Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08626/2016

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 14th December 2017	**On 22nd January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE D N HARRIS

Between

MR B.A.M.
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Cleghorn, Counsel
For the Respondent: Miss Pettersen, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Iraq born on 4th September 1996. The Appellant arrived in the UK on 3rd February 2016 and claimed asylum. Thereafter he submitted an application for asylum claiming to have a well-founded fear of persecution on the basis of his fear of ISIS. The

Appellant's application was refused by Notice of Refusal dated 19th July 2016.

2. The Appellant appealed and the appeal came before Judge of the First-tier Tribunal Cope sitting at North Shields on 31st March 2017. In a decision and reasons promulgated on 4th May 2017 the Appellant's appeal was dismissed on all grounds.

3. Grounds of Appeal were lodged to the Upper Tribunal on 12th May 2017. Those grounds contended:-

   (1) The First-tier Tribunal Judge's conduct of his own research had led to a perception of bias.

   (2) Failure of the First-tier Tribunal Judge to grant an adjournment.

   (3) There had been an improper departure from country guidance.

4. 6th September 2017 Judge of the First-tier Tribunal Alis granted permission to appeal. Judge Alis noted the grounds asserted that the judges had erred in that he had produced and relied on a map that he himself had obtained from the internet. It is acknowledged by Counsel that map was contained in the latest COIR for Iraq. Judge Alis concluded that the ground was misconceived in the sense that the judge had quite properly brought to the attention evidence that he felt was relevant in the appeal before him and that if he had not brought it to the parties' attention and relied on it later then that would have been procedurally unfair. He noted that the mere introduction of a map that it is accepted is contained within the latest COIR is not a material error (*Secretary of State for the Home Department v Abdi [1994] Imm AR 402*).

5. Judge Alis noted that the second and third grounds were linked as they concerned:-

   (a) The judge's refusal to adjourn the case after the map was produced to enable the Appellant to address the submission that Kirkuk was no longer a contested area

   (b) and the fact that the judge departed from *AA (Iraq) CG*.

6. Judge Alis noted that the Appellant's Counsel sought an adjournment to obtain further evidence due to the changed position and that the judge had refused to adjourn as he felt it seemed the Appellant was inadvertently seeking to reverse the burden of proof. Judge Alis considered that it was just arguable that the judge had not followed the guidance set out in *Nwaigwe (adjournment – fairness) [2014] UKUT 418 (IAC)*. He considered the decision to refuse to adjourn impacted on the Article 15(c) decision and it was on those issues that he granted permission to appeal. Judge Alis noted that the Appellant did not challenge the asylum decision. An appeal was consequently granted in respect of Article 15(c) only i.e. Grounds 2 and 3 of the Grounds of Appeal.

7. On 3rd October 2017 the Secretary of State responded to the Grounds of Appeal under Rule 24. The Rule 24 response argues that the judge at paragraphs 60 to 82 has made clear and properly reasoned findings as to why the Appellant's application for an adjournment was refused and that he has chosen to depart from the country guidance of *AA* and found in relation to Kirkuk the Appellant is not entitled to claim humanitarian protection.

8. It is on that basis that the appeal comes before me to determine whether or not there is a material error of law in the decision of the First-tier Tribunal Judge. The Appellant appears by his instructed Counsel Miss Cleghorn. Miss Cleghorn is extremely familiar with this matter. She appeared before the First-tier Tribunal and she is the author of the Grounds of Appeal. The Respondent appears by her Home Office Presenting Officer Miss Pettersen.

Submissions/Discussion

9. Miss Cleghorn notes the limited Grounds of Appeal that had been allowed but points out that there was no evidence provided to show that the judge should depart from country guidance and the judge had merely turned up with a map. However when challenged she accepts that this was not a basis upon which a Ground of Appeal was lodged and she takes me to paragraphs 12 and 13 of the Grounds of Appeal pointing out that the application to adjourn was made on the basis that time should be given to the Appellant in order to obtain an expert report on the current status of Kirkuk. She emphasised that had not previously been sought because the Secretary of State had not previously sought to identify Kirkuk as no longer being contested. I pointed out that she had country guidance to rely upon (*AA (Iraq)*). Consequently for the judge to have concluded at paragraph 66 that there was a real danger granting the application in looking to reverse the burden of proof was not a sustainable argument. She submits consequently that the judge materially therefore erred in law. Further she relies on the basic principles set out in *Nwaigwe* and that the judge had failed to give consideration as to whether the Appellant would be deprived of a fair hearing.

10. In response Miss Pettersen takes me to paragraph 68 of the decision pointing out that the judge has considered the security position that the judge has not just considered the position as per a map but has also taken into account recent information. She submits that the judge was entitled to conclude that there was no risk from the authorities in Kirkuk and that an objective conclusion as to the situation on the ground was one that the judge was entitled to make at the date of hearing.

11. Miss Cleghorn points out that the Home Office did not provide any documentary evidence only merely a bold assertion that the Appellant could return to Kirkuk and therefore it was not appropriate for the judge to provide the map without any opportunity being given to rebut. She emphasises that this constitutes the predominant material error of law.

She contends that the issue of fairness entitles the Appellant to a rehearing and asked me to remit the matter.

The Law

12. Areas of legislative interpretation, failure to follow binding authority or to distinguish it with adequate reasons, ignoring material considerations by taking into account immaterial considerations, reaching irrational conclusions on fact or evaluation or to give legally inadequate reasons for the decision and procedural unfairness, constitute errors of law.

13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Nor is it an error of law for an Immigration Judge to fail to deal with every factual issue of argument. Disagreement with an Immigration Judge's factual conclusion, his appraisal of the evidence or assessment of credibility, or his evaluation of risk does not give rise to an error of law. Unless an Immigration Judge's assessment of proportionality is arguable as being completely wrong, there is no error of law, nor is it an error of law for an Immigration Judge not to have regard to evidence of events arising after his decision or for him to have taken no account of evidence which was not before him. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because an Immigration Judge concludes that the story is untrue. If a point of evidence of significance has been ignored or misunderstood, that is a failure to take into account a material consideration.

Findings on Error of Law

14. The principal thrust of the appeal relates to the issue of fairness. *Nwaigwe* is authority for saying that where an adjournment refusal is challenged on fairness grounds it is important to recognise that the question for the Upper Tribunal is not whether the First-tier Tribunal Judge acted reasonably but rather the test to be applied is that of fairness; and was there any deprivation of the affected party's right to a fair hearing. There is of course a suggestion in this matter that there has been at least an impression given of a lack of impartiality by the judge and the adjournment would have at least diminished the appearance of bias. However it has to be remembered that permission was not granted to appeal merely because the judge relied on a map and indeed a map that was latterly approved by the Home Office.

15. What is of more importance is that the Secretary of State failed to provide any documentary evidence with regard to return to Kirkuk only relying on bold assertions. Consequently in such circumstances it was inappropriate for a map to be given to the judge without giving the opportunity to the

Appellant's legal representatives to rebut that that is being put before them. Where I consider there to be an error is to be highlighted within paragraphs 62 to 64 of the decision. Whilst I understand that the First-tier Tribunal Judge believes that he was being fair because he gave the parties the opportunity to comment on it the fact that he introduced it in the first place and relied upon it as the initial assertion could easily constitute an element of bias in that the documentary evidence was produced by the judge and not produced by the Secretary of State.

16. It is important that procedural fairness is maintained. In such circumstances I am satisfied that what has happened – albeit with the very best of intentions – has created a material error of law and the correct approach is to set aside the decision and to remit the matter back for rehearing before the First-tier Tribunal Judge. There are of course factual issues that flow from this matter. The position in Northern Iraq is constantly changing. As the matter is to be reheard it is appropriate that there be up-to-date objective and/or subjective evidence filed that may have a material effect upon the outcome of any appeal and not necessarily an outcome that would be favourable to the Appellant. He has to be aware of this. Further all this is made against a background that at the present time there are of course no enforced returns to Iraq.

Decision and Directions

The decision of the First-tier Tribunal Judge contains a material error of law and is set aside. The matter is remitted to the First-tier Tribunal for rehearing.

Directions

(1) On the finding that there is a material error of law in the decision of the First-tier Tribunal Judge the decision of the First-tier Tribunal Judge is set aside and the matter is remitted back to the First-tier Tribunal sitting at Bradford on the first available date 28 days hence with none of the findings of fact to stand.

(2) That the rehearing be before any judge of the First-tier Tribunal other than Immigration Judge Cope.

(3) That there be leave to either party to file and/or serve the bundle of objective/subjective evidence upon which they seek to rely on the Tribunal and on the other party at least seven days prior to the restored hearing.

(4) That in the event that the Appellant requires an interpreter at the restored hearing it is the responsibility of his instructed solicitors to notify the Tribunal of a language requirement and to request an interpreter within seven days of receipt of this decision.

A First-tier Tribunal Judge granted the Appellant anonymity. No application is made to vary that order and the anonymity direction is maintained.

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 Date 18.01.18

Deputy Upper Tribunal Judge D N Harris

TO THE RESPONDENT
FEE AWARD

No application is made for a fee award.

Signed Date 18.01.18

Deputy Upper Tribunal Judge D N Harris