Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13318/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 13th November 2018	**On 27th February 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

G H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Karnik (Counsel)
For the Respondent: Mr C Bates (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Durance, promulgated on 9th February 2018, following a hearing at Manchester on 25th January 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

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The Appellant

2. The Appellant is a male, a citizen of Iraq, and he was born on 1st March 1989. He appealed against the decision of the Respondent dated 30th November 2017, refusing his application for asylum and for humanitarian protection, pursuant to paragraph 339C of HC 395.

The Appellant's Claim

3. The essence of the Appellant's claim is that he has a fear of ISIS due to having been present in Makhmur, while they attacked the town, and in his claim he provides an account demonstrating that he had not been targeted personally or directly. He also claims that despite ISIS no longer being present in the territory he will be killed by Hasd-al-Shabi forces. He also fears mistreatment or death at the hands of his wife's ex-husband due to having got married to his wife.

The Judge's Findings

4. The judge comprehensively disbelieved the Appellant's account. He gave reasons for doing so (at paragraphs 49 to 65) and concluded that internal relocation was available to the Appellant in Iraq were he to return, and that the CSID card would be possible for him to procure again because he previously had such a card (paragraph 69).

Grounds of Application

5. The grounds of application state that the judge had wrongly either disbelieved the Appellant in terms of the account that he gave, or had made findings of fact, in relation to matters that were deemed by him to have been in issue, without these matters ever being expressly put to the Appellant for his explanation with regards to them. Particular attention was drawn to how the judge had made findings of fact at paragraphs 49 to 55.

6. On 31st July 2018 permission to appeal was granted by the Upper Tribunal on the basis that unless a point of contention was so obvious that it should have been addressed by an Appellant, without warning, it was arguable that judges should not make findings, on points that are not put to the Appellant. Moreover, in granting permission, the Upper Tribunal also stated that the use of the phrase by the judge that, "I find on the lower standard of proof that the Appellant has given discrepant information" (at paragraph 52) was unclear as to the precise standard of proof that was applied by the judge.

Submissions

7. At the hearing before me on 13th November 2018, Mr Karnik, appearing on behalf of the Appellant, submitted that there were three issues before this Tribunal. First, there was a procedural unfairness in that conclusions were reached in relation to particular aspects of the Appellant's appeal without

the issues being specifically put by the judge to the Appellant, before it was concluded that the Appellant had given discrepant answers. Second, there was a failure to take into account material matters. Third, there was an improper use of the standard of proof.

8. In making good his submissions before me, Mr Karnik submitted that he could do no better than go to particular aspects of the appeal, which were pivotal to the Appellant's claim. First, the judge considered an issue as to whether the Appellant had been assaulted by ISIS and had then fled, or whether he had been involved in fighting or subjected to gunfire/shelling or explosives (paragraph 49). The judge explained that the evidence from the GP in the notes there was that the Appellant was involved in the war in Kurdistan which had led to his being exposed to explosions. There was, however, an inconsistency as to why the Appellant had been forced to flee Iraq, and this was "pivotal in terms of the events which caused him to flee" (paragraph 50). Mr Karnik submitted that if this was in issue then it ought to have been put to the Appellant. It need not have been in issue because both things could have happened. The Appellant could have been assaulted by ISIS but at the same time in a separate event altogether, he could have been involved in the war in Kurdistan that led to his being exposed to explosions. To conclude on this basis that the Appellant had been discrepant in terms that was "pivotal", without this issue being put to the Appellant, was a procedural error.

9. Second, he submitted that if one looks at the Supplementary Bundle (bundle C) it is clear from the medical evidence of the doctor's notes that there is nothing here which is inconsistent with the Appellant's own explanation. In point of fact, the Appellant was never asked during his asylum interview about any explosion. It was therefore, all the more important, that if this issue was of concern to the judge, it ought to have been put to the Appellant in the hearing.

10. Third, he submitted that there was the question of the video evidence. This was even more interesting. There was actually no "video evidence" at all provided on the Appellant's behalf. There had, however, been a reference in the medical notes to there having been video evidence. Accordingly, if the judge wished to see this, the question ought to have been put to the Appellant. It was not. And yet, the judge states (at paragraph 55) that there was "footage of his cousin's funeral on his phone".

11. The judge considered two possibilities as to how this footage could have arisen. First, he said that "it was either taken on his phone or sent him on his phone". Second, the judge concluded from this that, "either way, this evidence does not support his assertion that he is unable to contact family members" (paragraph 55).

12. Mr Karnik submitted that there were two issues here that had been taken against the Appellant. First, the question of video footage and secondly, doubt being cast on his evidence that he was not in contact with his family

members. The reality was, however, that the Appellant had acquired the video footage from members of the Kurdish community in the UK (see paragraph 12 of the Grounds of Appeal before the First-tier Tribunal). This issue, if it was to be given a heightened importance by the judge, ought to have been put to the Appellant. It was not. Accordingly, a series of conclusions had been reached against the Appellant, where he had not been given the opportunity to address matters of concern arising in the judge’s mind.

13. For his part, Mr Bates submitted that there is no doubt that the judge does state (at paragraph 55) that there were discrepancies in the Appellant’s evidence, when referring to evidence from the Secretary of State and comparing this with what was said by the GP, but there is no explanation either way, raised in relation to how the issue of explosions impacted upon the Appellant’s claim. The judge may well have been entitled to conclude as he did, but he had to accept that the issue had to be put to the Appellant. Having said that, Mr Bates submitted that ultimately it was up to the Appellant to make good his case. If an issue had arisen in relation to “video footage” that had been referred to in the GP’s notes, then it was for the Appellant to ensure that such evidence was put in his bundles of evidence, so that it could be taken into account by the judge. In this respect there was no error of law.

Error of Law

14. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I set aside the decision and re-make the decision. My reasons are that the judge has concluded that there is no plausible explanation in relation to pivotal matters from paragraph 49 onwards, and yet these matters were not put to the Appellant. This is true both in relation to the “video footage”, as well as the question of the explosions impacting upon the Appellant and his beatings by ISIS, both of which, in themselves would not have been necessarily mutually exclusive in terms of leading to the Appellant having to flee Iraq, but were deemed by the judge to have been entirely of consequence, insofar as the veracity of the Appellant’s claim was concerned. If that was so, the issue should have been put to the Appellant. As a matter of procedural fairness, there is accordingly an error of law in this respect.

15. There has been a delay in sending out this Determination to the parties concerned, because although it was dictated on the day of the Hearing, and typed up shortly thereafter, it appears to have been held up in the system, before promulgation.

Notice of Decision

16. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed to the

extent that it is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Durance, pursuant to Practice Statement 7.2(a) of the Practice Directions.

17. An anonymity direction is made.

18. This appeal is allowed.

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
Deputy Upper Tribunal Judge Juss 25th February 2019