Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01715/2018

THE IMMIGRATION ACTS

Heard at Manchester	**Decision & Reasons Promulgated**
On 18 October 2018	**On 5 November 2018**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

SHERWAN [A]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Pratt, WTB Solicitors LLP
For the Respondent: Mr Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, a national of Iraq, has permission to challenge the decision of Judge A J Parker of the First-tier Tribunal (FtT) sent on 13 April 2018 dismissing his appeal against the decision made by the respondent on 24 January 2018.

2. The appellant's grounds first take issue with two aspects of the judge's treatment of s. 8 AI (TCs) Act 2004, it being said he wrongly raised it of his own volition and wrongly concluded that s. 8 was engaged by the appellant's late claim for asylum. The principal thrust of the remainder of the grounds is the complaint that the judge wrongly discounted the appellant's supporting evidence as being speculative and not first-hand.

3. I heard useful submissions from Mr Pratt and Mr Diwnycz, the latter's very short.

4. Before I proceed further, it is important to note that the appellant's claim for asylum made on 26 January 2017 was based on events that had happened in Iraq in 2016-2017, several years after he had entered the UK as a student (in 2011). As such it was a sur place claim. Its essence was (as stated by him in his answer to questions in the asylum interview) that he would be at risk because his brother-in-law Azad was a member of the Borzani clan and was involved in drug smuggling and was a member of the PDK who had been arrested by the Iraqi authorities in Baghdad and they blamed him and his sister.

5. I consider the appellant's first ground is made out. I see no legal error in the judge raising the s. 8 issue of his own motion – it is an obligation imposed on all decision-makers. However, if a judge raises it of his own motion the appellant must be afforded the opportunity to respond. In this case not only did the respondent not raise it but no questions had been asked of him by the respondent at his asylum interview demonstrating that he had engaged with any conduct falling within the material scope of s. 8. There is nothing to indicate the matter was raised with the appellant by the judge. Furthermore, even the appellant's student visa expired on 30 January 2017 he had applied for asylum before that date. If his account was considered as credible, then there was no question of him delaying his claim. I agree with Mr Pratt that there was a circularity in the judge's reasoning in that he appears to have reasoned that as the appellant was not credible as regards the substance of his asylum claim he must be treated as having delayed his asylum claim, whereas s. 8 went to the issue, if at all, of whether he was credible as to the substance of his asylum claim in the first place. Mr Diwnycz said he accepted that there was no discernible basis for the judge considering s. 8 was engaged and I agree.

6. Mr Diwnycz submitted that the judge's reliance on s. 8 considerations at paragraphs 44 and 45 was not a material error because the other reasons given by the judge for finding the appellant not credible were sufficient in themselves. I reject that submission. I would accept at a general level that s. 8 findings made by a judge may often be auxiliary and have no potential effect on the outcome of the decision, but in this particular case I consider there are valid concerns that the s. 8 consideration may have influenced the judge's overall assessment. One particular concern I have is that the judge says more than once that it was not credible to think that

the brother-in-law and kin would "blame" the appellant for his arrest given that he was "hundreds of miles away in a foreign country" (paragraphs 40 and 43). That may or may not be a proper response to the appellant's claim that his brother-in-law overheard a telephone call between the appellant and a family member in Iraq, but it leaves unaddressed the appellant's claim that the brother-in-law's family attached blame to the appellant's family and that already there had been a reprisal attack on his brother and an attack on his family home. In my judgement, the judge's failure to appreciate that the appellant's claim was based on fear of harm directed at him as a member of his sister's family also had an impact on his approach to the appellant's supporting evidence which was necessarily indirect, as he was not present in Iraq.

Notice of Decision

7. For the above reasons I set aside the decision of the FtT judge for material error of law and see no alternative to it being remitted to the FtT.

8. To conclude:

The decision of FtT judge is set aside for material error of law;

The case is remitted to the FtT (not before Judge A J Parker).

No anonymity direction is made.

Signed Date: 25 October 2018

Dr H H Storey
Judge of the Upper Tribunal