Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10190/2019 (A)

THE IMMIGRATION ACTS

On the papers	**Decision & Reasons Promulgated**
on 3 August 2020	**On 10 August 2020**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ATS
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Shore promulgated on 2 February 2020 in which the Judge dismissed the appellant's appeal on protection and human rights grounds.
2. Permission to appeal was granted by another judge of the First Tier Tribunal on 3 April 2020, the operative part of the grant being in the following terms:

> "2. The lengthy grounds seeking permission assert, in summary, that the Judge erred in misdirecting himself on the plausibility aspects of the Appellant's account, that he made inadequate findings, that he failed to give adequate consideration to the best interests of the child, he failed to follow the recent country guidance in SMO &

> Others and that he failed to adequately consider the experts report, or the evidence of the Appellant's witnesses.
>
> 3. As is frequently the case, some of the grounds raised are stronger than others. Arguably, however, the Judge failed to give adequate consideration to the expert report. He makes no reference to it in his findings. He makes a brief reference to the best interests of the child, but arguably fails to identify precisely what they were, and how they were met. Significantly, there was an issue under Paragraph 276 ADE as the Appellant's child had been in the UK for over 7 years. Arguably, the Judge has failed to determine why it would, or would not, be reasonable to expect the child to leave the UK. It is also arguable that the Judge failed to explain how the Appellant will be able to return to Iraq without a CSID.
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> 4. In these circumstances, I grant permission to appeal. Although I have highlighted those which I consider to be the stronger grounds, I should make it clear that all grounds are open for argument."

3. As a result of the Covid-19 pandemic directions were sent to the parties indicating a provisional view that the question of whether the Judge had made a material error of law and whether the decision should be set aside could be made without a hearing and providing an opportunity for the parties to comment upon both this proposal and to file any further submissions they would seek to rely upon in support of their respective cases.
4. The Overriding Objective is contained in the Upper Tribunal Procedure Rules. Rule 2(2) explains that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues.
5. Rule 2(4) puts a duty on the parties to help the Upper Tribunal to further the overriding objective; and to cooperate with the Upper Tribunal generally.
6. Rule 34 of The Tribunal Procedure (Upper Tribunal) Rules 2008 provides:

> 34.—
>
> (1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
>
> (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing.
>
> (3) In immigration judicial review proceedings, the Upper Tribunal must hold a hearing before making a decision which disposes of proceedings.
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> (4) Paragraph (3) does not affect the power of the Upper Tribunal to—
>
> (a) strike out a party's case, pursuant to rule 8(1)(b) or 8(2);
>
> (b) consent to withdrawal, pursuant to rule 17;
>
> (c) determine an application for permission to bring judicial review proceedings, pursuant to rule 30; or

(d) make a consent order disposing of proceedings, pursuant to rule 39, without a hearing.

7. The only party to have responded to the direction is Fountain Solicitors on behalf of the appellant. I am satisfied there has been proper service upon the Secretary of State's representative, but no response has been received from them within the permitted time.
8. I consider it is appropriate in all the circumstances to exercise the discretionary power contained in rule 34 to determine the question of whether the Judge has made an error of law material to the decision to dismiss the appeal on the papers without a hearing. No prejudice is made out to either party in doing so and no objection to so proceeding has been received.

Background

9. The appellant is a citizen of Iraq born in January 1975. The Judge refers to the background of the appellant's case and the nature of the documentary and oral evidence before setting out findings of fact from [67] of the decision under challenge.
10. The appellant sought permission to appeal on five grounds. Ground 1 asserts a material misdirection in the Judge finding it implausible the appellant would have been issued with an arrest warrant four years after he left Iraq without providing any explanation for why this should be so. Ground 2 asserts the Judge made a material misdirection in finding the appellant had not shown he has a genuine and subsisting relationship with his partner, a British citizen, and in failing to give reasoned and adequate findings in this regard in light of the evidence that was before the Judge. Ground 3 asserts material misdirection in the Judge failing to consider the best interests of the appellant's child as a primary consideration. The child had been in the United Kingdom since 2013, over 7 years, more than half of its life, yet the Judge failed to explain why the requirements of paragraph 276ADE were not met or why there would not be very significant obstacles to the appellant and his child returning to Iraq; especially given the fact the child has a medical problem. Ground 4 asserts the Judge erred in failing to correctly apply the country guidance case of SMO or to adequately assess the risk the appellant faces on return in light of the fact he has a child with medical difficulties and is a Sunni Muslim and in failing to address adequately whether the appellant or his daughter would have the necessary identification documents such as a CSID in order to return. Ground 5 asserts the Judge failed to take into account or to explain why weight was not attached to an expert report of Dr Alan George, or to make findings in relation to the evidence of the appellant's witnesses said to relevant to the article 8 ECHR claim.
11. In relation to Ground 2 it is also now the position that the appellant and his partner have a second child born in the United Kingdom on 16 May 2020 who is a British citizen. The appellant and his partner have Parental Responsibility for the second child which is said to further demonstrate the genuineness and subsistence of the relationship between them.

Error of law

12. Although the presence of the child born on 16 May 2020 is a new matter there is arguable merit in the assertion the child who had been born at the date of the hearing and who had been in the United Kingdom for more than half their life meant there was an obligation upon the Judge to consider not only what was in the best interests of the child but also the requirements of paragraph 276ADE and the question of whether there were very significant obstacles to the appellant and child returning to Iraq. Failure to do so amounts to legal error.
13. The failure of the Judge to properly address whether the appellant and his daughter would have the necessary identification documents such as a CSID is also a material error.
14. Also of concern is, despite a reading of the determination, the inability to properly identify whether the Judge gave adequate consideration to the report of Dr George. It is accepted the Judge was not required to set out findings in relation to each and every aspect of the evidence but it is necessary for a reader of the decision to understand what evidence was taken into account and what findings were made upon it. There was no dispute that the issues that Dr George indicated would create an elevated risk exist. There also appears to be merit in the challenge to the Judge's failure to make findings in relation to the evidence of the appellant's witnesses said to be of particularly relevant to the article 8 ECHR claim.
15. I find in light of the significant errors that the submission the appellant has not received a proper assessment of the merits of the appeal and is unable to understand why he failed has merit. Significant factual findings still need to be made both in relation to the matters that were before the Judge and the impact of the new child. Accordingly, I consider it is appropriate for the appeal to be remitted to the First-tier Tribunal sitting at Birmingham to be heard afresh by a judge other than Judge Shore. There shall be no preserved findings.

Decision

16. **The First-tier Tribunal Judge materially erred in law. I set aside the decision of the original Judge. I remit the decision to the First-tier Tribunal sitting at Birmingham to be heard afresh by a judge other than Judge Shore.**

Anonymity.

17. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 3 August 2020