Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12708/2018

THE IMMIGRATION ACTS

Heard at Bradford Combine Court Centre	**Decision & Reasons Promulgated**
On 21 August 2019	**On 5 September 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

HEVAR SALAH OSMAN
(Anonymity Direction Not Made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss G Patel Instructed by Hallmark Legal Solicitors.
For the Respondent: Mr M Diwnycz Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Drake promulgated on 6 June 2019 in which the Judge dismissed the appellant's appeal on protection and human rights grounds.

Background

2. The appellant is a national of Iraq of Kurdish ethnicity born on 2 October 1999 who entered the United Kingdom on 5 September 2018 and claimed asylum and/or another form of international protection or leave to remain on human rights grounds which was refused by the Secretary of State.
3. The Judge noted the basis of the appellant's claim at [12 – 16].
4. The Judge's findings are set out from [21] in which the Judge found the credibility of the appellant's claim was damaged as a result of a number of factors which emerged from the evidence which, overall, were found to warrant a conclusion the appellant had not discharged the burden of proof upon him to the required standard. The Judge's reasons are set out at [22(1) – (12)] of the decision under challenge.
5. Ms Patel asserts the Judge has erred in law in failing to consider material matters, in failing to give any or any proper reasons, and in failing to properly apply relevant country guidance applicable to Iraq.
6. Permission to appeal was granted by another judge of the First-tier Tribunal on 12 July 2019, the material parts of the grant being in the following terms:

> 3. It is arguable that the Judge failed to consider material matters. In paragraph [22.5] he states: "the appellant doesn't assert that anybody in his immediate family other than him was subject to beatings and threats. This is not plausible." The appellant did state answer to question 93 in the interview that his sister had also been attacked. The Judge has arguably made a mistake in law in paragraph [22.11]: "He has not been in this country long enough, established family connections and is not of sufficient age to enable him to qualify for rights protected by Articles 2 and 3 of the ECHR." As is argued in the grounds the rights protected by Articles 2 and 3 are absolute and not qualified rights.
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> 4. The decision and reasons do contain arguable material error is of law. Permission to appeal is granted in all grounds argued in the application dated 19 June 2019.

Error of law

7. Taking the grounds of challenge in the order they appear in the pleadings; the first challenge is to [22.12] in which the appellant asserts the Judge misunderstood the basis of the appellant's case so far as the Refugee Convention is concerned. The appellant was not asserting that family members of former sellers of alcohol form part of a particular social group (PSG). The appellant's case was that he was being targeted by his maternal family because of his father and that persecution based on membership of one's family can form part of a particular social group as per the House of Lords decision in *K and Fornah*. The grounds assert the Judge failed to consider this in his determination.
8. At [22.12] the Judge writes: *"Despite Councils eloquence, I cannot find in any case law or other source a basis for finding that though family members can be part of a PSG, but only if they satisfy the*

qualification that prime movers in that family qualify as a PSG and that there is nothing in case law defining alcohol sellers as a PSG, at least of all anyone indirectly connected therewith, forming part of a Convention protected PSG."

9. The Judge clearly understood the basis on which the appellant claimed international protection recording at [16] *"Council for the Appellant made an eloquent case for categorising persons who sell alcohol as being members of a Particular Social Group (PSG) as defined by and for the purposes of being thus accessible to Convention protection."* The grounds assert the Judge may have misunderstood those submissions on the basis it is not claimed that a family member of a former sellers of alcohol formed a PSG but rather that the appellant was being targeted by maternal family members as a result of being his father's son, a member of his father's family, and that it is the family which forms the PSG.

10. In *K and Fornah v Secretary of State for the Home Department [2006] UKHL 46* it was held that the family is the archetypal social group and where one member of a family is persecuted, albeit not for a Convention reason, persecution meted out because of him to other members of his family may be "for reasons of membership of a particular social group". However, where some members of a family face persecution, but not others, the issue of causation will need to be closely scrutinized. Lord Rodger of Earlsferry adopted an Australian proposition that, while it is not necessary that all the members of a social group be persecuted before one can say that people are being persecuted for reasons of their membership of that group, it is generally necessary that all the members of the group should be susceptible to persecution.

11. In this appeal there was insufficient evidence before the Judge to show that all members of the group are susceptible to persecution as there was no evidence those such as the appellant's father or mother had been targeted or ill-treated in the same way as the appellant.

12. In *Ahmedbekova (Common policy on asylum and subsidiary protection - Judgment) [2018] EUECJ C-652/16* the CJEU said that in carrying out the assessment of an application for international protection on an individual basis, account must be taken of the threat of persecution and of serious harm in respect of a family member of the applicant for the purpose of determining whether the applicant is, because of his family tie to the person at risk, himself exposed to such a threat.

13. The Judge was arguably correct to find that there is no authority that an alcohol seller or family of a seller of alcohol falls within a PSG per se, but neither can it be disputed that the appellant possesses an immutable characteristic as a member of his family unit. That is, however, not enough to entitle a person to a grant of international protection. It is settled law that in an asylum case there is ultimately one single question to be asked which is whether there is a serious risk that on return the appellant will be persecuted for a Convention reason. Which, in this appeal, required the appellant to prove he faces a real risk of ill treatment sufficient to satisfy the definition of

persecution as a result of being a member of the family unit on return, which the Judge did not find was made out. The finding by the Judge on this point is that as it was not accepted the appellant will face any risk of future beatings from the maternal family in the past as the circumstances prevailing did not support a finding of such future risk. Any error, even if made out as pleaded in this ground, has not been shown to be material.

14. Ground 2 challenges the findings at [22.1] in which the Judge found the appellant's account implausible and inconsistent, finding that the appellant had failed to provide evidence of how he came to be injured. The Ground asserts the Judge refused at the hearing to admit video evidence on the appellant's telephone showing one such instance when he had been beaten by members of his maternal family which the appellant has already mentioned and attempted to show at his asylum interview.

15. Evidence recorded in social media is admissible in the First-Tier Tribunal, but directions were clearly given in this appeal of the time by which such evidence was to be disclosed. The appellant, despite mentioning the existence of footage on his telephone of his being beaten at interview failed to disclose such evidence within the time limit provided or to take steps to ensure that it was possible to view such media within the Tribunal environment. Indeed it appears from the file that it was only the day before the hearing the appellant's representatives wrote to the Tribunal indicating the appellant wished to rely upon pictures and video on his telephone. The assertion the Judge refused at the hearing to admit the evidence, the full extent of the pleadings, misrepresents the actual findings of the Judge at [22.1] which are in the following terms: *"He has given accounts of his background and as to the reasons for him leaving Iraq which are implausible and inconsistent. For example, he says he has been beaten but provides no evidence of how he came to be injured. He sought to provide evidence in the form of pictures and videos on his phone but with no evidence to establish the provenance of such evidence and without credible corroboration of it to show that they depict what he says they depict."* This is a finding within the range of those clearly open to the Judge on the evidence. The appellant had the opportunity to disclose this information prior to the hearing and to have provided the type of evidence envisaged by the Judge. The Judge's comments regarding the weight that could be placed upon the evidence on the appellant's telephone clearly shows that little weight would have been given to it; which is a finding clearly open to the Judge.

16. Ground 3 asserts at [22.2] the Judge stated the appellant had provided no medical evidence to establish that he suffered injuries and such injuries were inflicted in the manner he asserted by those he accuses for which the Judge is criticised for failing to consider that the appellant left Iraq in July 2017, nearly two years ago, and thus any injuries he sustained will be hard to verify.

17. The finding of the Judge in this paragraph is in the following terms: *"He provides no medical evidence to assist in establishing that it is reasonably likely he suffered injuries and that such injuries were inflicted in the manner he asserts and by those who he accuses. He provides no evidence of complaint to the Police which he says he made nor of any absence of action by the Police in response to such complaint. Nothing he asserts is factually plausible and is vague, so thus damages his credibility."* It is not disputed that after two years there may be little by way of evidence of injuries that a medical practitioner could comment upon but that does not make the Judge's comments legally erroneous. The Judge's comment that the appellant had provided no medical evidence is factually correct. The Judge was therefore required to determine the merits of the appeal on the basis of the other evidence made available, as he did.
18. Ground 4 challenges the finding at [22.2] in which it is asserted the Judge found the appellant provided no evidence of complaints he made to the Police by him or evidence of any inaction by the Police for which the Judge is criticised for failing to specify what evidence he expected to see bearing in mind corroboration is not required in this area of law.
19. The content of [22.2] is set out above. The Judge does not seek corroboration and it is not made out that as a result of lack of corroboration the Judge dismissed the appeal for this reason alone. It is not necessary for the Judge to specify what evidence he expected to see. It is factually correct that the appellant provided no evidence to support his claim that he had reported the matters he alleged to the Police who then took no action. No arguable legal error is made out in this ground.
20. Ground 5 challenges the Judge's findings at [22.12] asserting the finding by the Judge that nothing the appellant asserts is factually plausible and is vague and thus damaged his credibility is not supported by adequate reasoning. This ground fails to establish arguable legal error. It is necessary to read the determination as a whole and when one does it is clear to a reader why the Judge came to the conclusions he did. Mere disagreement with the Judge's conclusions does not establish legal error especially when the Judge had the benefit of seeing and hearing oral evidence being given.
21. Ground 6 asserts the Judge erred when stating that the evidence did not support the appellant's assertion that his father's shop was closed due to pressure from his maternal family; arguing the Judge failed to consider documentary evidence from the Iraqi General Directorate of Tourism of Sulamaniyah which showed that the appellant's father's business was closed on 16 September 2012.
22. At [22.4] the Judge finds: *"According to the Appellant and as indicated by the photo evidence, the father's shop traded openly and for some considerable time before he closed it - this doesn't go as far as supporting the Appellant's assertion as to why he closed or that it was as a result of maternal family pressure"*. It is not disputed the shop was closed and the Judge does not find in the alternative. The finding

is that the evidence provided in support of the appellant's arguments as to causation showing the business was closed was not enough to make out the claim. This is a challenge the weight the Judge gave to the evidence when that was a matter for the Judge.

23. Grounds 6 and 7 assert that at [22.5] in which the Judge found the appellant had been inconsistent about when he faced problems with his maternal family, he clearly had not, and that the Judge failed to consider material evidence contained in his asylum interview at questions 124 to 126 in which the appellant claimed he had had the problem with the maternal family 6 or 7 years and that the last beating he received was a year ago (Ground 6) and that the Judge's statement that the appellant did not assert that anyone else in his family was subject to beatings or threats and that this was not plausible, illustrates the Judge failed to consider material evidence contained in the asylum interview at question 93 in which the appellant claimed that his sister was also attacked.

24. At [22.5] the Judge writes: *"The Appellants evidence of when he first faced maternal family pressure is inconsistent materially. He says in interview that problems occurred over five years but then asserts that beatings started in 2017, not before. It is not reasonable to suppose that only the Appellant faced beatings and pressure when he was not the prime mover in the sale of alcohol, yet the Appellant doesn't assert that anybody in his immediate family other than him was subjected to beatings and threats. This is not plausible."*

25. The appellant was asked in his asylum interview whether anyone else in his family was attacked to which he replied at Q93 "My sister". The appellant was asked how many times she was beaten up to which the appellant replied at Q94 "she was scared she wouldn't go out that much. My mum wouldn't allowed to go out because she was child she was young. When asked how old his sister was the appellant stated 13/14. Despite claiming his sister had been attacked the appellant failed to answer the specific question asked regarding how many times she was beaten up. As there was no evidence that the sister was the subject to beatings and threats, other than the appellants own assertions his sister was attacked, no arguable error is made out in the Judge's assessment which is that there was no other evidence that other family members were attacked. This cannot be said to be outside the range of findings reasonably open to the Judge in the evidence.

26. In relation to the chronology at Q124 the appellant was asked to explain how he had the same problems as he had lived in Erbil over five years but the problems began a year previously (in 2017) to which the appellant claimed in his response "I had this problem for six or seven years doing this job for a long time now" but when it was put to him at Q125 that the appellant was stating the beatings only started one year ago (2017) the appellant's reply was to claim that the last beating he had was a year ago. The problem is the appellant's claims he had the same problems with his maternal family which he initially stated had started six or seven years previously which would

have included beatings. The appellant's evidence considered by the Judge, who had the benefit of considering written and oral evidence, was that the appellant also claimed that the beatings only started in 2017. Whatever may have been said in interview the Judge clearly identified a discrepancy in the appellants evidence. The conclusion the appellant had been materially inconsistent has not been shown to be finding outside the range of those available to the Judge when the evidence was considered as a whole. The weight to be given to that evidence was a matter for the Judge.

27. Ground 7 refers the Judge's finding there were material gaps in the appellants evidence as to why he could not get a CSIDs document and why he could not move to Sulamaniyah to live with his family. The grounds assert the Judge failed to consider the appellants evidence in his witness statement which deals with these issues and failed to consider such evidence at [22.9 and 22.10] of the decision under challenge.

28. At [22.6] the Judge writes: *"He gave his evidence to me relatively clearly but as mentioned above, there were material gaps as to why cannot get CSID documentation to enable travel to the IKR whilst his family currently reside there in Sulamaniyah and why he might still be at risk if he lives there with or near them despite distance from his original home city of Erbil".* The appellant had claimed that he could not return to Erbil as his maternal family would find him there and could not go to Sulamaniyah as he will be found by the maternal family despite his immediate family living there. The appellant also claimed he had no identity documents to enable him to return anywhere else in Iraq or to gain re-entry to the IKR. The Judge found the appellant's evidence generally to lack consistency. At [22.9 and 22.10] the Judge writes:

> 22.9 I find his account that he cannot now access a means of gaining a new CSID and that he cannot lay hands on his original is not credible given the finding that he has been able through his family to source photos of his father shop depicting both his father and himself; if he is able to obtain such things for today's hearing, I am satisfied that also via family he can source copies of documents necessary to verify his identity (which require patrilineal verification which is available via his father) to enable movement within Iraq and also to and from the IKR;
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> 22.10 He did not assert that his family are unable to help him, and this is borne out by my finding above about sourcing copies of photos and also verification of the closure of the father shop as recorded by the local authority in Erbil. Thus, I cannot and do not find that obtaining identity documentation will be impossible and/or relocation is not a viable option.

29. Whilst the appellant claimed in his witness statement not to be able to contact family or obtain such documentation the weight to be given to that evidence was a matter for the Judge. The Judge clearly took into account all the evidence relied upon by the appellant in support of his claim and did not find the appellant credible. The appellant obtained documents from a relative in the IKR for use in the appeal as noted by the Judge The weight to be given to the appellant's assertions that he

will be unable to obtain the requisite documents has not been shown to be irrational or outside the range of findings available to the Judge on the evidence.

30. The appellant also asserts that in finding at [22.10] the Judge failed to consider that the appellant's identity has to be pre-cleared with the IKR authorities prior to return and without documentation the appellant cannot return to the IKR. This is a statement of the position accepted in the country guidance case law at the date of the hearing. The respondent will no doubt provide the appellant's details to the authorities in the IKR who, if satisfied he is who he claims to be, will grant preclearance to enable the respondent to return the appellant directly to that region of Iraq. Possession of a CSIDs has been identified as a means of securing services within Iraq and not part of the return process. If the appellant cannot be pre-cleared he will be returned to Baghdad and it is not made out he will not be able to obtain his CSID either predeparture or within a reasonable period of time thereafter to enable him to fly to the IKR. No arguable legal error is made out in the Judge's conclusions in relation to this issue.

31. The appellant's final ground of challenge is to the Judge's finding at [22.11] which Ms Patel submitted disclosed such a fundamental flaw in the Judge's reasoning it was sufficient to warrant the entire determination being set aside. In this paragraph the Judge writes "*He has not been in this country long enough, established family connection and is not of an age sufficient to enable him to qualify for rights protected by Articles 2 and 3 of the ECHR."* It is not disputed that rights protected by articles 2 and 3 are not qualified rights as they are absolute. The difficulty for the appellant with this ground is that the Judge does not find, for arguably sustainable reasons, that the appellant will face a real risk on return of harm sufficient to breach either articles 2 or 3. This is specifically confirmed at [28] in which the Judge finds "*Given the findings I have made I accept there is not a real risk that his Article 2 and 3 rights will be breached if he is returned to Iraq".* While some aspects of the wording in [22.11] are more appropriate to an article 8 ECHR assessment the appellant fails to establish arguable legal error material to the decision sufficient to warrant a finding of legal error and especially not of a nature that justifies the entire decision being set aside. The reality is that the appellant had not established an entitlement to succeed on any basis on the evidence.

Decision

32. **There is no material error of law in the Judge's decision. The determination shall stand.**

Anonymity.

33. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 29 August 2019