Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07233/2017

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 5 November 2018	**On 28 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

MR O E
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Not represented
For the Respondent: Mr Tan, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Iraq born on 21 May 2000. He arrived in the United Kingdom and claimed asylum. His application was refused in a decision dated 18 July 2017. He appealed against that decision and his appeal came before Judge of the First-tier Tribunal Hopkins for hearing on 12 February 2018.

2. In a decision and reasons promulgated on 5 May 2018, the judge dismissed the appeal. Permission to appeal was sought one day out of

time on the basis that the judge had erred materially in law: firstly, in applying a higher standard of proof; secondly, in failing to give proper consideration to the expert report; thirdly, in failing to provide adequate reasons for his findings and attach relevant weight to the evidence and erred in relying on a discrepancy as to whether the Appellant was in hiding or whether the authorities knew his whereabouts. It was asserted that in terms of the reasons challenged, that this related to whether the Appellant would face prosecution rather than persecution and whether in any event, treatment in detention would amount to persecution.

3. An extension of time was granted and permission to appeal in a decision of Judge of the First-tier Tribunal Parker dated 30 April 2018, in the following terms:

> *"I have carefully considered the judge's decision. The judge made largely positive findings of fact until he came to consider whether the Appellant may be of interest to the authorities from paragraphs 35 to 36. At paragraph 35 the judge stated that the Appellant could not confirm that they are currently looking for him whereas the correct standard of proof is reasonable likelihood. The judge relies on a discrepancy about whether the Appellant was in hiding or whether the authorities knew his whereabouts. There was no indication that this discrepancy was put to him at the hearing. Reliance upon this alleged discrepancy is arguably a breach of the Rules of natural justice and an error of law. The judge appears to have placed little or no weight on the Appellant's evidence about the arrest of his cousin. The judge arguably did not provide adequate reasons for finding that the Appellant would face prosecution rather than persecution and will not face treatment amounting to persecution in detention having regard to the evidence in the expert report set out at paragraphs 40 to 41 of the decision. There is an arguable error of law in the decision. Permission to appeal is granted."*

Hearing

4. At the hearing before the Upper Tribunal, there was no appearance by or on behalf of the Appellant. His previous solicitors who had drafted the grounds of appeal, Duncan Lewis, came off the record on 15 October 2018 but the hearing notice had also been sent to the Appellant's last known address.

5. Mr Tan stated that letters had also been sent to the Appellant at this address in July and September of this year but the Appellant has essentially been missing since May 2018. His discretionary leave, granted because he was an unaccompanied minor, had expired but an in-time application had been made to extend his leave on 21st November 2017 and the Home Office have been following up on that.

6. Given that there has been no contact with the Appellant for some six months and he has no representative, there would have been little point in adjourning the appeal. I proceeded to deal with the appeal under rule 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008, on the basis that the notice of hearing had been served on the Appellant and I considered it to be in the interests of justice to proceed in his absence.

7. I heard submissions from Mr Tan, who acknowledged there was no Rule 24 response. He submitted there was more detail in Judge Parker's consideration than in the actual grounds of appeal. He disagreed with the submission in the grounds of appeal that the judge had applied the wrong standard of proof at [34] and [35]. The judge had correctly identified the lower standard at [34] when he said, *"I find there is a reasonable likelihood that he did take part in the demonstrations on 9 and 10 October 2015."* In respect of the discrepancies as to the Appellant's whereabouts and whether or not this was put, he submitted that this was unclear, however this was not material given that this was a point raised in the asylum refusal decision arising from questions 84 and 85 of the asylum interview record and was addressed at [8] of the Appellant's witness statement. He submitted in these circumstances it was open to the judge to make a finding that the Appellant's accounts have been inconsistent. In relation to the arrest of the Appellant's cousin, this was not actually raised in the grounds of appeal but was again an inconsistency. The Appellant stated in his interview record at question 86 that the Appellant's cousin had been arrested because the authorities thought he was him but then changed this to say that it was because he was his relative and that the Appellant was at the demonstration as well. He submitted that it was open to the judge to find as he did at [35]: *"This does not explain why the authorities did not try to arrest him as well as his cousin."* Moreover, the Appellant in his witness statement dated 5 September 2017 said that he was in hiding in Qaladze but this is inconsistent with what he said in interview at question 85 which was that the authorities knew where he was.

8. In relation to the issue of whether the Appellant would face prosecution rather than persecution, Mr Tan submitted that the judge makes reference to the contents of the expert report of Dr Farangis Ghaderi at [23], [24] and [36] and sets out that report in some detail. It was open to the judge to find the Appellant was not of adverse interest to the authorities and on that basis the judge needed to go no further. The claim as to the Appellant facing prosecution was only consideration in the alternative and the judge was entitled to draw a distinction between those detained on terrorism charges and those on vandalism charges, see [40] to [43]. Mr Tan submitted that the judge was entitled to come to the findings he did and there was no basis of a risk of persecution or prosecution for the Appellant if returned to Iraq. Consequently, there was no material error of law.

Decision and Reasons

9. The judge made the following findings: at [31] that it was possible that the Appellant's face was shown in one of the video clips from the demonstration in Qaladze on 9 and 10 October 2017; at [33] the judge did not hold it against the Appellant that there was some inconsistency as to the age of Mohammed Rasul when he died; at [34] the judge found there was a reasonable likelihood the Appellant did take part in the demonstrations on 9 and 10 October 2015 and that he may have known Mohammed Rasul one of the people reported to have died; at [36] the judge accepted the evidence of the expert Dr Ghaderi, finding as follows:

> *"I accept that Dr Ghaderi is right in pointing out that, contrary to what has been stated in the refusal letter, people who took part in the demonstration had been arrested. But this has been in order to charge them with vandalism and unlawful activity. Non-violent protest has been allowed to continue. The authorities may not be aware that the Appellant was involved in the demonstrations or, if they are aware, that he did anything unlawful during them."*

10. At [37] the Judge held: *"If they are aware of his participation in the demonstration and he is of adverse interest to them the question arises whether his fear on return is of persecution or prosecution."* At [39] the judge found that the Appellant was not simply a peaceful protestor, in that he threw stones and together with others broke into the KDP offices and trashed them. At [40] the judge noted Dr Ghaderi's report, at [44] he cites sources indicating that the criminal justice system in Iraq and the KRI heavily relies on confessions often coerced through torture and other forms of ill-treatment. At [41] the judge again refers to Dr Ghaderi's report in relation to the Human Rights Watch Report, in respect of the demonstrations which records that more than 100 protestors were detained and charged however there was no evidence from her report as to what happened to those people: whether they were kept in custody or ill- treated or did not receive a fair trial and there was no evidence they were prosecuted in a manner that was persecutory or that they received disproportionate sentences.

11. The judge at [42] found;

> *"In the absence of evidence that those who were arrested for vandalism during the protests were ill-treated, I am not satisfied that this will be the case (i.e. that the Appellant would be at risk of an unfair trial or torture). Further the authorities are likely to be less anxious to target protestors for political reasons now more than two years after the event."*

12. And at [43]:

> *"In all the circumstances I am not satisfied that the Appellant would receive a thoroughly unfair trial or that he would receive a punishment that is disproportionate to the acts he has committed. He may be detained pending trial which would mean*

he would experience hardship but I am not satisfied that this would rise to the level of serious harm which would make his case a matter of persecution rather than prosecution."

13. I have concluded that the decision of the First tier Tribunal Judge contains material errors of law, in the following respects:

13.1. The judge at [35] relies on a discrepancy about whether the Appellant was in hiding or whether the authorities knew his whereabouts and it does not appear that this discrepancy was put to him at the hearing. Whilst Mr Tan submitted that this is not material given that the matter was raised in the Respondent's refusal decision, I find that the Appellant should have been given the opportunity to comment upon it in his oral evidence and thus reliance upon this alleged discrepancy is arguably a breach of the rules of natural justice and an error of law.

13.2. The judge appears to have placed little or no weight on the Appellant's evidence about the arrest of his cousin and whether this would potentially place him at risk on return to Iraq and in fact makes no clear finding as to whether or not he accepted that the Appellant's cousin had been arrested.

13.3. In light of the evidence of the expert, cited by the Judge at [40] that the criminal justice system in Iraq and the KRI relies heavily on confessions, which are often coerced through torture and other forms of ill-treatment, which evidence the Judge appeared to accept, I find that he did not provide adequate reasons for finding that the Appellant would face prosecution rather than persecution.

13.4. I further find, in light of that evidence, that the Judge's conclusion that the Appellant would not face treatment amounting to persecution in detention at [41] and particularly, [42] and [43] of the decision also lacks adequate reasoning, bearing in mind also that at that time the Appellant was a minor.

Notice of Decision

14. For the reasons set out above, I find material errors of law in the decision of First tier Tribunal Judge Hopkins. I set that decision aside and remit the appeal for a hearing *do novo* before the First tier Tribunal.

15. I make the following directions:

(i) none of the findings of fact are preserved;

(ii) the appeal shall be listed for 2 hours;

(iii) a Kurdish Sorani interpreter will be required;

(iv) in light of the Appellant's non-appearance, the Respondent is directed to inform the First tier Tribunal pursuant to rule 16 of the Tribunal Procedure (First-tier Tribunal) (Immigration and

Asylum Chamber) Rules 2014, if he becomes aware that the Appellant has left the country. If the Appellant is still in the United Kingdom he is directed to contact the First tier Tribunal confirming that he wishes to pursue his appeal.

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.

Signed Rebecca Chapman Date 22 November 2018

Deputy Upper Tribunal Judge Chapman