



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

Appeal Number: PA/11060/2019 (P)

**THE IMMIGRATION ACTS**

**Decided under Rule 34 without a hearing  
on 6 October 2020**

**Decision & Reasons Promulgated  
On 12 October 2020**

Before:

**UPPER TRIBUNAL JUDGE GILL**

Between

M M  
**(ANONYMITY ORDER MADE)**

Appellant

And

The Secretary of State for the Home Department

Respondent

**Anonymity**

**I make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the original appellant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings. I make this order because this is a protection claim. The parties at liberty to apply to discharge this order, with reasons.**

This is a decision on the papers without a hearing. The appellant's written submissions did not address the question whether it would be appropriate for a decision to be made on the papers. No written submissions were received from the respondent. The documents described at paras 5-6 below were submitted. A face-to-face hearing or a remote hearing was not held for the reasons given at paras 8-19

below. The order made is set out at para 57 below. (*Administrative Instruction No. 2 from the Senior President of Tribunals*).

**Representation (by written submissions):**

For the appellant: Mr A Caskie, instructed by Maguire Solicitors.  
For the respondent: (No representation).

**DECISION**

1. The appellant, a national of Iraq born on 1 January 1985, appeals against a decision of Judge of the First-tier Tribunal S.T. Fox (hereafter the "Judge") who, in a decision promulgated on 21 February 2020 following a hearing on 17 December 2019, dismissed his appeal on asylum, humanitarian protection and human rights grounds against a decision of the respondent of 16 October 2019 to refuse his further submissions of 20 June 2019.
2. On 3 July 2020, the Upper Tribunal sent to the parties a "*Note and Directions*" by Mr C.M.G. Ockelton, Vice President of the Upper Tribunal, in which he stated that he had taken the provisional view that it would be appropriate in the instant case to decide the following questions without a hearing:
  - (a) whether the decision of the Judge involved the making of an error of law; and
  - (b) if so, whether it should be set aside.
3. Mr Ockelton then gave directions which set a timescale for the appellant to make written submissions on questions (a) and (b), for the respondent to lodge submissions in reply and for the appellant to lodge further submissions in response. He also gave directions which provided for any party who considered that despite the foregoing directions a hearing was necessary to consider questions (a) and/or (b) to submit reasons for that view within a certain timescale.
4. The time limits for compliance with the directions of Mr Ockelton were extended by a decision of Mr A Hussain, lawyer of the Upper Tribunal, pursuant to delegated judicial powers, in a "*Decision and Further Directions*" dated 20 July 2020 sent to the parties on 21 July 2020 by email.
5. In response to the "*Note and Directions*", the Upper Tribunal has received from the appellant written submissions by Mr A Caskie submitted under cover of an email dated 28 August 2020 timed at 12:41 hours and again by email dated 28 August 2020 timed at 13:52 hours. This email did not contain the attachment referred to at para 2 of the written submissions, that is, a marked up copy of the Judge's decision. Following the Upper Tribunal's request for this document, it was received by email dated 6 October 2020 timed at 09:21 hours from Maguire Solicitors. It appears that the three emails from Maguire Solicitors were not copied to the respondent.
6. The Upper Tribunal has not received any submissions on the respondent's behalf in response to the "*Note and Directions*".

## **The issues**

7. I have to decide whether it is appropriate to decide question (a) and (b) set out above. If I decide that it is appropriate to decide the said questions without a hearing and if I do set aside the Judge's decision, then I will have to decide whether the decision on the appellant's appeal against the respondent's decision should be re-made in the Upper Tribunal or whether the appeal should be remitted to the First-tier Tribunal (hereafter the "*Issues*").

## **Whether it is appropriate to proceed without a hearing**

8. As I have said above, the Upper Tribunal has not received any submissions from the respondent. The appellant's written submissions do not address the question whether it would be appropriate for the Upper Tribunal to decide the Issues without a hearing.
9. I do not rely upon the mere fact that the appellant and the respondent have not made any submissions as justifying proceeding without a hearing. I have considered the circumstances for myself.
10. The appeal in the instant case is straightforward.
11. I am aware of, and take into account, the force of the points made in the dicta of the late Laws LJ at para 38 of Sengupta v Holmes [2002] EWCA Civ 1104 concerning the power of oral argument; and the dicta in the decision in R v Sussex Justices, ex parte McCarthy [1924] 1 KB 256 to the effect that justice must be done *and* be seen to be done, to mention just two of the cases in which we have received guidance from judges in the higher courts concerning the importance of an oral hearing.
12. I am aware of and have applied the guidance of the Supreme Court at para 2 of its judgment in Osborn and others v Parole Board [2013] UKSC 61.
13. Given that my decision is limited to the Issues, there is no question of my making findings of fact or hearing oral evidence or considering any evidence at this stage.
14. In addition, I take into account the seriousness of the issues in the instant appeal for the appellant. This appeal relates to his protection claim which is a serious matter. It also relates to his Article 8 claim human rights claim based, in part, on his relationship with his partner and their two children and his partner's child. This is also a matter of some seriousness.
15. I have considered all the circumstances very carefully and taken everything into account, including the overriding objective.
16. I considered the Judge's decision, the grounds and the submissions before me. I was of the view, taken provisionally at this stage, that there was nothing complicated at all in the assessment of the Issues in the instant case, given that the grounds are simple and straightforward and the Judge's decision straightforward. I kept the matter under review throughout my deliberations. However, at the conclusion of my deliberations, I was affirmed in the view I had taken on a preliminary basis.

17. Whilst the Tribunal is now listing some cases for face-to-face hearings and using technology to hold hearings remotely in other cases where it is appropriate to do so, the fact is that it is not possible to accommodate all cases in one of these ways without undue delay to all cases. Of course, the need to be fair cannot be sacrificed even if there would be a lengthy delay in order to hold a hearing face-to-face or remotely or even if there is a consequent delay on other cases being heard.
18. There are cases that can fairly be decided without a hearing notwithstanding that the outcome of the decision may not be in favour of the party who is the appellant. In the present unprecedented circumstances brought about by the coronavirus pandemic, it is my duty to identify those cases that can fairly be decided without a hearing.
19. Having considered the matter with anxious scrutiny, taken into account the overriding objective and the guidance in the relevant cases including in particular Osborn and others v Parole Board, I concluded that it is appropriate, fair and just for me to exercise my discretion and proceed to decide the Issues without a hearing, for the reasons given in this decision.

**Questions (a) and (b) - whether the Judge erred in law and whether his decision should be set aside**

**Background and summary of the decision of Judge Macdonald**

20. The appellant claimed asylum on 29 August 2008. His asylum claim was refused on 10 November 2008. His appeal against this decision was dismissed by Immigration Judge J G Macdonald in a decision promulgated on 19 January 2009. Although an order was made for the decision on the appellant's appeal to be reconsidered, Senior Immigration Judge Deans dismissed the appellant's appeal in a decision promulgated 31 July 2009. Judge Deans said that he was satisfied that Judge Macdonald had not materially erred in law.
21. It should be noted that the respondent was not represented at the hearing before Judge Macdonald.
22. The basis of the appellant's asylum claim before Judge Macdonald may be summarised as follows: On 5 August 2008, the appellant was approached by a terrorist group (Al-Qa'ida) and told to bring particular employees of the company for which the appellant worked as a driver to a pre-arranged location to be be-headed eventually by the group. He was told by one of the terrorists that they would kill him if he did not do as they had requested. The appellant told his company what had happened and they advised him to move away. The appellant's uncle then arranged for his journey out of Iraq. The appellant later discovered that the terrorists had destroyed his family home on 7 August 2008. He feared being persecuted by the group if he is returned to Iraq.
23. In addition, the appellant said that his father used to be with the security forces in the Ba'ath Party. He was killed on 17 May 2005 by Iraqi civilians for harming civilians when was in the Ba'ath Party. The appellant fears that he will face problems in Iraq due to his father's former association with the Ba'ath Party.

24. Judge Macdonald accepted the appellant's evidence that he had been approached by the terrorist group on 5 August 2008 and that he was forced to flee at very short notice because of the threat from a terrorist group who may well have links to or be part of Al-Qa'ida (para 30).
25. Judge Macdonald did not make any finding, in terms, concerning the credibility of the appellant's evidence that his father had been a member of the security forces of the Ba'ath Party and that he was killed by civilians for harming civilians when he was in the Ba'ath Party. However, in the course of his assessment of whether internal relocation was a viable option, he said the following at para 34 which may suggest that he may have accepted the credibility of the appellant's evidence concerning his father:
- "The suggestion that the Appellant will be at risk because of the Baathist activities of his father seems to me to be both vague and speculative and perhaps for that reason was not founded on in submissions by [the appellant's representative]."
26. In the appeal before Judge Macdonald, the appellant's nationality was in dispute. Judge Macdonald summarised the appellant's witness statement at paras 2-11 of his decision. According to para 11 of Judge Macdonald's decision, the appellant said in his witness statement that he had provided his Iraqi citizenship card and Iraqi civil affair card to his solicitors. This part of para 11 of Judge Macdonald's decision reads:
- "He [the appellant] has provided his Iraqi citizenship card and Iraqi civil affair card to his solicitors which confirm his nationality".
27. Judge Macdonald accepted that the appellant was a national of Iraq, stating at paras 22 and 24 as follows:
- "22. I do have a certificate of Iraqi nationality setting out the name of the Appellant and giving the full name of his father noting that his father was born in "Jaloula" as was his mother. In the absence of the Home Office I was not given any reason to doubt the Integrity of these documents. Accordingly, contrary to what is said In paragraph 22 of the refusal letter, the Appellant has provided objective evidence to support his claim to be an Iraqi national. The Home Office do acknowledge at paragraph 22 that he did answer some of the questions in relation to his nationality correctly at interview.
24. He has provided documents confirming his Iraqi nationality."
28. Judge Macdonald dismissed the appellant's asylum claim because he concluded that it would be safe and not unreasonable for the appellant to relocate in Iraq, away from his home area of Jalawla in the Diyala province in Iraq.

### The Judge's decision

29. Turning to the decision of the Judge, it is fair to say that there are a number of grammatical and other errors in the decision, as Mr Caskie states in his written submissions. Nevertheless, it is possible to summarise his key conclusions/findings as follows:
- (i) The appellant was not a credible witness (paras 34 and 35). The core of his account lacked credibility (para 35). He was an economic migrant (para 36).

(ii) In relation to the appellant's identification documents and the whereabouts of the documents, the Judge said as follows:

"11. ... He provided documents that confirmed his racking [*sic*] nationality at his initial interviews. Today, he maintains that these documents are still in the possession of the Respondent. The Respondent does not deny this. In his oral evidence he attempted to persuade me that he had never such documents in the first instance. When pressed, he resided [*sic*] from that position and accepts that the Respondent perhaps holds his relevant documentation."

"24. As indicated above I am satisfied that the Appellant and the Respondent, between them have the relevant identity documents that would align [*sic*] his return to Iraq...."

"29. ... He has the relevant identification documents.... "

"33. He maintained his attempted denial, not being an Iraqi national, and not having any documents that would support his identity or nationality. There is a clear and unequivocal record of these documents existing, being handed by him to the Respondent, who currently holds the documents. This attempted denial once again can only have a negative impact upon his credibility."

(iii) In relation to whether the appellant has any family in Iraq, the Judge said as follows:

"24. ... He maintains that he still has family in the area and they would be available to assist and support him in any endeavour is upon return. A bland averment, in the alternative from the Appellant is not sufficient evidence to persuade me to go against the relevant country guidance."

"29. ... He has family in Iraq..."

"60. ... He can make use of his family connections, relatives former friends and neighbours and colleagues to seek assistance from them to reintegrate. He speaks the language. He is familiar with the culture and customs as is his current partner. He has a relevant documentation available to him to assist in [*sic*] return."

(iv) In relation to the appellant's relationship with his partner, their two children and his stepson, the Judge said, inter alia, as follows:

"37. With regard to section 117 of the Nationality Immigration and Asylum Act 20021 make the following observations and findings. As indicated at paragraph 16 above, the Appellant and his partner both entered into a relationship knowing his immigration status. At that time neither could claim to be in neophyte of the immigration environment and process. For the purpose of today's hearing **the Appellant fully accepts that that relationship was precarious and remains so....**"

"56. Section 55 issues necessarily come to the fore and I take into account the Appellant's relationship with his stepson, partner and two children. I am aware of the need to safeguard and promote the welfare of children in the UK. His partner's status in the UK has not been recorded in any document before me today. I am led to believe that she has Leave to Remain, perhaps on foot of a successful asylum claim. She however along with the children live in

Birmingham. He lives in Glasgow. It must be extremely difficult for them to maintain any relationship over such a long distance. **Other than the evidence provided by the Appellant and his partner, there is no corroboration that the relationship still subsists to any meaningful degree, by demonstrating frequency in contact, physically, by mail, email, other mode or telephone call.** The Appellant admits in his evidence that he has had recourse to borrow money from others simply to help them survive. Lack of finances of the sea [*sic*] a very limiting and restrictive factor in maintaining such a relationship over a long distance. Its impact cannot be ignored. I also note the letters of support in the Appellant's bundle. None of these witnesses have come forward to give evidence today and to be cross examined."

"57. **There appears to be no dispute between the parties that this relationship exists between the Appellant, his partner and children.** It is not in dispute that two of the children are the Appellant's. He claims responsibility for the eldest child, his stepson. His claim to be active in their lives at different levels must be viewed against the background of a considerable geographical separation and the family's impecunious circumstances. How do they afford to stay in touch? He has not been adopted by the Appellant. The child is only 13 years old. There are letters of support from others in the Appellant's bundle which lend some credence to the Appellant's claim to be responsible for the eldest child. This would appear to be a matter of interest, when taken into account the possible coincidence of the relationship with his partner. **That child did not know the Appellant upon his arrival in the United Kingdom and it took some time for him to be integrated into the partner's family. In the alternative that relationship would appear to have been forged with indecent haste.** That would have had consequences. The child is aware of his real father. They all appear to have the ability to communicate freely and in unrestricted terms of by using Kurdish Sorani language. There is insufficient evidence before me today that would satisfy me that the Appellant has demonstrated that the child has fully integrated into society in the United Kingdom and that there would be difficulties reintegrating into the Appellant's home country of Iraq. All three children will benefit from their short stay in the United Kingdom. That experience will stand them in good stead elsewhere. The appellant's partner does not make a case that she would be happy to [*sic*] the family to be broken up. In that context I considered reasonable to unfair [*sic*] that she would be happy to accompany her partner, if her claim to being in a subsisting and genuine relationship is credible."

58. ... The Appellant and his family all accept that the relationship was entered into in full knowledge of his precarious that is [*sic*] **and that the relationship remains precarious.**"

(My emphasis)

### Assessment

30. The appellant's written submissions raised several new grounds that were not raised in the original grounds and in respect of which the appellant did not have permission. For example, paras 1-3 contend that the Judge's decision "*contained 50*

*typographical, grammatical, misgenderings, or other obvious errors of expression or law as highlighted in the enclosed marked up copy of the determination" such that the Tribunal should consider simply setting it aside because of a procedural defect, i.e. the absence of an adequate determination. In this regard, para 1 refers to and relies upon an unreported decision of the Upper Tribunal in Sareh, PA/03488/2017.*

31. However, whilst it is true that para 2(i) of the original grounds stated that paras 30-32 and 56-58 of the Judge's decision did not make grammatical sense, it was not pleaded as a ground that the number of errors in the decision was such that, on that account alone, the decision was inadequate and should be set aside. The ground that was raised was that, as a result of the fact that paras 30-32 and 56-58 of the Judge's decision did not make grammatical sense, the Judge's findings were unclear, which is not the same ground. Furthermore, this ground was raised in connection with the Judge's decision on Article 8, whereas paras 1-3 of the grounds extend to include the protection claim given that it is contended that the Judge's entire decision should be set aside.
32. Although I am aware that Sareh was a decision of a panel of the Upper Tribunal which included the Vice-President and although I acknowledge that decisions of the Vice President command considerable respect, it is nevertheless the case that the decision was an unreported decision. Mr Caskie therefore requires permission to rely upon it. No application was made for permission to raise the new ground advanced at paras 1-3 of the appellant's written submissions or to rely upon Sareh.
33. Other examples of grounds being raised in the written submissions which were not raised in the original grounds are as follows:
  - (i) Para 4 which contends that the Judge failed to make a finding on the immigration status of the appellant's partner.
  - (ii) Para 7 which contends that the Judge gave no reasons for not accepting that the appellant is likely to secure employment in the United Kingdom.
  - (iii) Para 8 which contends that the Judge erred in requiring corroboration at para 28 of his decision.
  - (iv) Para 9 which contends that the Judge applied the wrong standard of proof at para 42.
  - (v) Para 13 which contends that *"... the Judge appears to proceed in ignorance of the requirements of the provision of Asylum Support and the impact of that on a family that was formed after each adult member of the family had claimed asylum so that they were not for Home Office purposes dependents upon one another. That was a further relevant matter the Judge should have known about (it is a mater [sic] of law) that he left out of account."*
  - (vi) Para 14 which contends that the Judge adopted, at paras 50 and 53, a superseded model for the assessment of the Article 8 claim, i.e. whether there is an arguable case outside the Immigration Rules.
34. The directions given in the "Note and Directions" do not replace the requirements in the Tribunal Procedure (Upper Tribunal) Rules 2008 for appellants to have permission to argue their grounds. An application for permission to rely upon the



additional grounds raised in the appellant's written submissions should have been made.

35. In the absence of any such application, I decline to consider any grounds raised in the appellant's written submissions which were not raised in the original grounds.
36. As I have said at para 5 above, the appellant's emails of 28 August 2020 with his written submissions were not copied or addressed to the respondent. However, the respondent is not prejudiced by my proceeding to decide this appeal notwithstanding that she has not been served with the appellant's written submissions for the following reasons:
  - (i) I have decided to disregard the new grounds raised in the appellant's written submissions for which the appellant does not have permission; and
  - (ii) the respondent had an opportunity (which she did not take) to file and serve a Rule 24 reply notwithstanding that she has not been served with the appellant's written submissions.
37. Accordingly, my decision to proceed to decide this appeal notwithstanding that the respondent has not been served with the appellant's written submissions does not prejudice the respondent in any way.
38. I turn now to the Judge's decision.

*The Judge's decision on the protection claim*

39. In relation to the appellant's protection claim, I am satisfied that the Judge erred in law in making his adverse credibility assessment, for the following reasons:
  - (i) Firstly, in making his finding that the appellant's core account lacked credibility, he failed to take into account that the appellant had been found by Judge Macdonald to be credible in his evidence as to the core of his asylum claim. There was no mention in the Judge's decision of the guidance in Devaseelan v SSHD \* [2002] UKIAT 702. Indeed, he seemed to be unaware of it, as it seems he was unaware that Judge Macdonald had found the appellant to be a credible witness.
  - (ii) Secondly, the reasons the Judge gave for making his adverse credibility assessment were a wholly inadequate basis for rejecting the appellant's credibility concerning the basis of his asylum claim and for finding that he was an economic migrant. The Judge gave his reasons for his adverse credibility assessment at paras 30-33 and at para 38. I have ignored the remaining paragraphs because the Judge merely stated his conclusions on the facts without providing any reasons. Paras 30-32 concern the appellant's evidence about his family life claim in the United Kingdom. It is difficult to see the relevance of the reasoning at paras 30-32 to an assessment of the credibility of the appellant's evidence concerning the reasons for fearing being returned to Iraq. Para 38 of the Judge's decision concerned s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. Section 8 is an inadequate basis for rejecting the entirety of the appellant's evidence about the basis of his asylum claim. As will be seen from my reasoning below, the Judge's reasoning at para 33 of his decision cannot stand. It follows therefore that, even if this had

been a case in which Devaseelan was not applicable (which is not the case), the Judge's adverse credibility assessment was fatally flawed.

(iii) The errors described at (i) and (ii) above are each fatal to the Judge's adverse assessment of credibility. The credibility of the appellant's account of the reasons why he feared returning to Iraq was material to any assessment of the future risk, having regard to the guidance in SMO, KSP & IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC).

40. In addition, on the question whether the appellant has family in Iraq, para 24 of the Judge's decision, quoted at my para 29(iii) above, appears to make two contradictory statements, i.e. that "*he*" maintained he still has family in the area and also that the appellant had made "*a bland averment in the alternative*". Elsewhere, the Judge stated at several points that the appellant has family in Iraq. It appears that he made an assumption that the appellant was still in contact with his family. He did not engage with the appellant's evidence at para 3 of his witness statement (AB/1) that he had lost contact with his family since leaving Iraq in 2008 and did not know their whereabouts. Whether or not the appellant is in contact with his family in Iraq is an important matter, given the guidance in SMO concerning the importance of a CSID.

41. I turn now to the Judge's consideration of this aspect of the guidance in SMO.

42. In this regard, I have examined carefully the Judge's decision and Judge Macdonald's decision in an attempt to ascertain what evidence was before the Judge concerning the whereabouts of the appellant's identity documentation.

43. The grounds contend that the respondent had asserted that she had the appellant's identity documents and that the Judge erred in law in merely accepting that assertion. At para 11 of his decision (quoted at my para 29(ii) above), the Judge said that "*he [i.e. the appellant] maintained that these documents were still in the possession of the respondent*" and that "*the respondent does not deny this*". At para 24, he said that he was satisfied that the appellant and the respondent between them have the relevant identity documents. At para 33, he said that there is a "*clear and unequivocal record of these documents existing, being handed by him to the respondent, who currently hold the documents*".

44. I do not accept the contention in the grounds that the respondent had asserted in the appeal before the Judge that she was in possession of the appellant's identity documents. Furthermore, I am satisfied that, to the extent that the Judge assumed that this was the case, he erred in doing so. My reasons are as follows:

(i) That the respondent did not deny the appellant's assertion that the respondent had his identity documents (para 11 of the Judge's decision) was *not* an *assertion* by the respondent that the documents were in her possession. To the contrary, the decision letter noted at para 24 (page 11 of 19) that Judge Macdonald had noted that the appellant had given his Iraqi citizenship card and Iraqi civil affair card to his solicitor. Para 24 of the decision letter specifically states that the appellant was in possession of the documents needed to get re-documented.

(ii) If the Judge was satisfied that the respondent had asserted that the identity documents were in her possession, he would not have needed to say,

at para 24, that the appellant and the respondent *between them* have the identity documents.

(iii) It is unclear what evidence was before the Judge to support his observation at para 33, that there was a "*clear and unequivocal record of these documents existing, being handed by him to the respondent, who currently hold the documents*", given that:

(a) para 11 of Judge Macdonald's decision referred to the appellant's evidence in his witness statement that he had provided his Iraqi citizenship card and Iraqi civil affair card *to his solicitors* and there was no evidence before the Judge that the solicitors had passed the documents to the respondent; and

(b) Judge Macdonald said at para 22 of his decision that he had a certificate of Iraqi nationality but the respondent was not represented at that hearing.

45. All that can be said with any certainty, given everything that was said by Judge Macdonald at paras 11, 22 and 24 of his decision and everything that was said by the Judge at paras 11, 24, 29 and 33 of his decision, is that the current whereabouts of the appellant's identity documents is unclear.
46. It is therefore plain that the Judge's assessment of the country guidance in SMO is vitiated by his assumption that the appellant is able to obtain the documents, wherever they happen to be. Given the importance of such documentation being available to a returnee, it is plain that the Judge's decision on the appellant's asylum claim, humanitarian protection claim and the related Article 3 claim simply cannot stand.
47. In view of what I have said at paras 42-45 above, the case may benefit from a case management hearing before the decision on the appeal is re-made.
48. Although this will be a matter for the Judge who hears the appeal on the next occasion, the appellant should note that the evidence to which I have referred shows that he last had possession of his identity documents. He said in his witness statement that he had given them to his solicitor and Judge Macdonald said that identity documents were produced before him. The appellant is on notice that he will need to produce evidence from his solicitor as to the whereabouts of the identity documents.

#### *The Judge's decision on the Article 8 claim*

49. In relation to the appellant's Article 8 claim, the grounds contend that the child of the appellant's partner was a qualifying child and that the Judge therefore erred in failing to consider s.117B(6) of the Nationality, Immigration and Asylum Act 2002, i.e. whether it would be reasonable for the child to leave the United Kingdom.
50. However, I do not accept that the evidence before the Judge showed that the child was a qualifying child. In her witness statement dated 29 November 2019 (AB/5), the appellant's partner said that she left Iran in 2013 for the United Kingdom. The hearing before the Judge took place on 17 December 2019. Accordingly, it cannot be said

that the evidence before the Judge showed that the child had lived in the United Kingdom continuously for at least 7 years, on any reasonable view.

51. Nevertheless, I am satisfied that the Judge erred in law in his assessment of the appellant's Article 8 claim, for the following reasons:

(i) At para 68 of the respondent's refusal letter, the respondent noted that the appellant was living in Glasgow and that his partner and the three children were living in Birmingham. Nevertheless, the respondent stated that it was accepted that the appellant was in a genuine subsisting relationship with his partner, that he had a parental relationship with his two children and had a parental relationship with his partner's child. These were clear concessions on the part of the respondent.

(ii) However, at para 56 of his decision, the Judge questioned whether the relationship between the appellant and his partner "*still subsists to any meaningful degree ...*". It appears that he was also taking issue with whether the appellant had a parental relationship with his partner's child as he referred to the appellant having forged "*that relationship ... with indecent haste*".

(iii) It is therefore clear that the Judge went behind the respondent's concession that the appellant had a genuine subsisting relationship with his partner, without giving the appellant fair notice thereof. It may also be that he went behind the respondent's conclusion that the appellant had a parental relationship with the partner's child without giving the appellant fair notice.

(iv) These errors were plainly material to the Judge's assessment of proportionality. They are sufficient to vitiate the Judge's assessment of proportionality.

52. For all of the reasons given above, I am satisfied that the Judge did materially err in law in reaching his decision on the appellant's protection claim and his Article 8 claim. I therefore set aside his decision in its entirety. None of his findings can stand.

53. It is therefore unnecessary for me to deal with the remainder of the grounds.

54. The next question is whether the decision on the appellant's appeal should be re-made in the Upper Tribunal or whether the appeal should be remitted to the First-tier Tribunal.

55. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal (the "Practice Statements") recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

"(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

56. In my judgment, this case falls within para 7.2 (a). It cannot be said that the appellant has had a fair hearing. His case has simply not been considered. The Judge did not summarise the basis of the appellant's protection claim. He did not refer to the findings of Judge Macdonald. Although his decision is a lengthy one, it is noticeably lacking in any specific content about the appellant's protection claim. He repeatedly stated his conclusions without giving reasons. Furthermore, he repeatedly said that the appellant had family in Iraq without engaging with his evidence in his witness statement that he has lost contact with his family. In any event, this case plainly falls within para 7.2(b).

### **Notice of Decision**

57. The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside. This appeal is remitted to the First-tier Tribunal for a fresh hearing on the merits on all issues by a judge other than Judge of the First-tier Tribunal S.T. Fox.

This case would benefit from a case management review hearing, for the reasons given at paras 42-45 above. That may also provide the parties with an opportunity to narrow the factual issues.

Signed  
Upper Tribunal Judge Gill

Date: 6 October 2020

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### **NOTIFICATION OF APPEAL RIGHTS**

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is "sent" is that appearing on the covering letter or covering email