Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08219/2019 (P)

THE IMMIGRATION ACTS

Decided under Rule 34
On Friday 29 May 2020

Decision & Reasons Promulgated
On Tuesday 02 June 2020

Before

UPPER TRIBUNAL JUDGE SMITH

Between

P R
[Anonymity direction made]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this is an appeal on protection grounds, it is appropriate to continue that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

BACKGROUND

1. The Appellant appeals against the decision of the First-tier Tribunal Judge Hawden-Beal promulgated on 15 November 2019 ("the Decision"). By the Decision, the Judge dismissed the Appellant's appeal against the Respondent's decision dated 14 August 2019 refusing his protection and human rights claims and those of his wife and four children who are his dependents in this appeal.

2. The Appellant and his family are nationals of Iraq. They left Iraq in July 2017 and arrived in the UK in June 2018, travelling via Turkey and Greece. The Appellant claims to be at risk on return from the IKR authorities because he had organised and taken part in demonstrations against the government. He also claimed to have been targeted by an individual from a Peshmerga unit. The Respondent accepted that the Appellant is of Kurdish ethnicity but otherwise did not believe his claim.

3. The Judge accepted that the Appellant may have taken part in demonstrations which took place in IKR in 2014-16 but not that he was involved in organising them. She did not accept that the Appellant had been targeted by the authorities via the individual he claimed to fear or otherwise. The Judge did not accept that the Appellant was unable to obtain a CSID card. She also rejected the human rights claims based on Article 8 ECHR and those based on health problems of the Appellant and his wife. The appeal was dismissed on all grounds.

4. The Appellant appeals on six grounds which can be summarised as follows:

   Ground One: The Judge has applied too high a standard to the protection claim, finding that the Appellant should remember dates and therefore putting herself in the position of the Appellant.

   Ground Two: The Judge has assumed that, if the Appellant were genuinely an organiser of the protests, he would have been arrested and detained and has therefore erred by relying on plausibility.

   Ground Three: The Judge has erred by requiring documentary evidence of the claim.

   Ground Four: The Judge has made assumptions about the Appellant's ability to know the mind of the man he claimed to fear.

   Ground Five: The Judge has failed to give adequate reasons for rejecting the claimed fear of the individual concerned.

   Ground Six: The Judge has erred by relying on the Appellant's failure to mention the claimed fear of the individual during his screening interview which is potentially unfair.

5. Permission to appeal was granted by Designated Judge Shaerf on 7 February 2020 in the following terms so far as relevant:

   > "... The grounds challenge paragraphs 43-49 of the Judge's decision and assert the Judge made assumptions as to facts and the plausibility of elements of the

> Appellant's account, sought documentary corroboration, gave inadequate reasons to support her adverse credibility findings and failed to apply the learning in *JA (Afghanistan) v SSHD [2014] EWCA Civ 450* on the weight to be given to discrepancies between the replies given at the initial screening of the Appellant and subsequent evidence.
>
> It is arguable the Judge erred at paragraphs 45 and 46 of her decision in attaching too much weight to the absence of particular items of documentary evidence without exploring how difficult or easy it would be to obtain such evidence and to send it to the United Kingdom and any reason for its absence.
>
> I find the Judge arguably erred in law at paragraph 49 of her decision in her treatment of the evidence at screening, as the grounds for appeal state.
>
> The challenges to paragraphs 47 and 48 of the Judge's decision are weaker than the other grounds which are sufficient to merit the grant of permission to appeal. Nevertheless, all grounds may be argued."

6. By a Note and Directions sent on 6 April 2020, Upper Tribunal Judge Bruce, having reviewed the file, reached the provisional view that it would be appropriate to determine without a hearing (pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 – "the Procedure Rules") the following questions:

   (a) whether the making of the First-tier Tribunal's decision involved the making of an error of law and, if so

   (b) whether that decision should be set aside.

   Directions were given for the parties to make submissions in writing on the appropriateness of that course and further submissions in relation to the error of law. The reasons for the Note and Directions was the "present need to take precautions against the spread of Covid-19, and the overriding objective expressed in the Procedure Rules".

7. Rather than responding as requested to the possibility of making an error of law decision on the papers and expanding on the existing grounds, the Appellant, by his submissions dated 10 April 2020, sought to expand the grounds to include three further grounds. Ground seven asserted a failure to apply extant country guidance. It is not said which case the Judge failed to take into account which was relevant to the Appellant's case. Ground eight asserts a failure to consider internal relocation. Ground nine asserts a failure to consider past persecution arising from the reasons why the Appellant claims to suffer from migraines. I note for present purposes that the Appellant does not have permission to argue those grounds and has not made any formal application to amend explaining the failure to raise these grounds earlier. Contrary to what is suggested, Judge Bruce permitted the Appellant to submit further submissions in support of the assertion of an error of law, whilst noting that the grounds of appeal were detailed. She did not give the Appellant permission to amend the grounds which were put forward.

8. On 21 April 2020, the Respondent filed her response to the Appellant's submissions in the following terms:

> "... 2. The respondent does not oppose the appellant's application for permission to appeal in that the Judge appears to the applied to [sic] higher burden of proof on the appellant for supporting evidence.
>
> 3. It is submitted that the appellant does not challenge the ability to obtain a CSID card, therefore, that finding stands.
>
> 4. The Tribunal are invited to determine the appeal with a fresh oral (continuance) hearing. Given that this hearing concerns credibility this may be an appeal that requires oral evidence."

9. On 23 April 2020, the Appellant filed a Reply to the Respondent's written submissions. The Appellant disputed that he had not challenged the finding in relation to the CSID card. He drew attention to ground eight (as raised only in the further submissions). Whilst accepting that there was no mention there of the CSID card, he submitted that whether one could be obtained was relevant to the internal relocation issue which he said that the Judge had failed to consider. For the first time in that Reply, the Appellant raised the issue of the country guidance case which he said required the Judge to conduct the exercise of considering the availability of the CSID card in the context of internal relocation (being SMO, KSP & IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC) ("SMO and others"). That decision was reported on 20 December 2019 and therefore after both the hearing of this appeal and the Decision. The Appellant also sought a set aside of the whole of the Decision with no findings preserved. It was asserted that an oral re-hearing could only take place once it was safe to do so and that it was not possible to hear the appeal remotely due to the need for live evidence. It is not said why such evidence could not be given via remote means.

10. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

DISCUSSION AND CONCLUSIONS

11. When considering the grounds on which permission has been granted, it is appropriate to have regard to the passage of the Decision which sets out the Judge's findings and which is therefore the focus of the grounds of appeal. As Judge Shaerf points out, the relevant paragraphs (at least as regards the grounds before him) are [43] to [49].

12. The Judge's findings in fact begin at [42] where the Judge notes the consistency of the Appellant's claim about the anti-government demonstrations with the background evidence. At [43], the Judge considered the photographs produced of the Appellant's attendance at the demonstrations which although not dated, she accepted may show that he was involved with the protests. However, she pointed to the lack of media reporting which was inconsistent with the Appellant's claim about media attendance. Moreover, the Judge said that, if the Appellant had been an organiser as he claimed "[h]e would have had a rough idea of the number who attended and he certainly would have remembered the dates. The fact that he does not damages his

credibility in so far as his claim to have been an organiser of these protests". It is that sentence on which the Appellant relies as showing that the Judge erred both in terms of the standard of proof which the Judge required (by use of the word "certainly") and the assumptions made about the Appellant's likely recollection. Although the Judge did remind herself at [38] of the Decision about the standard which applies to protection claims, I accept the Respondent's concession that this sentence does tend to suggest that the Judge applied too high a standard and made assumptions which were unwarranted for that reason. That deals with ground one.

13. I am also persuaded that there is an error disclosed by ground two in relation to [44] of the Decision although not perhaps for the reasons given by the Appellant in that regard (insofar as I understand how ground two is put). There seems to me to be an inconsistency between the Judge's findings in that paragraph and/or an absence of a required finding. The Judge begins by noting that the background evidence reported the arrest of activists before the 2016 protests and yet it is the Appellant's case that he was not arrested and participated in those protests. That was something to which the Judge was entitled to have regard. However, the Appellant's case was that the authorities would have been unaware of his involvement as he and his friends were careful about how they transmitted information, avoiding the use of phones. The Judge does not actually say whether she accepts the Appellant's evidence in that regard but rather says that "..either he and his friends were very good at keeping their identity a complete secret from the security services or he did not have a prominent role as he would have me believe". She does not say why it could not be the case that they were indeed good at maintaining secrecy. I accept that she does give other reasons why she did not accept that the Appellant was an organiser which may have been open to her, but she did not resolve the issue which arose from the Appellant's evidence on this point.

14. I am unpersuaded by ground three. The consideration of the registration certificate at [45] is just that. The Judge was required to consider whether the certificate supported the Appellant's case. She concluded that it did not because it did not mention the Appellant and his friends. As she also pointed out, the organisation to which that certificate related was closed down (on the Appellant's case) after he left Iraq by the authorities (although that does rather add to the Appellant's case about the authorities' interest in that organisation which point is not expressly considered by the Judge). Similarly, at [46] of the Decision, the Judge was assessing the evidence which the Appellant put forward in support of the existence of the individual concerned. The threat from that quarter was considered not only in that paragraph but also those following.

15. I am also unpersuaded by ground four. At [47] of the Decision, the Judge says this:

> "If this General knew who the appellant was such that he was able to call the appellant's father and threaten him, why was the appellant never arrested? Clearly the General was able to find out who the appellant was and where he lived otherwise, he would not have sent the appellant a letter, but the appellant states that he was never arrested because he was not at his home or his shop when the men came. This is contradicted by his evidence today that he and his

> family were too afraid of the threats from the General to leave their home and go to work and that it became like a prison. Given that claim a General in charge of peshmergas, who had been fighting ISIS, would have been able to find the appellant if he really wanted to, especially if the appellant never went to work and stayed at home because he was so afraid. The appellant makes no mention of his friends being threatened by the General and so why was he targeted and no one else? I do not accept for one minute that such a high-ranking officer would call the appellant himself and threaten either him or his father. He would have much better things to do. If he was of such a high rank with an army at his command, I also do not accept that the appellant would have been able to avoid arrest as he claims he did."

16. The Judge was entitled to call this element of the case into question based on the inconsistency in the Appellant's case. Whilst I accept that some of what is here said turns on implausibility, the Judge was entitled to have regard to whether events are likely to have occurred as the Appellant claimed, in particular given the General's asserted state of knowledge and position. However, the reason why this paragraph discloses an error has nothing to do with a required need to second guess the actions of a third party but rather because this is another example of the Judge potentially applying too high a standard particularly when indicating that she did not "for one minute" accept that events "would" happen as the Appellant claims. The issue was whether it was reasonably likely that they did. Ground one therefore impacts also on these findings. For that reason, I do not need to deal with ground five which concerns the Judge's reasoning about this aspect of the Appellant's claim.

17. I do not accept that an error is disclosed by ground six. As the Court of Appeal itself said at the start of [24] of its judgment in JA (Afghanistan) v Secretary of State for the Home Department [2014] EWCA Civ 450 "[i]n the absence of a statutory provision of the kind to be found in section 78 of the Police and Criminal Evidence Act 1984, I do not think that in proceedings of this kind the tribunal has the power to exclude relevant evidence. It does, however, have an obligation to consider with care how much weight is to be attached to it, having regard to the circumstances in which it came into existence". I note the Appellant's failure to include that part of the citation in the grounds. What follows in the grounds does not explain what it is about the circumstances of the screening interview in this case which renders the Judge's reliance on a failure to mention something unfair. In JA (Afghanistan), the appellant was a minor who was interviewed without an appropriate adult. Clearly those circumstances do not apply here. There is no assertion in the Appellant's witness statement that the screening interview was unfairly conducted. Indeed, the Appellant expressly relies on that interview (see §3 of that statement at [AB/11]). I note also from [49] of the Decision that the Appellant failed to mention this either in his substantive interview when asked who he feared. Those were points which the Judge was entitled to take into account. However, the finding that the Appellant is not in fear of this individual cannot stand due to the Judge's comments which suggest that she may have applied too high a standard of proof as I have already noted.

CONCLUSION

18. For the above reasons, I find an error of law in the Decision, particularly as regards the adoption of too high a burden when considering the protection claim. I accept that the error is material, certainly as regards the determination of the protection claim.

NEXT STEPS

19. That brings me on to next steps as regards the setting aside of the Decision. The Respondent asks me to preserve the finding in particular in relation to internal relocation due to the Appellant's failure to challenge the finding that he would be able to obtain his CSID card. It is in this regard that the additional grounds raised in the Appellant's submissions dated 10 April 2020 become relevant. Whilst I do not propose to take those into account when considering whether there is any error of law in the Judge's asserted failure to deal with internal relocation or apply (unspecified) country guidance, this appeal will need to be re-heard whether in this Tribunal or the First-tier Tribunal and the extant country guidance which now applies is not that which was in force at the time of the Decision. As such, another Judge will have to consider the case as a whole including as to internal relocation (if and insofar as that is relevant) based on what is now said in SMO and Others. For that reason, it would not be sensible to preserve findings in that regard.

20. I have also considered whether it is appropriate to preserve the findings made in relation to human rights. However, this hearing took place over six months ago and involves minor children. It is not clear when it will be possible to hear this appeal. It would be appropriate for the human rights claims to be determined based on the facts as they stand at the time of the re-hearing.

21. That brings me on to the way in which this appeal should be re-heard. I accept that since credibility is in issue, live evidence will be required to be heard. However, simply because live evidence is required does not mean that a remote hearing is not possible. Arrangements can be made for evidence to be given via Skype or other platforms. It may also be possible for some face-to-face hearings to be heard even now although the types and prioritisation of such appeals will depend on administrative arrangements within the Tribunal. Good reason would need to be given why a remote hearing is not possible.

22. That leads me finally to consider whether the appeal should be re-heard in this Tribunal or remitted to the First-tier Tribunal. My decision has identified an error which impacts on the previous Judge's credibility findings as well as a potential need properly to re-determine the issue of internal relocation if that arises once credibility findings are re-made. It will be necessary for another Judge to consider all issues and to make credibility findings which will be initial ones. Due to the extent of the fact finding which will be necessary, I consider it appropriate to remit the appeal to the First-tier Tribunal for re-determination.

DECISION

I am satisfied that the Decision involves the making of a material error on a point of law. The Decision of First-tier Tribunal Judge Hawden-Beal promulgated on 15 November 2019 is set aside. The appeal is remitted to the First-tier Tribunal for re-hearing before a Judge other than Judge Hawden-Beal.

Signed *L K Smith* Dated: 29 May 2020

Upper Tribunal Judge Smith