



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

Appeal Number: UI-2022-006469  
[PA/50697/2020]

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 1 August 2023**

**Decision & Reasons  
Promulgated  
On 15 August 2023**

**Before**

**UPPER TRIBUNAL JUDGE PITT**

**Between**

**Secretary of State for the Home Department**

**and**

**DA**

**(Anonymity Direction Made)**

Appellant

Respondents

Representation:

For the appellant: Mr Melvin, Senior Home Office Presenting Officer

For the respondent: Ms Ferguson, Counsel instructed by C K Solicitors

**Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.**

## **DECISION AND REASONS**

1. This is a remaking of an appeal brought on humanitarian protection grounds.
2. For the purposes of the appeal, I refer to the Secretary of State for the Home Department as the respondent and to DA as the appellant, reflecting their positions before the First-tier Tribunal.

### **Background**

3. The appellant is a national of Iraq, born in 2003. He is of Kurdish ethnicity.
4. The appellant claimed asylum in the UK on 26 March 2020. The appellant maintained that his father was an Iranian of Kurdish ethnicity who moved to Ranya in the Kurdish Region of Iraq (KRI) in approximately 1989. The appellant's father then worked as a smuggler taking alcohol to and from Iran and also supported the Kurdistan Free Life Party (PJAK), a Kurdish militia fighting against the Iranian regime for self-determination for Kurds. In October 2019 the appellant's father and brother were attacked by the Iranian authorities. The appellant's brother was killed and his father severely injured and went into hiding. The appellant's maternal uncle took the appellant into hiding and at some point the appellant's step-mother and sisters also went into hiding. The appellant's uncle made arrangements for the appellant to leave Iraq with an agent.
5. The respondent refused the appellant's claim on 4 November 2020 but granted him leave to remain until 11 May 2021 under Article 8 ECHR on the basis of his status as an unaccompanied minor. Following further submissions the respondent undertook a review of the refusal of the protection claim but on 16 March 2022 maintained the decision.
6. The appellant appealed against the refusal of his protection claim. The appeal was heard on 12 May 2022 by First-tier Tribunal Judge Cohen. In a decision issued on 29 September 2022 Judge Cohen did not find the appellant's claim that his family were at risk in Iraq from the Iranian authorities or on any other basis to be credible; see paragraphs 21 to 28 of the First-tier Tribunal decision. The First-tier Tribunal allowed the appeal on humanitarian protection (HP) grounds, however; see paragraph 32.
7. The respondent appealed against the decision of the First-tier Tribunal and permission was granted by the First-tier Tribunal on 22 November 2022. The error of law hearing took place on 15 May 2023. In a decision issued on 26 May 2023 I found an error of law in the First-tier Tribunal decision. As set out in paragraphs 7 to 9 of the error of law decision the findings on HP were not consistent with other findings in the decision as to the appellant's circumstances on return. The decision on HP was set aside to be remade. The remaking of the appeal took place after a hearing on 1 August 2023.

## Preliminary Issue

8. Prior to the error of law hearing on 15 May 2023, no application had been made by way of a cross appeal or in the Rule 24 response challenging the adverse credibility findings of the First-tier Tribunal or conclusion that the asylum appeal should be refused. There was no formal application at the error of law hearing but it was suggested for the appellant that if the appeal was to be remade there should be no preserved findings. I queried why that should be so given that there was no challenge to the adverse asylum findings of the First-tier Tribunal. It was argued for the appellant that it remained open to him to challenge the refusal of the asylum appeal. This issue was addressed in paragraphs 10 and 11 of the error of law decision:

“10. There was no challenge to the findings of fact made by Judge Cohen. The appellant had the opportunity to challenge those findings in a cross-appeal or a Rule 24 response. There was no cross-appeal or Rule 24 response challenging the findings of fact made in the First-tier Tribunal. Ms Ferguson suggested at the hearing before me that he could still challenge those findings now. No legal argument or explanation for failing to cross appeal or make a challenge in a Rule 24 response were made, even in oral argument before me. It was not my view that such a challenge was permissible now given that it was not brought earlier despite the opportunities to do so, that there was no substantive reason for not doing so and that not even on the day of the hearing the matter was not raised until some time after submissions had begun and when it became apparent that the decision of the First-tier Tribunal on humanitarian (sic) was unlikely to be sustained.

11. The remaking of the appeal will therefore proceed on the basis of the extant findings of fact made by the First-tier Tribunal. As there are extant findings and the extent of the remaking is limited, it is appropriate for the remaking to take place in the Upper Tribunal.

12. No later than 7 days prior to the remaking hearing, the parties are to file a skeleton argument setting out their position on the appellant’s claim on asylum, human rights and humanitarian protection grounds.

13. No later than 7 days prior to the remaking hearing, the parties are to file an agreed bundle including any further witness statements and country evidence in an indexed and paginated format.

14. If the appellant intends to give any further oral evidence at the remaking hearing and requires an interpreter, the Upper Tribunal must be informed of this no later than 14 days after the issue of this decision.”

9. With hindsight the error of law decision could have been more precise as to the scope of the remaking. It was clear, however, from paragraphs 10 and 11, the decision as a whole and the history of the appeal, that it was the HP appeal that was set aside to be remade and not the asylum appeal or Article 8 ECHR. There had been no challenge to the findings on asylum or Article 8 ECHR and, in fact, the appellant had not lodged an Article 8

ECHR appeal and his skeleton argument before the First-tier Tribunal did not raise this as a ground.

10. It is clear that the appellant's representatives understood that the remaking was limited and did not include a remaking of the asylum appeal as on 12 July 2023 they made submissions seeking an extension of time in order for grounds challenging the adverse credibility findings of the First-tier Tribunal and conclusion that the asylum appeal should be refused to be admitted. On 17 July the Upper Tribunal made a direction that the application should be particularised and address the ratio of MS (appealable decisions; PTA requirements; anonymity) [2019] UKUT 00216 (IAC), a Presidential decision which provides guidance on the correct approach to onward appeals when an appellant has succeeded on some grounds before the First-tier Tribunal but failed on others.

11. The relevant sections of the head note of MS provide:

“(2) If an appellant's appeal before the First-tier Tribunal succeeds on some grounds and fails on other grounds, the appellant will not be required to apply for permission to appeal to the Upper Tribunal in respect of any ground on which he or she failed, so long as a determination of that ground in the appellant's favour would not have conferred on the appellant any material (ie tangible) benefit, compared with the benefit flowing from the ground or grounds on which the appellant was successful in the First-tier Tribunal.

(3) In the event that the respondent to the appeal before the First-tier Tribunal obtains permission to appeal against that Tribunal's decision regarding the grounds upon which the First-tier Tribunal found in favour of the appellant, then, ordinarily, the appellant will be able to rely upon rule 24(3)(e) of the 2008 Rules in order to argue in a response that the appellant should succeed on the grounds on which he or she was unsuccessful in the First-tier Tribunal. Any such response must be filed and served in accordance with those Rules and the Upper Tribunal's directions.

(4) If permission to appeal is required, any application for permission should be made to the First-tier Tribunal in accordance with rule 33 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014, within the time limits there set out. This includes cases where the appellant has succeeded on some grounds but failed on others, in respect of which a material benefit would flow (see (2) above).

(5) There is, however, no jurisdictional fetter on the Upper Tribunal entertaining an application for permission to appeal, even though the condition contained in rule 21(2)(b) of the 2008 Rules has not been met, in that the First-tier Tribunal has not refused (wholly or partly), or has not refused to admit, an application for permission to appeal made to that Tribunal. Rule 7(2)(a) of the 2008 Rules permits the Upper Tribunal to waive any failure to comply with a requirement of the Rules. The guidance in EG and NG (UT rule 17: withdrawal; rule 24: Scope) Ethiopia [2013] UKUT 00143 (IAC) is otherwise confirmed.

(6) The Upper Tribunal is, nevertheless, very unlikely to be sympathetic to a request that it should invoke rule 7(2)(a), where a party (A), who could and

should have applied for permission to appeal to the First-tier Tribunal against an adverse decision of that Tribunal, seeks to challenge that decision only after the other party has been given permission to appeal against a decision in the same proceedings which was in favour of A.”

12. On 21 July 2023 appellant particularised the application for an extension of time in order for grounds challenge the adverse asylum decision in the First-tier Tribunal decision with reference to MS. The Upper Tribunal indicated that this application would be addressed at the hearing on 1 August 2023 after hearing submissions on it from both parties.
13. The parties submitted skeleton arguments for the remaking hearing on 1 August 2023 in line with the direction made in paragraph 12 of the error of law decision issued on 26 May 2023. No agreed bundle was provided as directed in paragraph 13 of the error of law decision. The Upper Tribunal was not informed that the appellant was to give further evidence or that an interpreter was required as directed in paragraph 14 of the error of law decision. Unsurprisingly, no interpreter was booked for the hearing on 1 August 2023.
14. The parties made oral submissions on the jurisdictional issue at the outset of the hearing on 1 August 2023. Ms Ferguson maintained that there was no material benefit in challenging the refusal of the asylum claim where the appellant had been successful before the First-tier Tribunal on HP grounds. Applying paragraph 2 of the head note of MS, he had therefore not been required to submit grounds of appeal against the First-tier Tribunal asylum appeal decision. He was also not required to indicate that he intended to challenge the asylum appeal decision in the Rule 24 response dated 19 December 2022. If those submissions were not accepted, he should still be granted an extension of time to either admit grounds of appeal against the First-tier Tribunal or an amended Rule 24 challenging the asylum findings in the interests of justice.
15. Mr Melvin maintained that there was a material difference in being found credible and recognised as a refugee and being granted HP. They were different categories, attracting different periods of leave and dealt with entirely different aspects of the appellant’s profile. If that was not correct, the appellant should have indicated in the Rule 24 response that he wished to challenge the outcome of the asylum appeal in line with paragraph 3 of the headnote of MS. He did not do so and no explanation for failing to do was provided. He did not indicate that he wished to challenge the outcome of the asylum appeal until after it became apparent that the HP decision of the First-tier Tribunal would be remade. Paragraph 6 of MS indicated correctly that the Tribunal should be unsympathetic to the application for a significant extension of time where the delay in raising the new challenge, certainly in the Rule 24 response, was not explained.

### Decision on Preliminary Issue

16. The facts in MS were that the appellant was successful before the First-tier Tribunal on EU law grounds but the First-tier Tribunal did not make a decision on his Article 8 ECHR appeal. The appellant did not make an application for permission to appeal against the First-tier Tribunal decision but in a Rule 24 response maintained that he should be entitled to challenge the First-tier Tribunal decision where it failed to make a finding on his Article 8 claim.
17. The Upper Tribunal in MS found that the appellant was entitled to raise his challenge on Article 8 ECHR grounds in his Rule 24 response. The key consideration when deciding if an applicant should have made an application for permission to appeal to the First-tier Tribunal was whether a different outcome on the ground on which an appellant had been unsuccessful amounted to a “materially different conclusion”; see paragraph 55 of MS.
18. The Upper Tribunal in MS approved much of what was said in EG and NG (UT rule 17: withdrawal; rule 24: Scope) Ethiopia [2013] UKUT 00143 (IAC), setting out in paragraph 50 an extensive extract from EG. This included paragraph 47 of EG which, when considering whether a respondent should apply for permission to appeal or raise an issue in a Rule 24 response, stated:
  - “ 47. This is probably more significant in international protection cases than entry clearance cases because an appeal can be allowed on different grounds. An appellant may have shown, for example, alternatively, that he is a refugee, or entitled to humanitarian protection or that removal is contrary to his rights under article 8 of the European Convention on Human Rights. The beneficial consequences of success would be different in each case. For example a person found to be entitled to humanitarian protection may want to argue that he should have been recognised as a refugee whilst the Secretary of State may want to argue that the appeal should only have been allowed with reference to article 8. In such cases both parties would want a result materially different from the one decided by the Tribunal and both should seek permission to appeal.”
18. In paragraph 57 of MS the Upper Tribunal also found that there was a material difference between an appellant being recognised as a refugee as opposed to someone who would face Article 3 ECHR mistreatment. In paragraph 58 the Upper Tribunal found that no material benefit arose if there was a successful asylum or HP appeal and an unsuccessful Article 8 ECHR appeal. That was the situation in MS and the Upper Tribunal found that there was no requirement for permission to appeal but that the appellant had been entitled to address the Article 8 ECHR issue in his Rule 24 response. That is the approach set out in paragraph 3 of the head note to MS.
19. The appellant in this appeal maintained that there was no material difference between being recognised as a refugee and being granted HP. I

did not agree. Firstly, by the time of the First-tier Tribunal decision, if someone was found to be a refugee there was an option for them to be granted refugee permission (5 years leave to remain and settlement after 5 years) or temporary refugee permission to remain (2 ½ years leave and settlement after 10 year). A grant of HP could only lead to leave for 2 ½ years and a 10 year route to settlement. There was another minor difference as refugees would be entitled to a Convention travel documents but someone with HP leave had to use their national passport and if they could not get one obtain a Certificate of Travel from the respondent.

20. Secondly, the Presidential panel in MS approved the finding in paragraph 47 of EG that there was a material difference between being recognised as a refugee and being granted HP.
21. The appellant should, therefore, have applied for permission to appeal against the decision of the First-tier Tribunal notwithstanding that he had won his HP appeal.
22. If I am wrong on this, it is clear from MS that he should have raised the matter in his Rule 24 response. He did not. The Rule 24 response dated 19 December 2022 only argues that the HP decision was not in error and contains no reference to the appellant not having been found credible or the asylum appeal having been refused. Nothing in the written or oral submissions on the preliminary issue explained why the challenge to the asylum decision of the First-tier Tribunal was not addressed in the Rule 24 response as provided in paragraph 3 of the head note of MS.
23. The appellant also relied on paragraph 5 of the head note of MS. Notwithstanding the failure to challenge the adverse asylum decision of the First-tier Tribunal at all until the end of the error of law hearing, the Upper Tribunal had case management powers allowing for an extension of time to admit either amended grounds of appeal or an amended Rule 24 response or to otherwise allow the appellant to re-litigate his asylum claim as part of the remaking of the appeal. It was submitted for the appellant that it was in the interests of justice to do so. I did not agree. The Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) provide for the appellant to challenge the asylum appeal decision either by way of an application for permission to appeal or in the Rule 24 response. He did neither. Even if there was no material difference between being successful on HP grounds and not on asylum grounds, the appellant was still required to raise a challenge to adverse asylum findings in the Rule 24 response but did not. This matter was raised 5 months after the Rule 24 response and only towards the end of the error of law hearing by way of a suggestion that in the remaking no findings of fact should be preserved. There was no explanation as to why the issue was not raised in the Rule 24 response or why the refusal of the asylum appeal was not referred to at all until the hearing on 15 May 2023. The interests of justice would be poorly served in admitting the late challenges to the First-tier Tribunal decision on the asylum appeal in these circumstances.

24. For completeness sake, I should indicate that at the hearing on 1 August 2023 it was suggested that the Upper Tribunal should have booked an interpreter. As above, no additional witness statement was served in line with paragraph 13 of the error of law decision and the appellant's legal representatives did not inform the Upper Tribunal that the appellant intended to give evidence and required an interpreter as directed in paragraph 14 of the error of law decision. In the event, after hearing submissions on the issue set out above and announcing my decision that only the HP appeal was to be remade, neither representative identified any further evidence that they wished to take from the appellant and the issue of needing an interpreter fell away.

#### Decision on Humanitarian Protection

25. The appellant is now a 19 year old young man from the Independent Kurdish Region (IKR) who has been in the UK since March 2020. His claim that his family faced adverse interest from the Iranian authorities has not been accepted. It is not accepted that his brother was killed or that his father went into hiding or that other family members went into hiding. His evidence was that his father, step mother, four siblings and a maternal uncle live in the IKR. Nothing indicates that the appellant would not be able to return to live with these relatives and be supported by them on return.
26. The appellant's evidence in his witness statement dated 14 July 2020 at paragraph 4 asylum interview (see questions 75, 76 and 79, for example) on whether he had a CSID was that he did not know. The respondent maintained in the refusal letter that as the appellant had been to school in the IKR he would have been issued with a CSID document; see paragraphs 55 and 66 of the refusal letter dated 4 November 2020. In his appeal statement dated 26 May 2021 the appellant stated in paragraph 4 that he did not know if he had been issued with a CSID. In an Additional Respondent's Review dated 16 March 2022, the respondent set out in section C that it was not accepted that the appellant did not have a CSID, reliance was placed on paragraphs 55 and 56 of the refusal letter and the respondent maintained that he "still has [a CSID] in his possession or it could be sent to him from his family in Iraq who would have retained it." Taking his evidence at its highest, the appellant does not deny that he was issued with a CSID. His evidence is that he did not know whether he was or not. The country material relied on by the respondent shows that in order to go to school and go about his life in the IKR the appellant must have had a CSID. The appellant has never given evidence directly opposing the respondent's conclusion that he had a CSID and that he can get this document from his relatives in Iraq. My conclusion on the evidence on this matter is that the appellant was issued with a CSID and, in the absence of any evidence to the contrary, he can be expected to obtain this document from his family and use it to return to his family home in Iraq.
27. The appellant relied on two documents to support his HP claim on the basis of his mental health. The first contained extracts from his GP notes



dated 18 January 2021 and 23 February 2021. The notes record that the appellant reported headaches, memory loss and flashbacks. The GP noted that social isolation was a factor and indicated that they would try to get the appellant counselling and write to paediatrics. The entry for 23 February 2021 referred to similar symptoms and a referral to neurology. The appellant was recorded as having “no active suicidal thoughts or plans” and was awaiting a Kurdish counsellor. He was unhappy with his housing situation. His social work team had to be involved in any decision to prescribe sleeping tablets or anti-depressants so would be contacted.

28. The second piece of medical evidence was a letter dated 25 May 2021 from Ms Shalini Mehta, a child/art psychotherapist at the Refugee Council. The appellant had been referred on the basis of “extreme sadness, depression, memory loss and high levels of anxiety due to his asylum case.” An initial assessment found him to be in the “severe” category of clinical difficulty. Ms Mehta considered that the appellant’s symptoms were consistent with his having experienced “majorly distressing and traumatic past events.” He was having therapy sessions and being monitored and Ms Mehta considered that “he seems to have complex mental health needs.”
29. I did not find that the medical evidence was sufficient to show that the appellant was in need of HP when it was considered against the country evidence on medical provision in the IKR and the appellant being able to be supported by his family there. The medical evidence is over 2 year old. Nothing indicated that the appellant was so unwell that he was ever prescribed any medication or had counselling or therapy beyond that described by Ms Mehta. I accept that Ms Mehta is a professional with experience of working with asylum seekers but I did not find that her qualifications and experience as a psychotherapist and the brevity of her opinion could attract significant weight. As above, the GP notes identified some mental health issues but were also brief and did not appear to have led to any further investigation or treatment. The country materials show that there is poor but basic healthcare available in Iraq. The high threshold provided in AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17 is not shown to have been met here.
30. The country materials also showed that the economic and general living conditions in the IKR are poor but not, without more, so poor as to found a claim for HP. I therefore concluded that the appellant would not face inhuman or degrading treatment on return or there is a degree of indiscriminate violence in his home area such that he qualified for HP.
31. I therefore refuse the appeal on humanitarian protection grounds.

#### Notice of Decision

32. The decision of the First-tier Tribunal on the humanitarian protection appeal discloses an error on a point of law and is set aside to be remade.
33. The appeal on humanitarian protection grounds is refused.

Signed: S Pitt  
Upper Tribunal Judge Pitt

Date: 3 August 2023