Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: PA/09351/2018
PA/09367/2018

THE IMMIGRATION ACTS

Heard at Field House UT	**Decision & Reasons Promulgated**
On 13th March 2019	**On 28 March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ROBERTS

Between

ABDULLAH [K]
MOHAMED [K]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr Chakmakjian, Counsel
For the Respondent: Ms Cunha, Senior Presenting Officer

DECISION AND REASONS

1. The Appellants, who are brothers, are citizens of Iraq (from IKR). For ease of reference throughout this decision, I will refer to the first Appellant as "AK" and the second Appellant as "MK".

2. AK was born on 6th February 1999 and MK was born on 7th January 2000. They have been granted permission to appeal against the decision of the First-tier Tribunal (Judge Juss) dismissing their appeals against the Respondent's decision of 13th July 2018 refusing their protection claims. Although both Appellants were minors at their date of entry to the UK, by the time of the Respondent's decision refusing their protection claims, they were 19 years and 18 years respectively.

3. The FtTJ's decision at [3] is incorrect in saying both Appellants arrived in the United Kingdom in October 2016 and claimed asylum on 13th December 2016. In fact the younger brother MK arrived in the UK on 13th July 2016 and claimed asylum immediately. AK did not enter the UK until November 2016. This distinction is relevant since the factual matrix of their claims relies in part on events experienced by AK which occurred after MK left Iraq.

Background

4. In summary their claims to protection is as follows. On 25th June 2015 both AK and MK were working on their father's farm. MK accidentally injured a friend Bejin who was working alongside them. The Appellants immediately drove Bejin to hospital about 20 minutes drive away. The injury, which was caused by a pitchfork, resulted in Bejin being blinded in one eye. His injury necessitated a month's stay in hospital.

5. MK, having brought Bejin to the hospital, was arrested by the police and detained pending enquiries. He was released four days later with no charges being made. The Appellants' family were advised by local people to move away from the area and the family relocated to the nearest city which is about twenty minutes' drive away. Two or three months later, following Bejin's release from hospital, he came to the school where MK was studying and tried to attack him seeking revenge for the injury caused. Bejin was arrested by the authorities but released following an intervention by MK's father.

6. In October 2015 MK left Iraq. His father paid for him to leave on the basis that Bejin's threats and actions would result in harm to MK. MK travelled to Turkey on his own legally obtained passport, and then travelled via Greece, Austria and Germany to France. He stayed in France for five or six months before entering the UK in July 2016.

7. Meanwhile in January 2016, AK was attacked by Bejin in the market place. The police arrived following this altercation and both AK and Bejin were arrested. In February 2016 a Tribal Peace settlement was entered into. However AK's claim is that Bejin broke the terms of this attacking AK in April 2016. As a result AK left Iraq in October 2016 travelling by plane to Turkey and then travelling via Greece, Austria and France, where he stayed for five days, before arriving in the UK in a lorry on 23rd November 2016. He claimed asylum in December 2016.

8. The Respondent refused both applications for protection. It was accepted that both Appellants are of Kurdish ethnicity originating from the IKR, but

their claims were rejected because they did not fall within the Refugee Convention. Their claims for humanitarian protection also failed as they had not established that the authorities in Iraq were unable to adequately protect them. Further the Respondent having considered that there was no risk on return to either Appellant, decided that return to Iraq was feasible in both cases.

9. The Appellants appealed the Respondent's decision to the FtT. The FtTJ, having heard evidence from both Appellants and having considered documentary evidence which included the Tribal Peace Agreement, dismissed both appeals. Both Appellants sought and were granted permission to appeal to the Upper Tribunal. Thus the matter comes before me.

Onward Appeal

10. The Grounds of Appeal are set out under five headings, but I am satisfied that they can be distilled into two strands:

    - Failure to assess risk on return in the light of the ongoing risk to the Appellants, on account of the ineffectiveness of state protection in that Bejin is not honouring the Tribal Peace Agreement

    - Failure to give adequate consideration to the feasibility of returns to the IKR in the light of the country guidance case of **AAH (Iraq Kurds – internal relocation) Iraq CG [2018] UKUT 00212**.

Error of Law Hearing

11. Before me Mr Chakmakjian appeared for both Appellants and Ms Cunha for the Respondent. Mr Chakmakjian relied on the grounds seeking permission. He invited me to have regard to [30] of the FtT's decision. He submitted that the FtTJ had found the Appellants' account relating to the incident which caused Bejin to lose an eye, as credible. Nevertheless having found the Appellants' claim credible on this point, the FtTJ misapprehended the central part of their claim which relates to risk on return.

12. The risk on return is that Bejin is not honouring the terms of the Peace Agreement and therefore the agreement is ineffective. The judge's findings at [31] are unclear because he appears to accept that the Tribal Peace Agreement is ineffective but does not go on to make clear findings as to why the Appellants would not be at risk. In other words he gives no proper consideration to what protection is available to the Appellants.

13. The second strand to Mr Chakmakjian's centred on the judge's findings, or rather lack of them, concerning the feasibility of return for both Appellants to the IKR. He asked me to look at [35] of the decision. He submitted that the FtTJ had simply not made a proper enquiry into the Appellants' particular circumstances. Neither Appellant had a CSID. It was correct that both had had passports issued in their own name but the evidence before the judge was that they were no longer in possession of those passports. MK's birth certificate had also been lost in transit whilst he was

in Greece. The judge's findings on the method of return of both Appellants were equivocal. Whilst referring to **AAH**, the judge indicated that the presence of the Appellant's documents in Iraq is something that makes their case quite distinct from others. The judge however does not say what those documents consist of.

14. The FtTJ then said:

> "I have taken judicial notice of the fact that on 12th July 2018, a large number of flights to the IKR did actually land and these were by Royal Jordanian, Iraqi Airways, Turkish Airways, Qatar Airways, and Flynas, and this suggests return is feasible to the IKR for these two appellants." [35]

This finding is inconsistent with the headnote of **AAH**, which unequivocally states that there are no flights to the IKR and all returns from the UK are to Baghdad. The FtTJ appears to have departed from the CG by making a finding that the Appellants can return to the IKR by direct flight. There is a failure to identify the basis on which this conclusion is drawn. It appears that a flight schedule document was handed up during the course of the hearing by the Presenting Officer. What was not handed up was a copy of the Respondent's own guidance CPIN V8 October 2018 which identified that only those who return voluntarily will be sent to the IKR directly, the rest as per the country guidance case are sent via Baghdad.

15. Mr Chakmakjian asked that in view of these errors, which are material, the decision should be set aside and remade.

16. Ms Cunha in response indicated that from a reading of the decision it could not be said that the judge accepted that the core claim was made out. What the judge accepted as credible was the evidence of both Appellants that one of the two brothers accidently injured a friend – Bejin – with a tool. The judge therefore only accepted that there was an accident.

17. She submitted that [31] and [32] showed that the judge had discounted there being a risk on return to the Appellant because a Tribal Peace Agreement had been entered into. This amounted to sufficient protection.

18. So far as the feasibility of return to the IKR was concerned, she said that a reading of [35] showed that the judge had turned his mind to the feasibility of return. He had said that he had taken into account **AAH** and had made a finding that the Appellants had documents in Iraq and male members of their family were present and had provided the Appellants with support in the past.

19. Ms Cunha was unable to assist on whether a copy of CPIN V8 October 2018 had been handed up to the judge at the same time as the flight schedule.

20. At the end of submissions I reserved my decision which I now give with reasons.

Consideration

21. I find force in Mr Chakmakjian's submissions. The Appellants' cases have always been predicated on a claim that they are at risk on return because, despite the signing of the Tribal Peace Agreement, Bejin (and his family) remain a threat of serious harm to the Appellants, against which there is no effective protection anywhere within the IKR. In other words the threat of revenge against the Appellants means that there is a real risk of serious harm to them and the authorities cannot offer protection. This is because it has escalated into a matter of honour.

22. On a reading of the FtTJ's decision, I find, that the judge has failed to appreciate this concept, in that he has failed to make clear findings on the credibility or otherwise of the evidence presented to him.

23. MK's evidence was that he was threatened by Bejin at school. This is what prompted him to leave Iraq. His father then went down the road of entering into the Tribal Peace Agreement but following that agreement, and in contravention of it, the claim is that Bejin attacked AK. This prompted AK to leave. These are central issues going to the core of the claims. It is necessary therefore that this evidence is evaluated and findings made on whether this evidence is credible or not. Such evaluation will then lead in turn to an assessment of whether or not there is an objective risk on return for both Appellants.

24. I find it is unclear from a reading of [30] and [31] that this process has taken place. In [30] the judge appears to accept "... the claim as stated is credible on the lower standard, that is to say, that one of the two brothers 'accidentally injured one of [their] friend (sic) – Bejin – with a tool." That of course is only part of the claim. The judge fails to set out proper findings on whether or not he finds credible the claim made of attacks and threats on AK by Bejin, which are said to have occurred subsequent to the making of the Tribunal Peace Agreement. This is evidence which forms the cornerstone of the Appellants' claims and it should have been evaluated.

25. The judge seems to have become sidetracked into setting out his own opinion of the terms of the Tribunal Peace Agreement. In [31] he says, "If Bejin is acting outside the terms of this agreement, then the proper recourse for the Appellants and their family members lies with their taking this up with the other family, on the basis of the Agreement which tribal law and custom has decreed should hold for good." Nowhere do I see that the judge has made a finding on the contents of the Council of Chwarqurna Letter of October 2016 supporting the contention that the Tribal Peace Agreement was not working. I find that this means that a proper evaluation of the evidence relating to risk on return has not been made, and this is a material error.

26. So far as the second challenge to the decision is concerned, I am satisfied that the FtTJ has not made sufficient findings to demonstrate that he has properly turned his mind to the feasibility of return to the IKR for both Appellants. At [35] he says, "The presence of the Appellants' documents in Iraq is something that makes their case quite distinct from others that are often heard in this jurisdiction, and it may very well be the case that

the Originals do still exist." It would have been helpful if the judge had said precisely what documents he had in mind when saying this. The evidence of both Appellants was that they had lost their passports en route, there was no evidence that either had had a CSID to assist their passage, and MK lost his birth certificate en route. AK said in evidence that he has no Iraqi ID card.

27. Whilst it may be reasonable to suppose that some ID documents may be obtained from the IKR since their families remain there and they are in contact with their father, the judge does not say that. Instead he appeared to go down the route of finding that the Appellants can be returned to IKR by a direct flight. This is a departure from the CG headnote in **AAH.** As the Grounds of Appeal point out, the current Home Office guidance on returns to Iraq CPIN (October 2018) identifies that only those that are voluntary returnees will be sent to the IKR directly whereas the rest will be sent to Baghdad. The judge's findings at [31] are in error therefore since he does not identify the basis of his conclusion that the Appellants are able to be returned directly to the IKR. That error is material.

28. For the above reasons I find that the decision of the FtTJ contains material errors and the decision is hereby set aside.

29. I canvassed with the parties the proper disposal of this matter in the event that I set aside the decision for error of law. Both parties were of the view that the appropriate venue for the remaking of the decision would be to remit the matter to the First-tier Tribunal in view of the amount of judicial fact finding necessary to re-make the decision.

30. Mr Chakmakjian asked that in the event the decision was set aside, I preserve the finding made in [30] that the Appellants had given a credible account of their reasons for departing Iraq. Ms Cunha objected to this saying that, as she had pointed out in her submissions, the judge at [30] only went as far as saying that he was prepared to accept that one of the two brothers accidentally injured Bejin with a tool. In the circumstances I am not satisfied that any findings should be preserved. In any event the findings made at [30] are made without proper regard to the whole of the evidence. I take the view that this is a case where a fresh hearing altogether is required. The decision will therefore be set aside in its entirety.

31. The matter will be remitted to the First-tier Tribunal (not Judge Juss) for a fresh hearing to take place and for fresh findings of fact to be made.

32. I would add that in terms of evidence for the re-hearing, the situation covering returnees to IKR is fluid. Evidence becomes dated very quickly. The Respondent should be prepared therefore to produce any up to date evidence relating to the issue of returns to the IKR in good time before the resumed hearing.

Notice of Decision

The decision of the First-tier Tribunal promulgated on 15th January 2019 is set aside for material error. These appeals will be remitted to the First-tier Tribunal for a full rehearing. Nothing is preserved from the original decision. The hearing should take place before a Judge other than Judge Juss.

No anonymity direction is made.

Signed C E Roberts Date 23 March 2019

Deputy Upper Tribunal Judge Roberts