Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01958/2019

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 31 July 2020	**On 10 August 2020**

Before

Upper Tribunal Judge Pickup

Between

ZR
[Anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: In person, not represented
For the respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269), I make an anonymity direction. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or any member of his family.

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Ali promulgated 23.9.19, dismissing his appeal on all grounds against the decision of the Secretary of State, dated 14.2.19 to refuse his claim for international protection.

2. First-tier Tribunal Judge Keane granted permission to appeal on 7.11.19.

Error of Law

3. In the first instance I have to determine whether or not there was an error of law in the making of the decision of the First-tier Tribunal such that it should be set aside. This is not a remaking of the decision; the Upper Tribunal can only intervene at this stage if it is demonstrated that there is an error of law in the decision which was material to the outcome of the appeal.

4. The appellant is an Iraqi Kurd from Sulaymaniyah in the IKR. It was confirmed at the First-tier Tribunal that he has retained his CSID and identity documents necessary to return to Iraq. He entered the UK clandestinely in September 2016, accompanied by his wife and three children, whose ages at the date of the First-tier Tribunal appeal hearing were 5, 11, and 13, and immediately sought international protection.

5. The protection claim was based on both alleged Christian conversion of both the appellant and his wife, and on the basis of a threat to his life in Iraq. His factual claim was that he had been threatened by T, a member of ISIS, who kidnapped his nephew in order to extort money from the appellant. T was caught and sentenced to hang, as a result of which it is claimed that the appellant was put under pressure to have T released. It is asserted that his father was threatened, his own life threatened, he was shot at, and there was an attempt to abduct his children from school. In consequence, the appellant and his family fled Iraq in July 2015, making their way though Turkey and spending a considerable period in Germany, where he claims to have been converted to Christianity and baptised. They entered the UK together clandestinely in September 2016, whereupon he claimed international protection. It is claimed that his wife was converted to Christianity and baptised in the UK in December 2016.

6. The First-tier Tribunal Judge rejected the appellant's core factual claim of events in Iraq, finding the account not credible for the reasons set out in the decision. The judge also found the claimed Christian conversions not credible and/or not genuine. At [57] of the decision the judge considered the best interests of the three children, taking into account school reports, but concluded their best interests would be to return to Iraq with their parents. At [58] the judge summarised the findings that the appellant would not be at risk on return to Iraq, that there was a sufficiency of protection, and that he could internally relocate within the IKR. Obviously, the last two findings were in the alternative as the protection grounds were rejected for the reasons set out in the decision between [37] and [44] of the decision, and the claimed conversion rejected for the reasons set out between [45] and [51]. The appeal was, therefore, dismissed on all grounds.

7. The grounds of application for permission to appeal submitted that the First-tier Tribunal erred in (i) failing to give any or any adequate

consideration to the human rights grounds pleaded in the grounds attached to the Notice of Appeal; and (ii) failed to give any or any due regard to the court's duty under Section 55 of the Borders, Citizenship and Immigration Act 2009 to safeguard and promote the welfare of the children, and in particular to consider the impact of removal on the appellant's school-aged children.

8. In granting permission to appeal to the Upper Tribunal, Judge Keane considered both grounds at least arguable. The judge granting permission may have been under the misapprehension that the appellant would be returning to Iraq without his family.

9. It should be noted that the appellant has not appealed the findings of the First-tier Tribunal rejecting his core factual claim, or the dismissal of the appeal on asylum and humanitarian protection grounds. Neither is the decision challenged on articles 2 and 3 ECHR grounds. Whilst humanitarian protection is referred to in the briefest terms in the grounds of application for permission to appeal, that ground is not particularised or developed further. The sole ground relied on is that of human rights.

10. The appeal was first listed before Upper Tribunal Judge Hemmingway at Bradford on 10.1.20. However, the judge was surprised to find the appellant unrepresented and in the absence of an interpreter considered that he was unable to represent himself. The matter was adjourned with directions for the Tribunal to provide a Kurdish Sorani interpreter.

11. The matter was then listed for hearing on 8.4.20, a date which had to be vacated because of the COVID-19 pandemic. The matter was then considered by an Upper Tribunal Judge, who concluded that the case was not suitable for a remote (video) hearing as the unrepresented appellant would be unlikely to be able to participate effectively in such a hearing. Thus the matter was listed before me for a face-to-face hearing at Bradford.

The Human Rights Grounds of Appeal

12. It is not entirely clear to what extent and on what human rights basis the appellant's appeal was pursued before the First-tier Tribunal, other than the best interests of the children. In regard to human rights generally, the grounds of appeal to the First-tier Tribunal were generic and unparticularised. However, it was asserted that the removal of the appellant to Iraq would be unlawful under Section 55 of the Borders, Citizenship and Immigration Act 2009 "as it would be incompatible with the best interests of his children." There was a passing reference suggesting that removal of the appellant to Iraq would expose him to treatment that would breach articles 2 and 3 ECHR. However, that last issue was not pursued at the First-tier Tribunal appeal hearing beyond the factual basis of the protection claim, and it has not been pursued in the onward appeal.

13. The First-tier Tribunal had the benefit of the 486-page appellant's bundle, which comprised a few witness statements, a letter relating to the appellant's wife's voluntary service, and a large quantity of objective information on Iraq, together with the then-applicable Country Guidance case law. There was also a small supplementary bundle. In addition, it appears from my examination of the case file that the Tribunal was handed copies of letter detailing the school attendance and progress relating to the three children, a 2013 article from 'The Student Lawyer' entitled The 'Best Interests' of a child in Immigration Decisions', and a copy of the Upper Tribunal's decision in MT and ET [2018] which dealt in part with the best interests of children. I have considered all of these documents.

14. The appellant was represented before the First-tier Tribunal by counsel, Mr D Hewitt, whose skeleton argument dated 30.7.19 (the day of the hearing) was handed in. The skeleton argument was primarily focused on the protection claim. However, the best interests of the appellant's children was addressed, but only in limited terms as follows: "Further or alternatively, the Tribunal could be minded to allow the appeal based on Human Rights Grounds/based on what is in the best interests of A's three children (names and ages given)." Reliance was placed on Section 55 of the Borders, Citizenship and Immigration Act 2009 and the need to safeguard and promote the welfare of children who are in the UK. EV (Philippines) [2014] EWCA Civ 874 was also referred to, including the factors to be considered in deciding what is in the best interests of children.

15. The First-tier Tribunal Judge's typed Record of Proceedings (ROP) reveals that at the outset of the hearing the judge clarified with the two representatives the issues to be resolved in the appeal were: "Credibility, Return to the HO, Sufficiency of Protection and IR,"the last being a reference to Internal Relocation. Mr Hewitt's closing submissions were also recorded in summary form. In relation to submissions on human rights the judge noted only this of Mr Hewitt's submissions: "Best interests of 3 children not young children – settled and doing well at school." All other submissions on behalf of the appellant related to the protection claim.

16. At [57] of the decision the judge stated:

> *"I turn to the issue of the Appellants (sic) children and I have considered what is in their best interests. They have only been in the UK for a small period of time having spent the majority of their lives in Iraq a country and a place that they are familiar with. They have family who continue to remain in Iraq both from the paternal and the maternal side. Although they are in school in the UK and I have seen the reports which confirm this I find that this is not enough to reach the conclusion that it would be in their best interests to remain in the UK. It would be in their best interests to be with their parents and live with them and be brought up by them. Given that I have rejected the Appellants (sic) claim I do not consider it unreasonable for the children to return with their parents and continue living their lives in Iraq."*

Error of Law Submissions

17. I first remind myself that the according of weight to evidence is a matter for the judge. It is not an arguable error of law for a judge to give too little or too much weight to a relevant factor, unless the exercise is irrational. Nor is it an error of law for a judge to fail to deal with every factual issue of argument. Disagreement with a judge's factual conclusions, the appraisal of the evidence or assessment of credibility, or the evaluation of risk does not give rise to an error of law. Nor is it necessary to consider every possible alternative inference consistent with truthfulness because a judge has concluded that the story proffered is untrue. However, if a point of evidence of significance has been ignored or misunderstood, that may be a failure to take into account a material consideration.

Human Rights Generally

18. I have set out above the essence of the grounds of application for permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal. More specifically, it is submitted that whilst the decision made extensive findings regarding the appellant's protection claim, apart from the statement at [61] of the decision, "I dismiss the appeal on Human Rights Grounds", the decision did not engage with the issue of human rights at all. It is submitted in the premises that it is unclear whether the Tribunal recognised its obligations under the Human Rights Act and what weight was given, if any, to the appellant's private and family life, or how any balance has been struck between those rights and the public interest in immigration control.

19. I am satisfied that there is no merit in this unparticularised ground, outside the issue of best interests of the children. In particular, it does not appear that private or family life grounds were relied under article 8 ECHR at the First-tier Tribunal appeal; the only human rights issue advanced appears to have been that of the bests interests of the children. Whilst it is complained that the Tribunal did not address private and family life, it does not appear that article 8 was identified by either representative an issue, nor did it feature as an issue in either evidence or submissions to the Tribunal. In distinction from the best interests argument, as drafted, the grounds of application for permission remained in entirely generic terms in relation to human rights. Save for the best interests issue, it was never specifically contended that the appeal could succeed under the Immigration Rules relating to private and family life, or outside the Rules on article 8 grounds.

20. The judge can hardly be expected to address an issue not advanced at the appeal hearing and the inclusion of this issue in the grounds of application for permission to appeal is somewhat surprising. This ground appears to be no more than an opportunistic attempt to identify a lacuna in the decision rather forming the basis of any substantive error of law submission. In the premises, the ground is without merit and discloses no error of law.

21. Having regard to the way in which human rights was advance before the First-tier Tribunal, in a very limited way restricted to best interests of the children, I find no error of law in the omission of a consideration of article 8 private and family life from the decision and its reasoning. A judge is not obliged to address an issue not pursued.

Best Interests of the Children

22. The second and only substantive ground focuses on best interests, referencing the obligation to expressly consider the impact of removal on the children as addressed in various authorities, including Zoumbas v SSHD [2013] 1 WLR 3690, which held, inter alia, that such an assessment was integral to the article 8 proportionality assessment and that a child's best interests are a primary though not paramount consideration so that "no other single consideration can be treated as inherently more significant than the child's best interests, albeit that a number of other factors might outweigh them on balance."

23. The grounds of application for permission to appeal point out that both the appellant and his wife gave evidence and provided school reports to demonstrate the excellent progress of the children in the UK, that they all speak English and are at a pivotal point in their education and upbringing. The grounds submit: "Protection issues aside, it is clearly the case that returning these children to Iraq at this stage of their upbringing would not be in their best interests." It is submitted that at [57] the judge gave no more than "cursory consideration" to best interests and such a consideration did not meet the threshold that "no other single consideration can be treated as inherently more significant" than the welfare of these three children.

24. I first note that at the error of law hearing before me the appellant did not have any legal representative but was assisted by a Mr J Warren, pastor. I endeavoured to explain to the appellant through the interpreter the narrow ambit of the appeal to the Upper Tribunal. In particular, I pointed out that there has been no appeal against the dismissal of the claim for international protection, either on asylum or humanitarian protection grounds, either in relation to the rejection of the core factual account of events in Iraq (the threats), or the claimed Christian conversion of the appellant and his wife. I explained that these findings and conclusions must stand as made and that the only ambit of the appeal before the First-tier Tribunal was that of human rights, in relation to which the focus was on best interests of the children.

25. Although I explained that the Upper Tribunal can only intervene at this stage if there is a material error of law in the decision of the First-tier Tribunal, the appellant had some difficulty in addressing that issue himself. He told me that his three children were doing well and studying hard at school, coming top in their classes. He said that he wanted something special for their futures. In reply to my question, he agreed that both he and his wife still have family in Iraq. Later in the hearing, the

appellant's wife also asked to say something through the interpreter. She said that it will never be easy for them to return to Iraq. She said that she had been studying and working as a midwife and wanted to pursue that career in the UK. The children had adapted to conditions in the UK, she said, and told me that she and her husband were going to college to learn English. She also announced that she was expecting a further child.

26. Mr Warren was able to assist a little better in focusing on the narrow issue before the Tribunal and made some substantive points about the impugned decision. He took me to the second sentence of [57] of the decision, submitting that the judge was factually wrong to state that the children had spent the majority of their lives in Iraq. He pointed out that they left Iraq in 2015 and were a year and a month travelling in different countries, primarily Germany, before arriving in the UK in September 2016. He provided me with his calculations that the eldest child, now 14 years 2 months, was only 9 years 2 months when they left Iraq and has now spent 5 years outside Iraq. The middle child, now 12 years 3 months, was 7 years 4 months when leaving Iraq and had spent only 60% of his life so far in Iraq. The youngest child, now 6 years 8 months, left Iraq at 1 year 9 months and has spent 74% of his life outside Iraq. He then asserted that averaged up, the children has spent only half their lives in Iraq, which I found a somewhat peculiar submission that did not reflect the reality, as two of the children had spent the majority of their lives in Iraq, even though they were much younger than they are now when they left. It was further submitted that given the chronology it was incorrect for the judge to assert that that Iraq was a country with which they were familiar; that could only apply to the eldest child.

27. Mr Warren also took me to paragraph [17] of the appellant's wife's statement of 19.3.19, where she stated, "If I had to go back I would continue to be a Christian. I have found the right way and I will continue to choose this. I fear that it would be very difficult for us if we had to go back to Iraq. My family know that I have converted and they do not accept my new religion." Although I pointed out to Mr Warren that the judge had entirely rejected the claim to Christian conversion, he maintained that the appellant's family might treat them differently because of their conversion or baptism. However, I pointed out that was not an argument pursued at the First-tier Tribunal appeal hearing and had not been raised in any grounds or been the subject of a grant of permission. If the appellant's claim to Christian conversion by his wife and himself has been rejected, there is no basis for them to pursue that faith on return to Iraq and no basis for their respective families to treat them differently. At the highest, Mr Warren's submission on this point was speculative and did not address the grounds of appeal, which, effectively, were limited to the best interests of the children. It might be possible to construct an argument that adverse treatment of the child by extended family members arising from the parents' baptism in a Christian faith might be relevant to their best interests. However, in the absence of this ground having been pursued in the application for permission and in the absence of supporting evidence,

this point does not disclose any error of law on the part of the First-tier Tribunal in not considering it when it was never advanced to the Tribunal.

28. In relation to best interests, as Mr Diwnycz submitted, it is clear that this was addressed by the judge. As I have noted above, it was addressed in the written grounds, the skeleton argument and in oral submissions, in rather limited terms. The judge has addressed the issue in similarly limited terms. In Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC), the Upper Tribunal stated that, "It is generally unnecessary and unhelpful for First-tier Tribunal judgements to rehearse every detail or issue raised in a case. This leads to judgements becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost."

29. The fact is that the judge did address best interests of the children and made the unremarkable and, on the facts of this case, unsurprising finding that the best interests of these children were to remain with their parents, being raised by them. Their parents had no basis upon which to further remain in the UK. The judge took into account the ages of the children, their schooling and settlement in the UK, but also the relatively short time they have been in the UK, since September 2016. Although not mentioned by the judge, none of the children could meet the 7 years' qualification under paragraph 276ADE(1)(iv) nor could their parents come under s117B(6) of the 2002 Act. In any event, the judge considered the reasonableness of expecting them to leave the UK, finding that it was reasonable.

30. I acknowledge Mr Warren's submission on behalf of the appellant that the judge may have been factually wrong, but in relation to the youngest child only, when stating that they had spent the majority of their lives in Iraq. The assertion that they are familiar with that country might also be questioned when the length of time they have actually been outside Iraq is taken into account. However, their parents do not speak English and must, therefore, speak Sorani in the family home, whether or not the children now also speak English. Familiarity with a country does not depend purely on physical presence. It is obvious that these children will have been raised in an Iraqi Kurdish family environment and whilst they may well have settled and done well in schooling in the UK, their roots, native language, and cultural background must all centre in the same background as their parents. There is no basis to consider that there would be very significant obstacles to integration on return to Iraq, where the children can take up further education and where they have family members to assist their integration from both maternal and paternal sides of the family.

31. Having considered the grounds and the submissions made to me, and having carefully read the decision, I am satisfied that the judge has properly and correctly addressed best interests. In VW (Sri Lanka) [2013]

EWCA Civ 522 at [12], LJ McCombe stated, “Regrettably, there is an increasing tendency in immigration cases, when a First-tier Tribunal Judge has given a judgment explaining why he has reached a particular decision, of seeking to burrow out industriously areas of evidence that have been less fully dealt with than others and then to use this as a basis for saying the judge's decision is legally flawed because it did not deal with a particular matter more fully. In my judgment, with respect, that is no basis on which to sustain a proper challenge to a judge's finding of fact.” Those remarks might well apply to the grounds and submissions in the present case.

32. Frankly, even if the judge had taken greater space in which to address the best interests of the children, I cannot conceive that on the facts of this case any different conclusion could have been reached. On the facts, despite their time and schooling in the UK, the best interests of these children were obviously to return to Iraq with their parents. In Anoliefo (permission to appeal) [2013] UKUT 00345 (IAC), at para 16, the President said that “Where there is no reasonable prospect that any error of law alleged in the grounds of appeal could have made a difference to the outcome, permission to appeal should not normally be granted in the absence of some point of public importance that it is otherwise in the public interest to determine.” I am satisfied that there is no reasonable prospect that the alleged error of law could have made a difference to the outcome of the appeal.

33. It follows that I am satisfied that there is no error of law in the decision of the First-tier Tribunal. Even if there was an error by failing to address best interests of the children more fully, I find for the reasons set out above that the error could not have been material to the outcome of the appeal.

Decision

34. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision should be set aside.

I do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal remains dismissed on all grounds.

Signed DMW Pickup

Upper Tribunal Judge Pickup

Dated 31 July 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email