



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

**Appeal Number
UI-2021-001703
[PA/03672/2020]
UI-2021-001704
[PA/03673/2020]**

THE IMMIGRATION ACTS

**Heard at George House,
Edinburgh
On the 28 September 2022**

**Decision & Reasons
Promulgated
On the 02 November 2022**

Before

**UT JUDGE MACLEMAN
& DEPUTY UT JUDGE DOYLE**

Between

R A H & D A K

and

Appellants

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by Latta & Co,
Solicitors

For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Background

1. The first appellant is the mother of the second. They are Iraqi Kurds from the IKR. The first appellant claimed asylum on 18 July 2017 and the second on 28 January 2019. On 22 April 2020, the respondent refused both applications.

The Judge's Decision

2. By a decision promulgated on 15 June 2021 First-tier Tribunal Judge McGrade ("the Judge") dismissed both appeals.
3. Grounds of appeal to the UT were lodged and on 19 July 2022 Judge Neville granted permission.

The Hearing in the UT

4. Mr Caskie moved the grounds of appeal. He told us that the Judge had misinterpreted the record of the first appellant's screening interview, departed from the guidance in JA Afghanistan v SSHD [2014] EWCA Civ 450, and compounded his error by failing to deal with, or by giving inadequate reasons for rejecting, evidence contained in the combination of the appellants' asylum interview records, their witness statements, and oral evidence. He further maintained that the Judge's article 8 proportionality exercise was incomplete.
5. Mr Caskie referred to SA (Removal destination; Iraq; undertakings) Iraq [2022] UKUT 37 (IAC). He submitted that as the respondent intended to return both appellants to Baghdad, not the IKR, and neither would return voluntarily, SA shows that they are entitled to humanitarian protection.
6. Mr Diwnycz said that in light of up to date country information and a change of practice, the respondent's intention would now be to return both appellants to Sulaymaniyah, within the IKR, from which point the appellants would have no apparent difficulties. However, he conceded that the decision contains inadequate consideration of internal relocation and of the feasibility of return in light of the decisions in SA and in SMO & KSP (Civil status documentation; article 15) Iraq CG [2022] UKUT 00110 (IAC).
7. Ultimately, as submissions developed, both representatives invited us to set the decision aside and remit to the First-tier Tribunal to be determined of new.

Analysis

8. The thrust of the Judge's decision is that he sees discrepancies in the various strands of evidence. He describes the evidence of both appellants as unsatisfactory and explains why he finds contradictions.
9. In YL(2004) UKIAT 00145 the Tribunal noted that, whilst the answers given at a screening interview are expected to be true and may fairly be compared to answers given later, it is not appropriate at this stage to expect a detailed account of the applicant's asylum claim and account should be taken of the fact that the interviewee may well be tired after a long journey. These matters have to be borne in mind when considering inconsistencies between the screening interview and the later evidence.
10. In JA (Afghanistan) v Secretary of State for the Home Department [2014] EWCA Civ 450 it was held that the common law principle of fairness required that a First-tier Tribunal had to consider with care the significance to be attached to answers given by an asylum seeker in screening or asylum interviews that were recorded only by the person asking questions on behalf of the Secretary of State for the Home Department, particularly where an interpreter was required, or the asylum seeker was vulnerable by reason of age or infirmity.
11. Although the Judge accepts that the appellants endured a gruelling journey to the UK, and that the first appellant complained that she was both ill and tired when interviewed, he uses the appellants' performance at screening interview as the foundation for his adverse credibility findings. The grounds and submissions show that he made more than was justified of an apparent shortcoming in the evidence from the first appellant at the screening stage. This slip fed into the analysis of the rest of the evidence.
12. An expert report from Dr Fatah was before the Judge. The Judge summarises its contents, but makes no findings and neither accepts nor rejects its conclusions. He does not factor it into his overall assessment.
13. It is a matter of agreement that the Judge's consideration of the feasibility of return and the viability of internal relocation is lacking. Since the Judge's decision was promulgated, country guidance relevant to these appeals has been clarified. We are now told it is intended to return both appellants to IKR.
14. In SA (Removal destination; Iraq; undertakings) Iraq [2022] UKUT 37 (IAC) it was held that
 - (i) 'Removal' in s84 of the Nationality, Immigration and Asylum Act 2002 refers to enforced removal pursuant to directions issued by the Secretary of State and not to the possibility of an individual making a voluntary return to their country of origin or a part of that country.

- (ii) A person ("P") who would be at risk on an enforced return but who could safely make a voluntary return is not outside P's country on account of a well-founded fear of persecution. P is consequently not owed the obligation of non-refoulement in Article 33(1) of the Refugee Convention and cannot succeed on the ground of appeal in s84(1)(a).
- (iii) In considering the ground of appeal in s84(1)(c), however, a court or tribunal must only consider whether P's enforced removal would be unlawful under section 6 of the Human Rights Act 1998. P's ability to return voluntarily to a part of the country to which he will not be removed is irrelevant to that ground of appeal.
- (iv) The Secretary of State should, where possible, identify the place to which she intends to enforce removal; that location provides the proper focus for the issues which arise in the appeal.
- (v) In Iraqi protection appeals, enforced removal is only currently possible to Baghdad International Airport because the authorities of the Independent Kurdish Region only accept voluntary returnees. Where P might safely return voluntarily to the IKR, that is determinative of the Refugee Convention ground of appeal (against him) but is irrelevant to the human rights ground of appeal, since the focus can only be on the safety of P's enforced removal to Baghdad.
- (vi) An undertaking by the Secretary of State not to remove P until it would be safe to do so (when he has acceptable Civil Status documentation or until he can be forcibly removed to the IKR, for example) cannot be accepted by the tribunal because to do so would impermissibly delegate to the respondent the legal claim which is for that tribunal to determine. That claim must be assessed by considering the safety of the only available route of enforced return, which is via BIAP.

15. In SMO & KSP (Civil status documentation; article 15) Iraq CG [2022] UKUT 00110 (IAC) it was noted at [26] that

"There are regular direct flights from the UK to the Iraqi Kurdish Region and returns might be to Baghdad or to that region. It is for the respondent to state whether she intends to remove to Baghdad, Erbil or Sulaymaniyah."

16. We note that notwithstanding the submissions to us, we were not shown that the appellants asserted in evidence that they would refuse under all circumstances to co-operate in returning to anywhere in Iraq, or that any findings have been made on such matters.

17. The above issues will be live when remaking the decision.

18. Remittal to First-Tier Tribunal
19. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal 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.
20. Based on the errors of law summarised above, and as conceded, we set aside the decision of the FtT. None of its findings of fact are to stand. In light of the extent of the further fact-finding exercise required we remit the case to the FtT to be reheard, not before Judge McGrade. The remaking will extend also to the case on human rights grounds.
21. There may be no ongoing need to depart from the principle of open justice, but as the matter was not addressed in the UT, we retain anonymity at this stage.
22. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, no-one shall publish or reveal any information, including the name or address of the appellants, likely to lead members of the public to identify them, without their express consent. Failure to comply with this order could amount to a contempt of court.

P Doyle

5 October 2022
Deputy Upper Tribunal Judge Doyle

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.