Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05809/2018

THE IMMIGRATION ACTS

Heard remotely via video (Skype for Business)	**Decision & Reasons Promulgated**
On 15 October 2020	**On 21 October 2020**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

ANWAR [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr S Winter, Counsel, instructed by Maguire Solicitors
For the respondent: Mr D Clarke, Senior Home Office Presenting Officer

This decision follows a remote hearing in respect of which there has not objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Grant-Hutchison (the judge) who, in a decision promulgated on 2 November 2018, dismissed the appeal of Mr Anwar [M] (appellant) against the decision of the

Secretary of State for the Home Department (respondent) dated 10 April 2018 refusing his asylum and human rights claim and his claim for Humanitarian Protection (HP).

Background

2. The appellant is a Kurdish national of Iraq who was aged 30 at the date of the judge's decision. He hails from Kirkuk which, according to the Country Guidance (CG) case of **AA (Article 15(c)) Iraq CG** [2015] UKUT 00544 (IAC), was one of the contested areas of Iraq in respect of which the Secretary of State conceded that a civilian with no distinguishing characteristics would, by virtue of his presence, be at real risk of suffering serious harm of the type identified in Article 15(c) of the Council Directive 2004/83/EC (the Qualification Directive).

3. The appellant claimed to have entered the UK clandestinely on 23 August 2008 and made an asylum application the same day. The appellant's asylum claimed was refused and an appeal against that refusal was dismissed on 19 December 2008. The appellant became appeal rights exhausted on 26 March 2009. Extracts from the December 2008 Tribunal decision in the Reasons for Refusal Letter suggest that the appellant was not found to be a credible witness. At paragraph 8 of the Reasons for Refusal Letter the following extract appears, with reference to paragraph 42 of the December 2008 decision:

> "When I looked at the overall situation in the round I concluded that I did not find the Appellant credible. I particularly had major difficulties with regard to the problems concerning whether or not he was in the army and I concluded on taking into account all the above matters that I did not accept that the Appellant was a member of the Iraqi army and that his account was not credible with regard to what had happened to both his father and himself."

4. The appellant lodged several further applications for international protection, the last being on 6 April 2018. He maintained that he was fearful of returning to Kirkuk because of the general situation there and that he would be unable to relocate elsewhere in the country.

5. In her Reasons for Refusal Letter refusing his application the respondent considered that the appellant could now return to Kirkuk as there was no longer considered to be a threat of serious harm meeting the threshold of Article 15(c) of the Qualification Directive. The respondent considered the appellant could, in any event, internally relocate to the Iraqi Kurdish Region (IKR) (also known as the Kurdish Regional Government – 'KRG'). The appellant appealed the respondent's decision to the First-tier Tribunal under s.82 of the Nationality, Immigration and Asylum Act 2002.

The decision of the First-tier Tribunal

6. At [6] of his decision the judge noted, as a preliminary point, the appellant's representative's indication that he would proceed by way of submissions only

and that all that he required was that the respondent had conceded that the appellant was an Iraqi from Kirkuk. There was consequently no oral evidence.

7. In reliance on an expert report the appellant submitted that Kirkuk was in a difficult situation as it was being threatened by Iraqi forces, the Peshmerga and Isis, and that the volatility of the situation meant that the appellant would be at real risk of serious harm if he were to return there. The appellant would not be able to relocate to the IKR/KRG. A summary of this aspect of the appellant submissions is contained at [8(c)] of the judge's decision.

> "In relation to the KRG the availability of a CSID is not enough to decide matters however for present purposes the Appellant is content to proceed on the basis that he has one or it can be obtained shortly. If the Appellant flies to Baghdad and then Erbil what then? There is no suggestion that he has family in the KRG. If he did it would be the cultural norm for them to assist. The Appellant would have to go to a refugee camp which AAH [a reference to **AAH (Iraqi Kurds – internal relocation) Iraq CG** [2018] UKUT 00212 (IAC)] states are overcrowded. He would have 300 to 400 dollars which would last him a month if he did not use it on flights. AAH says that this is unduly harsh in terms of the basic necessities. In terms of employment the Appellant arrived in the UK aged 20. He had effectively been a private in the Army. There is no suggestion that he has any work experience in the last decade. It would be very difficult to find an employer to take him on. In any event there is a high unemployment rate. There was also a patronage/nepotism system operating from which he cannot benefit. He would come off the plane with some money. It would run out. He would be living in a building site or a disused government building."

8. The judge then recorded the appellant's submission that he would face very significant obstacles as understood in paragraph 276ADE(1)(vi) of the immigration rules to integrating in society if required to return to Iraq.

9. At [9] the judge summarised the respondent's submissions, including the submission that the appellant's claim that his father has been killed was a credibility point, that the judge who dismissed the appeal in 2008 found that the appellant was vague on this matter and found him to be incredible. The respondent submitted that it was not credible that the appellant was not in contact with his family and that there did not appear to have been any steps taken by him to trace his family.

10. At [14], in the section of his decision headed 'The Decision', the judge accepted that the appellant could not return to Kirkuk in reliance on the expert's report. The judge found that the situation in Kirkuk was "very far from stable" and that it was not safe for the appellant to return there.

11. At [15] the judge considered the possibility of the appellant obtaining support from his family if he were to relocate to the KRG. The judge stated,

> "The next question that was canvassed before me was whether the Appellant could internally relocate to the KRG. I am readily persuaded by

> the Appellant's representatives' submissions under reference to AAH that the economic circumstances in the KRG are very difficult indeed. The difficulty I have in coming to a view on this matter is that there is simply no evidence before me as to what had in fact happened to his family particularly in relation to his father and brother. There is some mention of this in what the appellant told the expert. However, this is not a matter for the expert. It is a matter to be decided after the consideration of evidence, preferably tested, relating to the appellant's circumstances. In the absence of such evidence I am not able to make any finding that the appellant has no family in the KRG. Similarly I have heard no evidence as to the Appellant's working experience. These are both important matters in deciding whether relocation is unduly harsh. But the Appellant's representative has conceded that for present purposes that [sic] the Appellant can or can soon obtain a CSID. Accordingly I can find that the Appellant can travel and gain entry to the KRG. He is a Kurd. He is from that culture. He is healthy. He is resilient and can safely adapt to a different society as has [sic] shown by the amount of time he has spent in the UK. Relocating to the KRG will be effective and not unduly harsh."

12. The judge then considered whether there would be very significant obstacles to the appellant's integration in Iraq pursuant to paragraph 276ADE(1)(vi) of the immigration rules but concluded, in light of his earlier findings, that there would not be any very significant obstacles.

13. The judge dismissed the appeal on all grounds.

The challenge to the judge's decision

14. Permission to appeal to the Upper Tribunal was initially refused by both the First-tier Tribunal and the Upper Tribunal. The appellant petitioned the Court of Session (Outer House) against the Upper Tribunal's refusal to grant permission to appeal. In a 'Joint Minute for the Parties' the matter was settled extra-judicially, the respondent accepting that the Upper Tribunal erred in law in refusing permission by failing to address the appellant's argument that the First-tier Tribunal judge left out of account his witness statement relating to his family.

15. On 14 February 2020 the Upper Tribunal granted permission to appeal (in a decision of the Vice-President dated 10 February 2020).

16. The Grounds of Appeal, briefly amplified by Mr Winters in his oral submissions, contend that the judge failed to consider or engage with the appellant's written statement, in which did refer to his family. At paragraph 3 of the appellant's statement he claimed he had no contact with his family. At paragraph 12 of his statement the appellant said, "I don't have anyone who can assist me in obtaining any of the documents and I do not have any sponsor in the IKR who is able to assist me."

17. The appellant contends that this failure was material because if he had no sponsor or family support in the KRG he may have to access a critical shelter arrangement, which may, in turn, be unduly harsh (with reference to headnotes 8 & 9 of **AAH**).

18. The appellant additionally contends that, contrary to the judge's indication that he "heard no evidence as to the appellant's working experience", this was also addressed in the statement (he claimed that prior to his arrival he had been a private in the army from 2006 – 2008 and had not been allowed to work for the decade in which he resided in the UK) and that the evidence indicated that the appellant had limited work experience. The appellant would therefore be significantly disadvantaged in obtaining work in the KRG by the type of nepotism referred to in the case law and the high unemployment rate.

19. A skeleton argument dated 29 May 2020, prepared by Mr C Avery, contained an extract from the presenting officers note at the First-tier Tribunal hearing. This read,

> "As a preliminary issue Mr Cassie [*sic*] stated he will not be calling the appellant as a witness, he would not be adopting his statement and the appellant wanted to proceed on the basis that it is accepted he is Iraqi and from Kirkuk. I objected as the appellant has some questions to answer regarding his family situation in Iraq. The IJ explained that if the appellant was not to give evidence then the credibility finding would stand and any submissions I made regarding the appellant could be unchallenged. Mr Casskie [*sic*] agreed and proceeded with the hearing."

20. Mr Clarke submitted that the respondent had always taken issue with the appellant's credibility relating to his contact with his family and his claim that he would be unable to support himself if removed to Iraq (including the IKR), and that it would set a dangerous precedence if the appellant were able to rely on a written statement which was not adopted, and that this would be highly prejudicial to the respondent in any appeal hearing and that there may be issues as to whether the mere existence of a signature meant that reliance could be placed on a statement as representing, or continuing to represent, an appellant's position or claim.

Discussion

21. There was evidence before the judge, albeit in the form of a written statement which was not adopted by the appellant (but which he signed), in which he claimed he had no contact with his family in Iraq and no one to assist him in the KRG.

22. Although the Practice Directions for the Immigration and Asylum Chambers, published on 19 December 2018, indicate (at 7.5) that directions would, in most cases, be issued to the parties requiring witness statements of the evidence to be called at the hearing to be served and to stand as evidence-in-chief, it is ultimately for an appellant to decide whether to give oral evidence (see, e.g. **SSHD v Sarigul** [2002] UKIAT 06938, at [12] & [15]). Moreover, the Tribunal

may admit evidence whether or not it would be admissible in a civil trial in the UK (see rule 14(2)(a) of the Tribunal Procedure (First-tier Tribunal) (Immigration & Asylum Chamber) Rules 2014). The fact that the appellant chose not to adopt his statement (which, if he had done, would have enabled the respondent to cross-examine him) does not prevent the statement from still being admitted.

23. It was incumbent on the judge to make a finding in respect of this evidence, one way or the other, having regard to the burden of proof resting on the appellant, albeit to the lower standard, having regard to the fact that the appellant was not tendered for cross-examination and that the assertions in his statement could not be tested, and having regard to the previous judicial findings relating to the appellant's credibility, particularly in respect of what he claimed happened to his father and brother (and, I note, his claim to have been in the army). It would, of course, be a matter for the judge to determine what weight ought to be attached to untested and otherwise unsupported assertions of fact. But he could not ignore that evidence.

24. For similar reasons, I am satisfied that the judge's failure to engage with the appellant's assertion in his witness statement that he had only worked for the Iraqi Army, that he had not been involved in any other activity or job, and that he had not done any other work, and that he had never worked in the UK.

25. I cannot accept Mr Clarke's submission that requiring a judge to consider a statement, even if not adopted, sets a 'dangerous precedent' or is otherwise prejudicial to the respondent. It remains open to the respondent to make submissions that the judge ought to attach little if any weight to such a statement in the absence of any opportunity to test the assertions contained in the statement.

26. Given the headnote in **AAH**, and the background evidence that was before the judge relating to the conditions in the KRI, including the work conditions, I am satisfied that the judge's failure to engage with or assess the appellant's assertions contained in his witness statement may have materially affected the outcome of the appeal.

Remittal to First-Tier Tribunal

27 Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to

the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

28 I have determined that the judge's decision is unsafe because he failed to take account of relevant written evidence. Mr Winter indicated that if a material legal error was uncovered the appellant would be likely to give oral evidence at a further hearing. He also noted that there was now a new CG case on Iraq (**SMO, KSP & IM (Article 15(c); identity documents) Iraq CG** [2019] UKUT 00400 (IAC) which would need to be considered. Given that the appellant is likely to give oral evidence at a hearing to remake the decision, and that credibility is very much in issue, and given the absence of any credibility findings or other material factual findings relating to the appellant's family in Iraq or his work experience, Mr Clarke and Mr Winter agreed that in these circumstances it was appropriate for the case to be remitted back to the First-tier Tribunal.

29 The appeal will be remitted to the First-tier Tribunal so that a new fact-finding exercise can be undertaken.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of errors on points of law and is set aside.

The case is remitted back to the First-tier Tribunal to be decided afresh (de novo) by a judge other than judge of the First-tier Tribunal Grant-Hutchison.

No anonymity direction is made.

D.Blum 15 October 2020

Signed Date
Upper Tribunal Judge Blum