Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12979/2018

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 16th September 2019	**On 29th November 2019**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

P H M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms H Masih, Counsel instructed by Braitch Solicitors
For the Respondent: Mr C Howells, Home Office Presenting Officer

DECISION AND REASONS

1. An anonymity direction has previously been made by F*t*T Judge Maka and as the appeal concerns a claim for asylum and international protection, in my judgement, it is appropriate for the anonymity order to be continued under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. PHM is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify

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him. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to Contempt of Court proceedings.

2. The appellant is an Iraqi national. He claims to have left Iraq in 2008 and claims that he lived in Iran with his mother and stepfather in Iran, until February 2018. He claims to have left Iran on 10th February 2018 and travelled, via Turkey, to the UK. He arrived in the UK on 2nd May 2018 and claimed asylum. His claim was refused by the respondent on 29th October 2018, and his appeal against that decision was dismissed by F*t*T Judge Maka for the reasons set out in a decision promulgated on 5th February 2019.

3. The appellant claims that he was born in Dookan, Iraq and is of Kurdish ethnicity. He claims that when he was very young, the family moved to Qaladze. The appellant claims that his father was taken by the PUK in 2004, when the appellant was about 10 years old. After his father's disappearance, the appellant, his mother and his sister moved to Koya. His brother did not go with them, but left Iraq because the appellant's mother considered it was too dangerous for him to remain in Iraq. The appellant believes that his brother left Iraqi and came to the UK. The appellant claims that after they had lived in Koya for about six months, his mother remarried. She married an Iranian national who was living in Iraq, and the family moved to an area just outside Koya. It was uncontroversial that Qaladze, where the appellant was born, and Koya, where the appellant claims he last lived in Iraq with his family, are in the IKR.

4. The events that the appellant claims led to his departure from Iraq and subsequently from Iran, are summarised at paragraphs [14] to [22] of the decision. The appellant's evidence is summarised at paragraphs [35] to [45] of the decision.

5. The Judge's findings and conclusions are set out at paragraphs [47] to [65] of the decision. The judge accepts that the appellant is an ethnic Kurd with Iraqi nationality.

6. At paragraphs [49] and [50] of his decision, the judge states:

> "49. Beyond this, I confess, I have concerns about this appeal even with the low standard of proof. I have read all the documents carefully including the appellant's asylum interview and witness statements. I find his account to be internally inconsistent as well as externally inconsistent. I do not accept the appellant's father was involved with the Ba'ath party or was taken by the PUK in 2004. … even allowing for the appellant's age, I am satisfied if his father was genuinely involved with the Ba'ath party and had some important position, it would have been something known to him and his family given the prestige and honour of those involved in the Ba'ath party and the associated privileges that would have flowed from that membership, rank and role.
>
> 50. … I am satisfied if his father was genuinely involved and was a person of interest, the PUK would not have waited until 2008 to take him away given the disdain with which Kurds were treated by Saddam Hussein and his Ba'ath party and the retribution that quickly followed of Baathists after the downfall of Saddam Hussein. I note the registration, ID and the requirements for Kurds in the IKR. Given the appellant does not mention his father was living in hiding in the IKR, I am satisfied, if he was involved with the Ba'ath party, would have been a person of interest well before 2008 and would reasonably have been questioned and taken away by the authorities to determine whether he should stand trial for his crimes as someone involved with the regime in Baghdad."

7. At paragraph [51], the judge refers to the appellant's claim that the family moved Qaladze to Koya. The judge states: *"... I note the appellant's brother left Iraq in 2008 (Q.22), although his witness statement inconsistently said he left in 2004 before the family moved to Koya… Whatever the true position, I am satisfied the appellant's mother would also have sent the appellant with his brother, if she genuinely felt he was also at risk despite his young age."*. The judge refers to the appellant's account that he was allegedly beaten up in 2008, by men who swore to him about his father. The judge did not find the account given by the appellant to be plausible.

8. At paragraph [52] of his decision, the judge addressed the claim made by the appellant that his mother had re-married. The judge states:

> "The appellant's mother re-married an Iranian national. It was put to the appellant in cross-examination his stepfather had no status in Iraq and would therefore not have been able to purchase property and/or the factory he allegedly purchased in Iraq. I do not accept the appellant's response that "this was normal" and his stepfather was able to purchase the property. The appellant's objective evidence (see page 129) shows the discrimination Kurds faced in Iran. I do not accept it is reasonably plausible given the discrimination of Kurds in Iran and the registration requirements in the IKR, that the appellant stepfather, as an Iranian, would have been able to live and work freely in the IKR (no incident has been mentioned by the appellant) and be able to marry a Kurd (his mother) as well, without any incident or claim of persecution or discrimination against him or his family. I find the Appellant's stepfather would

> only have been able to live and work freely in the IKR, if he had some official paperwork to do so given his Iranian background. "

9. The judge found, at [53], that it is not plausible that the appellant was targeted in 2008 or at all. The judge noted that during his interview the appellant claimed that the assault had taken place between Erbil and Koya, along the road going to Erbil, whereas in his witness statement the appellant claimed that the road joined another road which went to Howler and Koya. The judge noted also that the appellant could not describe his attackers beyond saying that they were adults and one or two had a beard. The judge did not find it plausible that the appellant would only have injuries to his head and leg, if he had been attacked in the way he claimed. The judge states, at [54]

> "On the appellant's own admission, his attackers did not mention his father being involved with the Ba'ath party … Nor was he able to say how his attackers recognised him as his father's son … I do not find this plausible… I am satisfied given the appellant's age at the time his father was allegedly taken in 2004, if anything, those wishing retribution would be more interested in his mother and stepfather rather than the appellant who they would not have seen (the appellant was at school at the time …) and who they would not have recognised as his father's son."

10. At paragraph [55], the judge noted that the appellant's account about how he saw his house and farm being burnt down is implausible, and the account given by the appellant in his witness statement contradicts his oral evidence. At paragraphs [56] and [57], the judge addresses the appellant's account of events in Iran. At paragraph [58], the judge noted that the appellant himself has no political affiliations or interests. The judge did not find it plausible that the appellant only speaks a little Farsi, given the difficulty conversing openly in Kurdish in Iran, and the suspicions with which Kurds are viewed there. The Judge states:

> "… I am satisfied I am not being told the truth by this appellant. I also do not find plausible the authorities would have been aware of the appellant in Iran seeing they did not have his details as he claimed he was illegal there. I do not accept they would have been able to obtain a photograph of him. I find the call made by the appellant to his stepfather from Turkey is not plausible given his stepfather was more involved than the appellant in the distribution of leaflets and this much would have been evident from any raid on the family home and/or integration family members which the Iranian authorities would reasonably have done. I also note his mother is still living with his stepfather in Iran despite being illegal there.

11. At paragraph [59], the judge concluded as follows:

> "I do not accept the appellant's claim of encountering problems in Iraq and Iran. I reject his account. I do not accept his account of his documents being burnt including his CSID. I find this *(sic)* evidence on this self-serving. I am satisfied the appellant, as an Iraqi Kurd will be able to obtain his CSID or even a new one, either with the assistance of his mother or using a proxy or a lawyer. The appellant is an Iraqi Kurd, speaks the language and is from the KRG. I note there are flights from Baghdad to Sulaymaniah. I am satisfied the appellant will be able to obtain a CSID prior to his travel or reasonably soon upon arrival in Iraq. I find the appellant knows the page and volume number of the book holding his CSID and that of his family and can use their assistance on this, if necessary. I am also satisfied he will be able to find employment in Iraq and seek the assistance of his family if necessary. I am satisfied he remains in contact with them despite stating otherwise. On his own evidence, his stepfather wanted to return him back to Iraq despite being aware of the incident he encountered in 2008. I am satisfied he only said this because his stepfather knew he would not encounter any problems in Iraq. I am satisfied just as the appellant showed great fortitude in coming to the UK, equally, with such resilience, he will be able to establish himself back in Iraq, if need be with the assistance of a returns package allowing him sufficient time to obtain his CSID and ID documents. I do not accept his account his documents are not there or have been destroyed."

12. The judge refers to the relevant country guidance decision and at paragraphs [61] and [62], the judge states:

> "61. … I find the appellant can be returned to the KRG if he wishes, where he has lived for 14 years and where he is from, for the reasons I have already given. I find he has some wider family there, who he can make contact with, through his mother and stepfather if necessary. I do not accept his risk on return since I have found he does not have a well-founded subjective fear in Iraq. I find the appellant is just a normal Kurdish Muslim, who can return to Iraq. I am satisfied he also has a CSID card and has, in any case, his family can assist him on return given the ease to which on his own evidence they travelled from one country to another. I do not accept he is undocumented.
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> 62. I note **AA** states an appellant, pre-cleared with the IKR authorities can return there. I am satisfied this appellant, who originates from IKR can rely upon this to return. I do not accept he is at any risk in his home area. The issue of internal relocation therefore does not arise. I do not accept he faces any risk on the evidence before me."

The appeal before me

13. The appellant claims that the F*t*T judge made several mistakes as to fact that impact upon his assessment of the credibility of the appellant, and his claim. Furthermore, the judge refers to inconsistencies in the appellant's account when there is no

inconsistency, but a misunderstanding of the evidence. The appellant claims the judge has failed to properly assess the risk upon return, and whether the appellant could obtain a new CSID without having had proper regard to the relevant country guidance.

14. Permission to appeal was granted by F*t*T Judge Bulpitt on 12th March 2019 and the matter comes before me to determine whether there is a material error of law in the decision of F*t*T Judge Maka, and if so, to remake the decision.

15. On behalf of the appellant, Ms Masih submits that the judge proceeds, at [50], upon the mistaken premise that the PUK would not have waited until 2008 to take the appellant's father away, whereas the appellant has consistently claimed that his father was taken away in 2004. That, she submits, undermines the adverse credibility finding made by the judge. Furthermore, at [51], the judge refers to the appellant having claimed in interview that his brother left Iraq in 2008, whereas the appellant has consistently maintained that his brother left in 2004. The reference to '2008', at question 22 of the record of interview disclosed by the respondent, is an error. The appellant has provided a supplementary bundle and at pages 96 and 97, there is a transcript of the interview, which confirms that the answer given by the appellant was "*I do not know when he entered but he left Iraq in 2004*". Ms Masih submits that in finding, at [53], that the appellant has been inconsistent as to the road referred to by the appellant, the judge disregarded the appellant's evidence that 'Erbil' and 'Howler' are in fact one and the same place. 'Howler' is the Kurdish name for 'Erbil'.

16. Ms Masih submits that the judge's conclusion, at [54], that those wishing retribution would be more interested in the appellant's mother and stepfather fails to acknowledge that the appellant's brother had left Iraq in 2004 to avoid retribution. It is said in the grounds of appeal that "*his mother had not married his stepfather at the time*", and this is an indication that the judge failed to appreciate the timeline of events.

17. In so far as the risk upon return is concerned, Ms Masih submits the judge erred at [60], in his conclusion that the appellant could, if he wished, return to Iran. The

judge concludes that he is satisfied that the appellant lived in Iran with the consent and knowledge of the Iranian authorities and had official residence documentation to show this. The judge did not accept the appellant was living in Iran illegally. The respondent had conceded in paragraph [59] of the decision dated 30 October 2018, that the appellant has "no legal status in Iran", and therefore he could not be returned to Iran. The respondent had not withdrawn that concession, and the finding made by the judge as to the appellant's status in Iran, is unsafe for lack of reasoning based upon cogent evidence before the Tribunal. In any event, the appellant had not understood the fact that the appellant has no legal status in Iran to be in issue and was given no opportunity to address the submission made by the Presenting Officer that the appellant could return to Iran if he wished, with evidence.

18. Finally, Ms Masih submits that the judge failed to properly engage with the country guidance in his assessment of the appellant's ability to return to Iraq. She submits the judge failed to have regard to the appellant's evidence and the judge irrationally concluded that the appellant could obtain a CSID because he knows the page and volume number of the book holding his CSID, when there was no evidence to support such a conclusion.

19. In reply, Mr Howells accepts that the judge made errors in the decision, but, he submits, the errors are immaterial. He submits the judge properly noted at [14], the appellant's account that his father was taken by the PUK in 2004. The appellant's account is that his father was taken because he was a member of the Ba'ath party. At [49], the judge did not accept the appellant's account that his father was involved with the Ba'ath party, and the judge set out his reasons for rejecting that claim. In the circumstances, whether the appellant's father had been taken in 2004 or 2008, was immaterial.

20. Mr Howells submits that the inconsistency identified by the Judge at [51] regarding the year in which the appellant's brother left Iraq, even if mistaken, is immaterial because the judge went on to say that "*whatever the position*", he was satisfied that the appellant's mother would also have sent the appellant with his brother, if she genuinely felt he was also at risk despite his young age. The reasons provided by the

judge for rejecting the appellant's account are not based upon the inconsistency as to the year in which the appellant's brother left Iraq, but whether the account is plausible.

21. Mr Howells accepts that 'Erbil' and 'Howler' are one and the same place. He submits that although the judge found there to be an inconsistency in paragraph [53], at paragraphs [53] and [54], the judge sets out a number of reasons why the appellant's account of his being attacked, and his account of what happened thereafter, is simply not plausible. Mr Howells accepts that, at [54], the judge appears to proceed upon the basis that those wishing retribution would be more interested in his mother and stepfather, without acknowledging that the appellant's mother and his stepfather were not married at the time.

22. Mr Howell also concedes that the judge appears to reach inconsistent views as to the appellant's position in Iran, and whether the appellant could lawfully return to Iran, but submits that the judge's observations and findings regarding the position in Iran are immaterial, because, as the judge accepts at [60], the appellant is not being returned to Iran.

23. Mr Howells submits that notwithstanding the mistakes as to fact relied upon by the appellant, it was open to the F*t*T Judge to find that the appellant would not be at risk upon return, and to dismiss the appeal. The mistakes as to fact were peripheral and would not have made a difference to the outcome of the appeal.

Error of Law

24. The judge had plainly identified, as he noted at [7], that the credibility of the appellant, and his account of events, was at the heart of the appeal. Beyond accepting that the appellant is an ethnic Kurd of Iraqi nationality, the judge found that the appellant is not a credible witness and that his account of events is inconsistent, vague and implausible.

25. In assessing the credibility of the appellant and the claim advanced by him, the judge was required to consider a number of factors. They include, whether the account

given by the appellant was of sufficient detail, whether the account is internally consistent and consistent with any relevant specific and general country information, and whether the account is plausible. Some of those factors may be more relevant in an individual case than others. If an account is littered with internal inconsistencies that may be enough for a judge to dismiss the evidence of an appellant as incredible. The assessment of the claim and the credibility of the appellant is fact sensitive.

26. If the mistake relied upon by the appellant had simply been in relation to the year in which the appellant's father had been taken by the PUK, I would have had little hesitation in agreeing with the submission that is made by Mr Howells, that the mistake is immaterial. Although the judge does, at [50], refer to a concern that the PUK appeared to have waited until 2008 to take the appellant's father away, I note that at [54], the judge refers to the appellant's age at the time his father was allegedly taken in 2004. I would have been prepared to accept the submission that the judge was aware that the appellant claims that his father was taken in 2004, and in any event, whether his father was taken in 2004 or 2008 is immaterial, given the other reasons provided by the judge for rejecting that claim.

27. The perceived inconsistency as to the year in which the appellant's brother left Iraq was not an inconsistency in the account given by the appellant, but arose because of an incorrect transcript of the interview record.

28. The mistakes of fact identified by the appellant and accepted by the respondent, taken together, have in my judgement, played a material (not necessarily decisive) part in the judge's reasoning. Although I accept that it may still have been open to the judge to reject the account and find that the appellant is not credible for many of the other reasons set out in the decision, I am satisfied that the mistakes played a material part in the judge's assessment of the claim.

29. In my judgment, even though there were sound reasons for rejecting the appeal, the series of material factual errors, constitute an error of law. The essential question for me is whether this appellant had a fair hearing of the claim that he made. As part of that fair hearing, the judge was required to take into account conscientiously, the

claim being made when considering arguments that are deployed in favour of a finding that the appellant is telling the truth, as well as those arguments against.

30. My concern however is that the decision contains a number of mistakes as to fact, and in the end, when taking all of those mistakes together, I can have no confidence that the judge properly understood claim advanced by the appellant and the relevant timeline, in reaching his decision. I am persuaded by Ms Miah that the judge made mistakes as to the account being advanced by the applicant as set out in his witness statement and interview, when reaching his findings and conclusions.

31. In my judgment, the decision of the FtT contains a material error of law and should be set aside.

32. I must then consider whether to remit the case to the F*t*T, or to re-make the decision myself. I consider that where a first instance decision is set aside on the basis of an error of law involving the deprivation of the appellant's right to a fair hearing, the appropriate course will be to remit the matter to a newly constituted F*t*T for a fresh hearing. In any event, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012, the nature and extent of any judicial fact-finding necessary will be extensive. The parties will be advised of the date of the First-tier Tribunal hearing in due course.

NOTICE OF DECISION

33. The decision of First-tier Tribunal Judge Maka promulgated on 5th February 2019 is set aside.

34. The appeal is remitted to the First-tier Tribunal for rehearing, with no findings preserved.

Signed Dated 22nd November 2019

Upper Tribunal Judge Mandalia

FEE AWARD

I have set aside the decision of the First-tier Tribunal and remitted the matter to the FtT for rehearing. In any event, as no fee is paid or payable, there can be no fee award.

Signed Dated 22nd November 2019

Upper Tribunal Judge Mandalia