Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/14130/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 June 2019	**On 12 June 2019**

Before

UPPER TRIBUNAL JUDGE HANSON
UPPER TRIBUNAL JUDGE KEITH

Between

'HA'

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
The anonymity direction previously made by the First-tier Tribunal ('FTT') continues to apply. 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 his 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.

Representation:
For the appellant: Mr H Ali, representative
For the Secretary of State: Mr S Lindsay, Senior Home Office Presenting Officer

ERROR OF LAW FINDING AND REASONS

Introduction

1. This is an appeal by the appellant, against the decision of the FTT (the 'Decision') promulgated on 6 March 2019, in which the FTT dismissed the appellant's appeal against the refusal by the Secretary of State ('the respondent') to grant asylum and humanitarian protection; and leave to remain based on his human rights. The respondent had issued a refusal decision on 19 November 2018.

2. In essence, the core points taken against the appellant by the respondent focussed on two sets of connected issues: his protection claim; and his claim based on his family life with his wife, a British citizen of Kurdish/Iraqi national origin.

3. In respect of the protection claim, the respondent did not accept that the appellant had encountered adverse interest from the family of a former girlfriend with whom he had claimed to have eloped. The respondent regarded as internally inconsistent the claim that the couple had informed their respective families of their love for one another and their desire to marry; and yet their families had allowed them to continue to communicate; and to leave Iraq. The respondent also considered, and applied, section 8(4) of the Asylum and Immigration (Treatment of Claimants) Act 2004. The appellant travelled through, but did not claim asylum in, Hungary. The respondent did not accept the explanation he did not claim asylum there as he was advised not to do so, because it was not safe in Hungary, by the agent who accompanied him. The respondent did not accept the claim that an arrest warrant which had been issued, accusing him of kidnapping his former girlfriend, was genuine, or that he would be of continuing adverse interest from his former partner's family.

4. In respect of the human rights claims, the respondent noted that appellant had entered the United Kingdom ('UK') on 17 June 2016, aged 23 and had only lived in the UK for 3 years and 4 months at the date of the respondent's decision. While he had married his current partner, who had indefinite leave to remain, on 16 March 2018, whom he had met two months previously, the respondent did not accept at that stage that they were in a genuine and subsisting relationship. If they were, the appellant could return to Iraq and reapply for entry clearance.

FTT's decision

5. The FTT found that the appellant had not established his general credibility, and his evidence was not coherent or plausible. The FTT noted that the appellant claimed to have developed a clandestine relationship over many months where the objective evidence suggesting that a girl could be killed by her own family just because she fell in love; the couple had been able to inform their families of their relationship and intention to marry yet were able to obtain both of their passports; remain in contact; and leave Iraq. The claim of the family reporting matters to the local police a couple of days after leaving in 2015 was not plausible in the

context of the objective evidence of a limited appetite for police and courts to be involved in family matters. The FTT did not regard as plausible the account of how the appellant recovered his passport via unnamed agents; or how he obtained a copy of a police arrest warrant, namely because a cousin had visited the family home and had merely found the warrant and taken it without the appellant's family knowing.

6. The FTT regarded the appellant's return to Iraq feasible ([61] to [66]), on the basis that the appellant has a passport and his CSID is in Kirkuk, and he could obtain this from his cousin; he had previously fought with the Kurdish Peshmerga; and he would have assistance from his wife's family on returning to the Independent Kurdish Region of Iraq ('IKR'), where they live.

7. Whilst the FTT found that the appellant is in a genuine relationship with his wife, the appellant's immigration status was precarious, in the context of his protection claim having been fabricated. The FTT concluded that tittle weight should be applied to his private life for the purpose of section 117B(5) of the Nationality, Immigration and Asylum Act 2002. The FTT did not accept that paragraph EX.1.(b) of Appendix FM of the Immigration Rules was met, as there were not insurmountable obstacles to family life between the appellant and his wife continuing in the IKR. She spoke the local language, had extended family there, had knowledge of the cultural customs, could practice her religion; and would be able to enter using her British passport. Whilst it was more likely the appellant would return alone to Iraq and whilst he couldn't currently meet the financial requirements while his wife was a student, the FTT noted that her studies would soon end and her income could then increase. The FTT noted that there was no evidence before it to conclude that any temporary separation would be disproportionate and in breach of the appellant's article 8 rights.

8. For the above reasons, the FTT rejected the appellant's appeal.

The grounds of appeal and grant of permission

9. While not numbered as we have done so below, the grounds appear to be as follows:

- ground (1) - the FTT had failed to take into account the security situation in Iraq and in particular the country policy and information or 'CPIN' of November 2018, in the context of its assessment of whether the appellant's wife could be expected to return to Iraq ([2] of the grounds);

- ground (2) – the FTT failed to consider if the appellant's wife's income was likely to be sufficient for the appellant to meet the income requirements of the Immigration Rules, an application for entry clearance would then be disproportionate, noting the principle in Chikwamba v SSHD [2008] UKHL 40 ([3] of the grounds);

- ground (3) - the FTT had failed to consider the respondent's delay in refusing the appellant's appeal, which meant that family life developed in the meantime, noting the principle in EB Kosovo v SSHD [2008] UKHL 41 ([4] of the grounds);

- ground (4) - the FTT had referred to the CPIN for Iraq, but had not referred to the underlying source material referred to in the CPIN – 'Kurdish Honour Crimes' of August 2017, which suggested that the appellant would be at high risk of being killed ([6] of the grounds);

- ground (5) - the FTT had not explained adequately why it regarded the appellant's failure to have claimed asylum in Hungary was not reasonable ([8] of the grounds);

- ground (6) - the FTT had not explained adequately why it regarded the appellant's account of how he received his passport and arrest warrant as not plausible ([13] of the grounds);

- ground (7) the FTT's conclusion that the appellant could return on a domestic flight to the IKR is not consistent with the objective evidence, specifically the CPIN of October 2018, which stated that a person attempting to enter the IKR, if from Kirkuk, would be returned to Kirkuk.

10. Grounds (1) to (3) focussed on the appellant's human rights claim; whilst grounds [4] to [7] focused on the protection claim.

11. First-tier Tribunal Judge Scott-Baker granted permission on 29 April 2019.

The hearing before us

The appellant's submissions

12. Whilst granting permission to appeal on all grounds, Judge Scott-Baker noted that in respect of the protection appeal, given all of the evidence before the FTT, its findings were arguably open to it. Her view was the same in respect of the issue of the viability of the appellant's return in the context of the security situation. Her concerns were on arguable failures in respect of an assessment of continuation of family life and the sufficiency of reasoning on that issue. Whilst we indicated that it was our provisional view only, on the papers before us, we agreed with Judge Scott Baker's analysis that the FTT's findings in respect of the protection claim were open to it and disclosed no error of law. We nevertheless invited Mr Ali, who was content for us to indicate our provisional view, to make any further submissions if he wished to on the point. He was content merely to rely on the written grounds in respect of the protection appeal.

13. In respect of the human rights appeal, Mr Ali reiterated that the appellant's wife had been in the United Kingdom since 2004, aged 7. The FTT had proceeded on a factual error that she was due to complete her legal studies at the end of March 2019, when in fact she was continuing to

study until the 2020. This was important as the FTT erroneously assumed the couple's separation would only be temporary, when it would not, as the wife's continuation of her studies meant that the appellant would not meet the income requirements of the Immigration Rules.

14. Mr Ali reiterated the delay in the respondent's decision, during which time the couple developed their family life. The FTT had failed to consider this in the proportionality exercise.

The respondent's submissions

15. We indicated that Mr Lindsay did not need to address us, in the absence of further submissions from Mr Ali, on the protection appeal.

16. In respect of the human rights appeal, Mr Lindsay argued that the FTT had plainly considered the situation on the ground in Iraq and whether these would present any obstacles to the couple's return there at [62] of the Decision. The FTT had noted that the appellant had a passport and would be able to obtain his CSID, as well as support from his wife's family. There was nothing to indicate that the FTT had considered irrelevant material; or failed to consider relevant material.

17. The FTT have not reached the conclusion that a future application for entry clearance by the appellant would be bound to succeed. The argument that the appellant's wife's income would be limited until 2020 went against the argument that the 'Chikwamba' principle should apply, ie. that return and reapplication for entry clearance was disproportionate.

Error of law discussion

Grounds (1) to (3) – human rights appeal

18. In relation to ground (1), the FTT considered the CPIN of November 2018, referring to it, albeit briefly, at [27] of the Decision. It was unarguably open to the FTT to find that there are not insurmountable obstacles to family life with the appellant and his wife continuing in the IKR, noting that she has extended family there who would support her; she has visited the IKR previously; and she would be able to enter the IKR using her British passport. The general commentary on the wider security situation in Iraq, referred to in the CPIN, is something which, while potentially relevant by way of background, was not inconsistent with the FTT's findings on the viability of family life continuing within the IKR. The FTT's findings disclosed no error of law.

19. In relation to ground (2), we accepted Mr Lindsay's submissions that even if the FTT had proceeded on the factual error that the appellant's wife's studies would not end until 2020, as opposed to March 2019, this would in fact weaken the appellant's ground of appeal. Put simply, it was said that the FTT had erred in assuming that the appellant's separation from his wife would be temporary, and that this was key to the proportionality exercise. In fact, as [78] the Decision makes clear, the FTT made no such

assumption about the temporary nature of the couple's separation. The FTT expressly noted that it was not speculating about the outcome of a future application for entry clearance. What the FTT noted was that it had no evidence before it of the 'Chikwamba' scenario, namely the situation where somebody was bound to meet the requirements of the Immigration Rules, in which case a requirement for them to leave the UK and re-apply for entry clearance, would very likely be disproportionate when carrying out the balancing exercise in assessing the proportionality of refusal of leave to remain, in the context of the appellant's article 8 rights. It was unarguably open to the FTT to reach the conclusion that there was no such evidence of a 'Chikwamba' scenario. Mr Ali's submission that the appellant's wife's studies are continuing and therefore she could not support the appellant in meeting the financial requirements of the Immigration Rules until 2020, if he were to apply for entry clearance, took the appellant further away from the 'Chikwamba' situation, and made the respondent's decision to refuse leave to remain more, not less proportionate, under an article 8 assessment.

20. In relation to ground (3), while the issue of delay was not expressly referred to in the Decision, including in the appellant's representatives' submissions; the FTT noted the case of TZ (Pakistan) v SSHD [2018] EWCA Civ 1109, which in turn deals with the issue. The FTT also noted the appellant's immigration history, including his claim of asylum on 18 June 2015, which was not refused until 19 November 2018; and the fact that the appellant had met his wife in 2017 and he had told her that he was an asylum seeker ([22]). The FTT expressly referred to the appellant being in a genuine subsisting relationship with his wife who is a British citizen, and that he had been present in the UK for almost 4 years ([70]). The FTT noted the fact of development of the appellant's family life, specifically his marriage, when assessing factors in the appellant's favour, in the proportionality assessment at [82]. It was clear that the FTT had considered all relevant facts in carrying out the proportionality assessment, and the FTT was unarguably entitled to reach the conclusion it did on the proportionality assessment.

Grounds (4) to (7) - the protection appeal

21. In relation to ground (4), the FTT expressly considered the CPINs of August 2017 (Kurdish 'honour' crimes) – [45]; and November 2018 (Iraq: Security and humanitarian situation) at [27]; as well as the Country Guidance cases of AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC); AA (Iraq) v SSHD [2017] EWCA Civ 944; and AAH (Iraqi Kurds – internal relocation) Iraq CG [2018] UKUT 00212 (IAC). The FTT expressly considered the claimed risk to the appellant in the context of the background evidence. It was open to the FTT to conclude that the appellant's account did not 'fit' with available background evidence of the otherwise significant risk to the appellant's former partner, had the former partner's family objected to that relationship. The assertion in the grounds that the objective evidence indicated that the appellant would also be at risk, as well as his former partner, was consistent with the FTT's findings that the claimed account

was fabricated, rather than supporting his claim that the relationship had continued and that the couple were able to escape despite the risks to them. In reality, the ground amounts to a disagreement with the FTT's findings. The FTT's findings were open to it to make on the evidence before it and do not disclose an error of law.

22. In relation to grounds (5) and (6), they relate to the adequacy of reasoning in [59] of the Decision, in which the FTT did not accept the appellant's account of why he had not claimed asylum in Hungary; nor his account of how he obtained his passport and the purported arrest warrant against him. Whilst we accept that the FTT's conclusions are brief in that paragraph, they must be read in the context of other references in the Decision; at [50], the FTT did not accept that the appellant's failure to claim asylum because of his claim that he was 'under the influence of an agent' while in Hungary, was a reasonable explanation. Even then, the FTT was careful to note that any damage to the appellant's credibility needed to be considered in the round, and in particular in the context of all of the evidence. The FTT clearly considered the appellant's oral evidence at [15] that the appellant's cousin had happened to see the arrest warrant in the appellant's family's home in a 'certain [unspecified] place in the house', and 'picked it up' without telling the appellant's family, and sent it via unnamed third parties to the appellant. It was open to the FTT to conclude that this account did not have the 'ring of truth.' The FTT had also noted the inconsistent accounts of how the appellant obtained his passport at [17], when he said that he had brought it with him or alternatively had it posted to him via an intermediary. It was open to the FTT to not accept the appellant's account as credible. Considering the Decision as a whole, the findings, taken in context, were adequately reasoned and do not disclose an error of law.

23. In relation ground (7), the FTT considered the Country Guidance ('CG') cases in relation to internal relocation of people of Kurdish origin within Iraq and whilst not expressly referring to the CPIN of October 2018, the CG cases expressly deal with viability of return of an Iraqi national of Kurdish ethnic origin to the IKR, including the viability of travel between Baghdad and the IKR with a CSID and passport. It was unarguably open to the FTT to find that the appellant would be able to gain entry to the IKR, noting that he has a passport; would be able to obtain his CSID; would not be at risk during the security screening process because he had previously fought for the Kurdish Peshmerga; and his own account of travelling without difficulty between Iraq and the IKR. The FTT's findings are consistent with the objective evidence and disclose no error of law.

Notice of Decision

The decision of the First-tier Tribunal did not involve an error of law, such that the decision must be set aside. The appellant's appeal is dismissed.

Signed J Keith Date: 10 June 2019

J Keith

Judge of the Upper Tribunal