant to establish to the lower standard of proof his claim to be an Iranian national, and that the burden of proof was on the respondent to establish on the balance of probabilities that the appellant is in fact an Iraqi national. However, it is submitted that the judge applied the correct burden and standard of proof;
  - ii. It is accepted that in considering the appellant's claim to be a Christian convert, the two pieces of evidence at [44] of the decision, his oral evidence and the report of the consultant psychiatrist are not necessarily incompatible, as the appellant may have attended church in more than one of the institutions in which he has been detained in the UK. However, it is submitted that the error is not material as it depends on the success of ground 1 and the claim to be an Iranian national, and, secondly, the judge gave other reasons for rejecting the claim to be a Christian. It is also pointed out that no Dorodian witness attended the hearing to support the claim to Christian conversion;
  - iii. The concerns as to the reliability of the psychiatric report set out by the judge between [26] and [34] of the decision were reasonable and open to the judge. In particular, the judge noted that the suicide attempt whilst at Morton Hall IRC, reported by the appellant to the consultant, did not appear in his medical records.
  - iv. It is accepted that the judge did not consider whether the appellant met either of the exceptions in s117C or whether the public interest in deportation was outweighed by very compelling circumstances over and above those in the two exceptions. However, it is submitted that the

appellant's appeal was advanced on protection grounds and he did not articulate any human rights claim other than in a vague reference to private life and the assertion that there would be very significant obstacles to his integration in Iran.

8. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal. For the reasons set out below, I am satisfied that the only ground of any merit is in relation to the nationality claim.

#### *The Nationality Claim*

9. I note that there has been no challenge to the judge's refusal of an adjournment request so that the respondent could carry out enquiries with the Iranian embassy, the judge considering that the appellant had been given ample time to adduce evidence, including that of an expert on the issue of nationality, but failed to do so.
10. The judge was entitled to apply Devaseelan (Second Appeals - ECHR - Extra-territorial Effect) Sri Lanka [2002] UKAIT 00702 and take as a starting point the findings of the previous Tribunal decision in 2017 that the appellant failed to establish to the lower standard of proof that he was Iranian as claimed. It is not open to the appellant's representatives to now challenge the earlier and previously unchallenged decision. In any event, Judge Gibbs accepted at [39] of the decision that facts occurring since the initial decision are relevant in considering whether to depart from that decision.
11. For example, at [39] of the decision the judge noted that the language report had to be taken into account, and [40] of the decision, took into account the Iraqi authorities' failure to confirm the appellant's nationality. The reference in the GCID at page 251 of the bundle states, "*Findings were that he was Iranian in line with previous findings of 24/04/19, we should look at whether a referral to the Iranians would be possible.*" In relation to this point the judge stated, "*I do not know what information was placed before the Iraqi authorities and I also find that the appellant has only just revealed that the respondent has been proceeding on the basis of a name which is not in fact his real name.*" According to the record of proceedings, at the First-tier Tribunal appeal hearing the appellant stated that his surname was in fact Ahmedi. Whilst the grounds assert that "*determinations of nationality by a particular embassy should be given considerable weight,*" the judge was entitled to question what information was provided. I do not accept the submission in the grounds that the respondent was under a duty to withdraw that part of the refusal decision because of the claimed rejection following interviews at the Iraqi Embassy. The grounds attempt to elevate the GCID note to the status of a determination by the Iraqi Embassy, which in my view is putting it rather too high. The report in the GCID is at best second-hand and the weight to be attached was entirely for the judge. Contrary to the submissions made both in the grounds and orally, the judge did take this matter into account. It is well-

established law that the weight to be given to any particular factor in an appeal is a matter for the judge and will rarely give rise to an error of law, see Green (Article 8 -new rules) [2013] UKUT 254. In Herrera v SSHD [2018] EWCA Civ 412, the Court of Appeal said that it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence.

12. The primary point in the first ground is that the judge failed to apply the correct burden and standard of proof where it was the Secretary of State's assertion that the appellant is Iraqi and not Iranian. Whilst it is for the appellant to establish to the lower standard of proof that he is Iranian, I accept, as does the respondent, that as the respondent makes the positive assertion that the appellant is Iraqi, it is for the respondent to discharge the burden of proving this on the balance of probabilities.
13. I agree that at no point does the judge accurately distinguish the separate burdens and standards of proof in relation to the countervailing assertions of nationality. However, I do not accept the complaint in the grounds that the judge erred in stating the burden and standard of proof at [21] of the decision, which dealt with the adjournment application made on the basis that the respondent should be required to make enquiries of the Iranian embassy. The judge was correct to state there that the burden of establishing that the appellant is Iranian was on the appellant; as it is his assertion that he is Iranian. It is clear, as Mr Ball accepted, that the burden of establishing that he is Iranian as claimed is on the appellant, to the lower standard of proof. In relation to that issue, the judge was correct as to both the burden and the standard. No error of law is disclosed in this regard.
14. However, elsewhere in the decision the judge appears not to distinguish the different burdens and standards of proof that may apply in a case of disputed nationality. At [41] of the decision the judge stated, "*I place weight on the fact that the burden of proof is on the appellant and he has had several years to obtain evidence to discharge this burden.*" It is not clear whether the judge was there referring to the appellant assertion to be Iranian and/or the respondent's assertion that he is Iraqi. More clearly, at [43] the judge applied the lower standard of proof to conclude that the appellant had failed to establish that he is a citizen of Iran, but added "*and it is reasonably likely that he is a citizen of Iraq. On this basis his claim for protection must fail because he does not assert that he would be at risk on return to Iraq.*" The respondent's position set out in the Rule 24 reply rather side-steps the issue. However, Mr Tan accepted that the judge appeared there to be applying the lower standard of proof to both whether the appellant's claim to be Iranian is made out and whether the respondent's assertion that he is Iraqi has been satisfied. As already pointed out, it is clear that the judge did not make any self-direction in relation to the burden on the respondent and the standard of proof of a balance of probabilities in relation to the assertion that the appellant is Iraqi.

15. It follows that if there is any error on the part of the First-tier Tribunal in respect of the nationality issue, it is in relation to the finding that the appellant is "*reasonably likely*" to be a citizen of Iraq. Having given anxious consideration to the way in which the judge dealt with this issue, I am satisfied that this finding was made in error of law.
16. However, I raised with the two representatives whether the error I identified was material to the outcome of the appeal. If the judge erred as to the burden and standard of proof in relation to the assertion that the appellant is Iraqi, the fact remains that the judge found, applying the correct burden and standard of proof, that appellant has failed to establish that he is Iranian, which undermines his factual claim to be at risk on return to Iran for the feud, political, or religious reasons claimed. On the face of it, the judge did not err in respect of the burden and standard of proof in relation to that issue. I asked the two representatives to consider where that leaves the appellant; not having succeeded in establishing that he is Iranian, but not being liable for deportation to Iraq.
17. Mr Ball relied on the respondent's Home Office guidance to submit that in a case of disputed nationality, where the respondent makes a positive assertion as to nationality, there is but one test, with the burden on the respondent to prove the assertion on the balance of probabilities. He submitted that otherwise the appellant would be left in limbo.
18. However, the other side of that coin is to ask whether a failure by the respondent to establish that he is Iraqi entirely relieves the appellant from the burden to establish his claimed Iranian nationality so that it must be assumed that he is Iranian. Having heard detailed submissions from both representatives on the point, I was not persuaded that Mr Ball's submission is correct. Even if the respondent failed to establish that he is Iraqi, there must remain a burden on him to establish that he is Iranian, as claimed. I am not satisfied that Mr Ball's restrictive interpretation of the Home Office guidance is correct; it can surely only reflect the position in law and is not, in my view, a policy decision to which the respondent is bound.
19. Following further submissions and discussions with the two representatives as to this issue, I reached the conclusion that the way in which the judge dealt generally with the burden and standard of proof in relation to the issue of nationality amounted to a material error of law requiring the decision to be set aside and remade. Given that the judge failed to distinguish that there are different burdens and standard of proof in relation to issues of claimed nationality by both the appellant and the respondent, I am satisfied that there can be no confidence that the judge's finding that the appellant failed to demonstrate that he was Iranian as claimed was not influenced by the error of law as to the correct burden and standard of proof in finding that the appellant is Iraqi. The one finding is so intertwined with the other that it is impossible to be satisfied that the finding that the appellant is Iraqi did not unduly influence

the finding that the appellant failed to demonstrate that he is Iranian, as claimed.

20. For the purpose of this appeal, I make no definitive finding that the two related issues of nationality require two separate findings with different burdens and standards of proof. It may be that provided the judge has properly identified and made a correct self-direction as to the burden and standard of proof, the issue can be resolved by a single finding whether the appellant is Iraqi or Iranian. That will be for the Tribunal remaking the decision in the appeal to consider.

#### *The Remaining Grounds of Appeal*

21. I have addressed the other grounds of appeal briefly below for the sake of completeness but am not satisfied that any of them disclose a material error of law.
22. In relation to ground 2 and the claim of Christian conversion, I agree, as does the respondent, that the alleged inconsistency identified by the judge at [44] of the decision is not necessarily an inconsistency, as the appellant could have attended church services whilst in detention in the UK. He told the judge at the First-tier Tribunal that he first became involved with Christianity in September 2019 but converted to Christianity on 7.10.19.
23. It follows that the appellant has failed to demonstrate that he is Iranian, as the judge appears to have found, the claimed risk on return as a Christian convert would fall away, rendering the error complained of as not material. However whether or not there was an error of law in relation to the nationality issue, the judge was entitled to accord little weight to the claim of Christian conversion in the absence of the witness Pastor Asgher. In the premises, any error is immaterial; on the basis of the limited evidence put before the Tribunal, the claim of Christian conversion was bound to fail.
24. In relation to the third ground and the complaint as to the judge's treatment of the psychiatric evidence, it is clear that the judge gave careful consideration to this evidence, accepting that the appellant was suffering from low mood and depressed, but because of his ongoing detention rather than because of events in the past or a fear of deportation. The judge did not ignore the evidence but concluded that limited weight could be give to the report. Cogent reasoning for this conclusion is adequately set out between [26] and [35] of the decision. The judge was entitled, for example, to point out at [28] of the decision that the consultant failed to comment on the absence of any reference in the medical records to an alleged suicide attempt by hanging at Moreton Hall. At [31] the judge noted that whilst the consultant concluded that the appellant was at high risk of suicide, the staff treating him in detention did not take such a view. In fact, one month after seeing the consultant, on 17.1.20 the appellant reported to staff at Moreton Hall that he did not have any suicidal or self-harming thoughts, even though he was struggling with low moods and intrusive

thoughts. In this regard, the grounds at [25] assert that the judge made a striking error of fact. It is asserted that the detention centre staff did have “*very live concerns*” about the appellant’s suicide risk and for that reason he was repeatedly placed on an Assessment Care in Detention and Teamwork (ACDT) Plan, on 25.3.19 and again in September 2019. However, I am not satisfied that there was an error of fact and this overstated ground is little more than a disagreement with the findings and the weight given to the evidence.

25. Neither is the judge to be criticised for concluding that the appellant’s mental health issues do not adequately or satisfactorily explain the inconsistencies in his account which undermined the credibility of his claim. The issue was one for the judge to assess and for which findings cogent reasoning has been provided.
26. In relation to the fourth ground in relation to the deportation decision, which could have been more carefully addressed, it is correct that the judge did not consider either of the two exceptions in section 117C of the 2002 Act. However, on the facts of this case it is clear that the judge concluded that the appellant was a foreign criminal who had caused serious harm. Further, it is not clear from the grounds that the appellant could have met either exception or demonstrated very compelling circumstances, relying only on rather vaguely expressed private life grounds. The appellant’s case was pursued on the basis of the protection claim, not human rights. In the circumstances, no error of law is disclosed and the ground is an attempt to undermine the decision by dissection and criticism of its constituent parts.
27. Nevertheless, as set out above, I have found material error of law in the decision of the First-tier Tribunal requiring it to be set aside and remade. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. The errors of the First-tier Tribunal vitiate all other findings of fact and the conclusions from those facts so that there has not been a valid determination of the issues in the appeal.
28. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President’s Practice Statement at paragraph 7.2.

## Decision

The appellant’s appeal to the Upper Tribunal is allowed to the extent that the decision of the First-tier Tribunal is set aside.



The remaking of the decision in the appeal is remitted to the First-tier Tribunal sitting at Harmondsworth, with no findings preserved.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 11 November 2020

### **Anonymity Direction**

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

*“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 to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.”*

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 11 November 2020