Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01562/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 November 2018	**On 21 December 2018**

Before

UPPER TRIBUNAL JUDGE WARR

Between

H G
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Draycott of Counsel instructed by Sutovic & Hartigan
For the Respondent: Ms N Willocks-Briscoe, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Iraq born in July 1975. He claimed to have had problems in Iraq and following a message from his mother that the police wanted him he escaped and applied for asylum on 27 July 2010, the day of his arrival in the United Kingdom. His appeal was dismissed on 29 October 2010 by Judge Blackford and the appellant became appeal rights exhausted on 15 December 2010. There were fresh representations and judicial review proceedings and in January 2018 the respondent refused the application following the representations but granted an in country right of appeal. The appellant's appeal came before a First-tier Judge on 5

March 2018. The appellant was represented by Mr Draycott. Mr Scholes appeared for the respondent. The appellant did not appear at the hearing and neither did his witness, his uncle.

2. The principal issue in this case is the judge's decision to refuse the application for the adjournment of the proceedings and it is appropriate to set out the part of the decision where the application to adjourn is considered as follows:

> "2. I called the case on at 10am. Mr Draycott informed me that the Appellant had not yet arrived, and neither had his witness, who is the Appellant's uncle. Mr Draycott informed me that he would be applying for an adjournment. He filed, twenty minutes before the hearing, an Appellant's bundle comprising 415 pages, and a skeleton argument. Having assessed the relevant issues, and noting that the Appellant intended to apply for an adjournment, the case was called on substantively at 12 noon. At this stage, there was no attendance by the Appellant, nor by his witness. Mr Draycott informed me that his instructing solicitors had been attempting to contact the Appellant, but there was no reply from the Appellant's mobile telephone, and they had no idea where the Appellant was. Having checked the documents with the file, I was satisfied that the Appellant's representative had been fully informed of the hearing, obviously, considering that the Appellant's Counsel had turned up. Mr Draycott informed me that the address for the witness was in Dundee, Scotland. Mr Draycott said it was "obvious" why the witness was not here. There had been much traffic disruption between Scotland and England in the last few days, and trains had been cancelled. I asked Mr Draycott what information he had from the uncle, and whether he had spoken to the uncle or whether those instructing him had spoken to the uncle. The answer was, I am afraid, a resounding "no". Thus, apart from inferring because of snow a couple of days ago, that the uncle might not have made it to England, there was no information as to why either the uncle, or the Appellant, was not in attendance. Nevertheless, Mr Draycott pursued an application for adjournment, because he said there were "multiple issues, and it was necessary to have an expert report in this case". In fact an application for adjournment had been made previously by the Appellant's representatives, by way of lengthy letter/facsimile on 27th February 2018, in similar terms. This application had been refused by the duty judge. An application on 20th February was refused because 'the Appellant has already had one appeal which was dismissed, he has remained in the UK for over seven years and has had ample time to get evidence together'. The application was remade. This time, it was refused again on 1st March for the same reasons and "because the representatives have avoided saying when they applied for funding for the proposed expert's report".
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> 3. Mr Scholes opposed an adjournment. He noted that the original application had been for three months, and now was revised down to two months, and opined that the Appellant had ample time to prepare the case, considering how long he had been in the United

Kingdom. Furthermore, he noted that there was no explanation for the absence of the Appellant, nor for the witness, and he sought to persuade me not to adjourn the matter.

4. Given the history of the Appellant's presence in the United Kingdom, and the fact that he has been represented throughout, and in particular, noting the lengthy chronology relating to litigation by the Appellant, I resolved not to adjourn the matter. I was satisfied that refusing the adjournment request would not prevent the just disposal of the appeal and refused it."

The judge then determined the appeal on the material before him finding that his starting point had to be the findings made by Judge Blackford in 2010. Judge Blackford had concluded that there were glaring inconsistencies in the appellant's evidence and these so undermined his credibility that he came to the conclusion that the appellant was "not to be believed as regards his account of the events leading up to his leaving Iraq". The First-tier Judge found Judge Blackford's decision, both his starting point and "I fear, my end point." There was no evidence from the appellant and no reason given for his absence. There was no evidence from the appellant's witness.

3. In considering the risks on return the judge took into account the guidance in **AA (Iraq) CG [2015] UKUT 544** and **BA (Returns to Iraq) CG [2017] UKUT 18**. Having found that the appellant had not established any subjectively genuine or objectively well-founded fear of persecution he concluded his assessment of the appellant's asylum claim as follows:

"22. The Respondent's representative has raised the issue of internal flight as an alternative to international protection and has claimed that it would not be unduly harsh for the Appellant to relocate internally. I have considered paragraph 3390 of the Immigration Rules.

(a) I was grateful to both legal representatives for their assisting me in working through the principles outlined in the country guidance case. I note from the case of **BA** (referred to above) that the general level of violence in Baghdad city remains significant but the current evidence does not justify departing from the country guidance case of **AA**, referred to above. In principle, I saw nothing within the facts within my findings, to persuade me that the Appellant can bring himself within the risk categories shown in **BA**.

(b) Turning to the case of **AA**, I am not persuaded that the Appellant comes from a so-called 'contested area' and I am not persuaded that he comes from a part of the Baghdad belt forming the border between the Baghdad governorate and other controlled areas.

(c) Mr Scholes said that the position of the Respondent, was that return at present was not 'feasible' because there was no evidence that the Appellant has either a passport or a laissez passer. He could in fact obtain the latter from the embassy of Iraq, Mr Scholes said. Regardless of the feasibility of his return, it is necessary to decide whether or not he has a

> CSID, or could obtain one, reasonably soon after arrival in Iraq. Clearly there is evidence that he has family or other persons able to provide means of support, in the interim before he obtains the CSID. There is no reason why the Appellant cannot attend his local civil status affairs office, or, if need be, the National Status Court in Baghdad, for formal recognition of identity. The position which I glean from **AA**, is that it would not be unreasonable or unduly harsh for a person from a contested area (or of course from west Baghdad) to relocate to Baghdad city or if necessary areas within the Baghdad belts, and I have taken into account the potential risk factors set out in paragraph 15 of the annex to **AA**. He could obtain a CSID. He speaks Arabic. He is not a lone female. He comes from a wealthy background and therefore could if necessary find accommodation. He is not from a minority community, being a member of the Shi'a majority.
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> In the case of **Januzi and Others [2006] UKHL 5**, it was decided that the test for whether it would be unreasonable for an asylum seeker to relocate to a safe haven within his own country is not whether the quality of life there fails to meet basic norms of civil, political and socio-economic human rights, but whether he would face conditions, such as utter destitution or exposure to cruel or inhuman treatment threatening his most basic human rights. The case of **AH and Others [2007] UKHL 49** reminds me that if the Appellant will face a standard of living in the safe haven which a significant proportion of his countrymen have to endure, then (absent individual characteristics making the Appellant particularly vulnerable) it will not be unduly harsh for him to relocate there. In this case, I am satisfied that the Appellant may reasonably be expected to relocate within their homeland."

4. The judge dismissed the appeal on humanitarian protection grounds. He found that the appellant could not meet any of the relevant provisions of the Immigration Rules and dismissed the appeal under Article 8. There was an application for permission to appeal. The application was refused by the First-tier Tribunal but the application was renewed and permission was granted by the Upper Tribunal on 12 October 2018 who found it arguable that the judge had erred in refusing to adjourn the appeal particularly in the light of what was said in paragraphs 8 and 9 of the application for permission. It was arguable that the judge's findings were flawed.

5. The respondent filed a response on 22 November 2018 arguing that the judge had given proper and anxious scrutiny to the adjournment request and he had not proceeded with the hearing until noon. Neither the appellant nor his uncle had even contacted the appellant's solicitors or the Tribunal to explain why they could or would not attend the hearing. There was only mere speculation on the part of the representative as to potential travel disruption by the appellant and his uncle. The judge had taken all relevant matters into account including the fact that the appellant had been given proper notice and was aware of the hearing. The decision was

open to the judge given the circumstances and also the history in this particular appeal. The additional grounds had no merit and merely disagreed with the adverse outcome of the appeal without identifying any arguable material error of law. The judge had considered all the evidence available to him.

6. The application for permission to appeal had been supported by a witness statement from a solicitor, Mr Sicher, dated 23 April 2018. Mr Sicher explains the background to the request to adjourn the proceedings prior to the judge's hearing. It was desired to instruct a country expert to provide a report which he would not be able to do before the proposed hearing in March and as the appellant was publicly funded it was necessary to apply for an extension of costs to cover her report but it was said that the legal aid agency would not consider granting any funds for any expert or exceptional funding until the Tribunal granted an extension of time for the full hearing. The application was refused on 22 February and the application had been refused by the Tribunal on 1 March 2018. The decision was accordingly taken to renew the adjournment application in court. Mr Sicher had emailed the appellant on 2 March 2018 and had informed him of his hearing on 5 March and that both he and his uncle should attend. If his uncle was unable to attend "for instance because of the weather" then he should inform the barrister on the day of the hearing. Mr Sicher received no response to the email or any indication that it had not been received by the appellant. He called both the appellant and his uncle on the day of the hearing but the appellant's number would not accept a message and the appellant's uncle did not respond but Mr Sicher left a message for him to contact him. On 13 April 2018 Mr Sicher contacted the appellant following receipt of the decision dismissing his appeal but the appellant did not respond. His uncle did respond and when asked why he and the appellant had not attended the hearing he informed Mr Sicher that the appellant had no money and that he was kicked out of his NASS accommodation and since he had been moving between various addresses he had no way to support himself. He could only contact him through WhatsApp. He was then able to contact the appellant who informed Mr Sicher that since being made homeless and destitute by NASS he had had to move to various addresses and that he often did not have any money including money to put on his mobile phone to be able to receive or make calls or to be able to use the internet. He was unable to check his emails and that was why neither he nor his witness had attended the hearing. It was unclear to Mr Sicher why the appellant had lost his NASS support.

7. At the hearing Counsel said there was no further statement from Mr Sicher. The appellant might or might not be out of the jurisdiction but the appeal would not have been abandoned he submitted under the current legislation. Counsel referred to the background of the case and the applications that had been made to adjourn the proceedings. The proceedings had taken place during a cold snap and the trains were not running at all.

8. Counsel referred to the authorities relevant to the issue of adjournment which he had helpfully lodged with his indexed bundle of authorities and materials. He referred to **SH (Afghanistan) [2011] EWCA Civ 1284** and **Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC)**. In that case it had been said that in most cases the question would be whether the refusal deprived the affected party of his right to a fair hearing. Reference was made to **AM (Cameroon) v Asylum and Immigration Tribunal [2008] EWCA Civ 100**. A very high standard of fairness was required.

9. In addition, in relation to Article 8 the judge had erred since the skeleton argument raised the issue of Article 8 but the judge had not given the matter proper consideration. In the light of the country guidance it was clear that the appellant would be at risk having been out of the country for some eight years and he was Shia and not Sunni and would be returning to a part of Baghdad which was dangerous for him.

10. Ms Willocks-Briscoe submitted that the statement from Mr Sicher was new evidence and the permission of the Tribunal had not been sought to lodge fresh evidence. The judge had had no explanation for the appellant's absence nor the absence of his witness. Sufficient time had been allowed to make contact with him. She relied on her response that had been filed. No credible explanation for the appellant's absence had been put forward. There was nothing from the appellant on the issue and no document about the alleged issues he had had with NASS or any correspondence about his support or lack of it. The decision of the Fist-tier Judge had not been unfair. She had been unable to find any information about his NASS support. In the light of the lack of evidence before the First-tier Judge he had been acting perfectly fairly in refusing the application. In the cases relied on by Counsel (**Kanda v Government of the Federation of Malaya [1962] AC 322 PC** and **In re D (Minors (Adoption Reports: Confidentiality) [1996] A.C. 593)** the individuals had not known the case against them. In this case the appellant was fully aware of what the respondent's position was.

11. In **SH (Afghanistan) [2011] EWCA Civ 1284** the respondent had produced the report to which the appellant wished to respond and the respondent had not opposed the adjournment. It had been heard under the Fast-Track procedure. In **AM (Cameroon)** the appellant had been unwell and unrepresented. The First-tier Judge's approach was not unfair in all the circumstances. In relation to the point about the expert report there had been an absence of information about funding and other issues. The decision to proceed was not unfair. If the Tribunal agreed with her points that would answer a lot of the other issues. The judge had considered matters in the light of the decision of Judge Blackford and the grounds of appeal simply represented a disagreement with his conclusions. He had reached a holistic assessment of the evidence and had properly applied the country guidance. In relation to Baghdad the

appellant had a viable relocation option. He had the option to find family members to assist him. Simply being away from Iraq was not sufficient. He had been away from the country for less than ten years. The judge's assessment was not irrational and there was no material error of law. The appellant did not appear to have raised Article 8 in his witness statement.

12. Mr Draycott in reply submitted that Mr Sicher's statement should be relied upon in the circumstances – it was not appropriate to apply the test in Ladd **v Marshall [1954] EWCA Civ 1**. It was not clear that the judge had properly applied the country guidance. An expert report was required. Article 8 had been raised in the skeleton argument.

13. At the conclusion of the submissions I reserved my decision. I can only interfere with the decision of the First-tier Judge if it was flawed in law.

14. In dealing with the fresh evidence point, under the standard directions issued and under the Procedure Rules notice should be given. However, the surprising feature in this case is that no further evidence has been lodged about the appellant or his whereabouts or indeed anything else. The appellant sought to explain the absence of the uncle because of snowy conditions at the time but Mr Sicher's statement at paragraph 27 makes no reference to the uncle being inhibited from travelling because of the weather. There is in effect nothing since April 2018 to explain matters and nothing from the appellant and it appears that his representatives have no idea where he is or indeed if he has left the country.

15. Given the limited information before the First-tier Judge I agree with the points made in the response and developed orally by Ms Willocks-Briscoe that there was nothing unfair about the judge's decision. He properly directed himself and had all relevant considerations in mind. As was said by the Presenting Officer at the hearing the appellant had ample notice of the case he had to meet and his absence was unexplained. I am not satisfied that there was any error in the judge's decision to press ahead with the hearing. In the circumstances the judge dealt with the case appropriately, properly applied **Devaseelan** [2002] UKIAT 00702, and indeed was not persuaded that evidence from the appellant would have taken matters much further. As Ms Willocks-Briscoe submitted once it was determined that the judge had not acted unfairly in refusing the application for the adjournment then the remaining points were no more than expressions of disagreement with the judge's decision. In relation to Article 8 it is true that the issue of Article 8 featured in the last three lines of Counsel's fourteen page skeleton argument dated 4 March 2018: it was argued that the appellant was either entitled to humanitarian protection under the Qualification Directive "or else should be entitled to remain in the UK by reason of his Article 8 family/private life or through the application of paragraph 276ADE(vi) of the Immigration Rules." The judge properly dealt with Article 8 both under and outside the rules in paragraphs 25 to 31 of his decision.

16. I have given very careful consideration to the points made by Mr Draycott but for the reasons I have given I prefer the arguments I have summarised above in the respondent's response and as developed by Ms Willocks-Briscoe at the hearing.

Notice of Decision

17. The appellant's appeal is dismissed on asylum, humanitarian protection and human rights grounds and the decision of the First-tier Judge is confirmed.

18. I deem it appropriate to make an anonymity order in this case.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date: 12 December 2018

G Warr, Judge of the Upper Tribunal