Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: AA/12366/2015**

THE IMMIGRATION ACTS

Heard at HMCTS Employment Tribunals, Liverpool	**Decision & Reasons Promulgated**
On 12th January 2017	**On 24th July 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR ABDULLA AHMED SABER
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Draycott (Counsel)
For the Respondent: Mr G Harrison (HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge M Davies, promulgated on 18th August 2016, following a hearing at Manchester Piccadilly on 9th August 2016. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a male, a citizen of Iraq. He appeals against the decision of the Respondent dated 9th September 2015, refusing his claim for asylum in the United Kingdom on the basis of his Kurdish ethnicity because he comes from an area that is controlled by the Kurdish Regional Government in Iraq.

The Appellant's Claim

3. The Appellant's claim has been that he fears ISIS (Daesh) because they seized control of Mosul and the Appellant was unable to return to work. He had been involved in mechanical engineering and he claims to have established a company which was involved in mechanical work on electricity substations. He claims that he was prevented from carrying out such work on an electricity substation in Mosul because it came under the control of Daesh. He and his partner then employed a crane driver by the name of Huer, who he alleges was subsequently kidnapped by Daesh, resulting in Huer's family blaming the Appellant for being involved in Huer's abduction, such that they have now threatened to kill him or do him serious harm. He claims he has been receiving threatening telephone calls from Daesh.

The Judge's Findings

4. The judge rejected the Appellant's claim that he was unable to continue carrying on work after Mosul came under the control of Daesh. The judge also rejected the claim that Huer was abducted such that the Appellant can now be blamed for his abduction by Huer's family. The Appellant had claimed that after he received threatening telephone calls he sought guidance from his uncle who worked for the Kurdish Security Forces and the judge held that "it is wholly incredible that if the Appellant subsequently had a problem with Huer's family, members of the Bradost Tribe, for the reasons he has claimed that he would not utilise the services of his uncle again ..." (paragraph 62). The judge also held that he could not understand why the Appellant should choose to leave Iraq when he had no direct contact whatsoever with those threatening him. Moreover, he had every opportunity to move elsewhere in the Kurdish Regional Government area. Indeed, he could return to another area which is not under the control of Daesh, namely, an area which is controlled by the Kurdish Regional Government. The judge rejected entirely the suggestion that he was at risk from Huer's family or from members of the Bradost Tribe in the area controlled by the Kurdish Regional Government. Internal relocation was entirely within the reach of the Appellant and he could not succeed in this claim.

Grounds of Application

5. The grounds of application state that the judge, before coming to the findings that he did, which I have set out above, stated at the outset that,

> "The fact that the Appellant passed through both Italy and France en route to the United Kingdom and did not claim asylum is evidence that does damage his credibility. The reason for that is that it is clear having spent some months in Turkey that the Appellant left Turkey with the intention to seek international protection. He has given no evidence whatsoever as to why he did not seek that international protection in either Italy or France where he was well able to do so. That in my view does damage his credibility" (paragraph 60).

6. The grounds state that the Appellant's journey to the United Kingdom was not a matter raised by the Secretary of State in her letter of refusal. It was not raised by the Secretary of State's advocate at the Case Management Review hearing. It was not canvassed during cross-examination either. Since the Respondent did not rely on Section 8 of the 2004 Act, and since the Appellant had prepared his case on the assumption that his credibility was not damaged, there had been an inherent unfairness caused to the Appellant. Judge Davies did not inform the parties of his concerns in relation to the Appellant's journey to the UK at the hearing. He did not ask the Appellant questions about his journey. In short, the Appellant had been given no opportunity to deal with the judge's concerns.

7. On 12th September 2016, permission to appeal was given by the Tribunal on the basis that the refusal letter did not rely on Section 8 of the 2004 Act and the Record of Proceedings shows that the Respondent did not rely on Section 8 either and so it was wrong for the judge to have based his decision on this without giving the parties the opportunity to address this matter.

8. On 2nd October 2016, a Rule 24 response was entered by the Secretary of State on the basis that the Appellant's account was largely incredible. The Appellant was unable to support his claim that his problems arose from working on an electrical substation in Mosul. The judge explained why he found it implausible that the Appellant would not use the services of his uncle to resolve the position with the Bradost Tribe and benefit from security in the KRG area. Moreover, internal relocation was available to the Appellant.

The Hearing

9. At the hearing before me, Mr Draycott, appearing on behalf of the Appellant repeated the grounds that had been set out in the Grounds of Appeal. The core aspect of the claim was a fear that the Appellant had on account of his work in Mosul from ISIS (Daesh), as well as the blood feud that had arisen with the Bradost Tribe. If the judge was to raise Section 8 as an issue it was something that should have arisen at the end of his analysis. It was not the starting point and this had been made clear in the case of **JT Cameroon [2009] 1WLR 1411** and the case of **SM (Section 8: Judge's Process) Iran [2005] UKAIT 00116**. In the first of these

cases the qualifying word "potentially" should be inserted before the word "damaging." In the second of these cases it was held that,

> "Given the terms of Section 8, it is inevitable that the general fact-finding process is somewhat distorted, but that distortion must be kept to a minimum. There is no warrant at all for the claim, made in the grounds, that the matters identified by Section 8 should be treated as a starting point of a decision on credibility."

10. Mr Draycott submitted that the situation was particularly invidious given that Section 8 had not even been raised before the hearing. It was not raised at the hearing either.

11. For his part, Mr Harrison relied upon the Rule 24 response and submitted that the judge has to take into account Section 8 even it is not raised if he deems it to be relevant. The Appellant did travel through other European countries and he took time to decide when to seek international protection. The judge had to start somewhere with Section 8 and although this had been set out at the beginning of his findings at paragraph 60 this did not mean to say that the other findings that followed thereafter could not stand independently. Indeed, if one looks at them carefully, they do stand independently of the Section 8 evaluation made at the outset.

12. In reply Mr Draycott submitted that immigration hearings are not "inquisitorial" hearings but are "adversarial" and the judge should not have entered the arena, and if he did do so, he ought to have given notice to the parties, which he did not do, thereby depriving them of the right to deal with the issues that were in his mind.

13. At the end of the Hearing I proceeded to make my decision which was then immediately sent for typing, and I give below herewith my reasons, for deciding this appeal as I did.

My Consideration of the Appeal

14. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of **TCEA [2007]**) such that I should set aside the decision. My reasons are as follows.

15. First, whereas it is entirely arguable that the judge independently of his statement at paragraph 60 makes separate and discrete findings against the Appellant from paragraphs 61 to 64 in relation to his claim, before concluding ultimately that internal relocation is available to him (at paragraph 65), the question is whether these findings have been tainted by a finding reached at the outset that the Appellant's credibility is damaged because he travelled through Italy and France before arriving in Turkey and then moving on to the United Kingdom to make an asylum claim. The case of **SM [2005] UKAIT 00116** is clear that, "there is no warrant at all for the claim made in the grounds that the matters identified by Section 8 should be treated as a starting point of a decision on credibility."

16. Second, and even more importantly, the fact that the judge does not raise this matter in open court, in the absence of it having earlier been raised in the refusal letter, deprived the representative for the Appellant the chance of dealing with this matter of travelling through other countries before arriving in the UK to make an asylum claim.

17. Third, the judge also, in rejecting the Appellant's core claim, namely, that his difficulties arose when ISIS took over Mosul, made the statement that, "none of the evidence produced in the form of documents by the Appellant supports that contention" (paragraph 62), whereas it is well-established that cooperation is not a requirement in an asylum claim: see **Ates [2002] UKIAT 06221**.

18. Finally, there is the matter raised in the Skeleton Argument with respect to the case of **Bagdanavicius (2004) 1WLR 1207**, where the Court of Appeal stated that, even if there was state protection available in the receiving state, it may be the case that state authorities, "are unlikely to provide the additional protection his particular circumstances reasonably require," and if this is the case then he would have a well-founded fear of persecution. This is a matter that would need to be properly probed by a First-tier Tribunal Judge again, but it is arguable, that given what I have already identified as amounting to errors of law, that this may or may not have a significance, but it would be for the judge in the First-tier Tribunal to determine afresh.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is remitted back to the First-tier Tribunal, to be determined by a judge other than Judge M Davies pursuant to Practice Statement 7.2(a) because 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 before the First-tier Tribunal.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 11th July 2017