Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08468/2019 (P)

THE IMMIGRATION ACTS

Decided under Rule 34 without a hearing	**Decision & Reasons Promulgated**
On 25 June 2020	**On 10 July 2020**

Before

UPPER TRIBUNAL JUDGE GILL

Between

A A
(ANONYMITY DIRECTION MADE)

Appellant

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Anonymity

I make a direction under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. No report of these proceedings shall directly or indirectly identify him. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings.

I make this direction because this is a protection claim.
The parties at liberty to apply to discharge this order, with reasons.

This is a decision on the papers without a hearing. Neither party objected. A face-to-face hearing or a remote hearing was not held for the reasons given at paras 5-8 below. The documents described at para 4 below were submitted. The order made is set out at para 32 below. *(Administrative Instruction No. 2 from the Senior President of Tribunals).*

Representation **(by submissions in writing):**
For the appellant: Ms K Smith, of Counsel.
For the respondent: Ms H Aboni, Specialist Appeals Team.

DECISION AND DIRECTIONS

1. The appellant, a national of Iraq born on 1 August 1982, appeals against a decision of Judge of the First-tier Tribunal N Lodge (hereafter referred to as the "judge") who, in a decision promulgated on 15 November 2019 following a hearing on 7 November 2019, dismissed his appeal against a decision of the respondent of 19 August 2019 to refuse his further submissions of 2 July 2019 in support of his protection and human rights claims first made on 2 October 2008 and refused in a decision dated 14 October 2008.

The issues

2. The following are the issues I have to decide (hereafter the "Issues"):

(i) whether it is appropriate to decide the following questions without a hearing:

(a) whether the decision of the judge involved the making of an error on a point of law; and

(b) whether the judge's decision should be set aside.

(ii) if I conclude that it is appropriate to proceed without a hearing and if the answer to both questions (a) and (b) above is "*yes*", then whether the appeal should be remitted to the First-tier Tribunal or whether the decision on the appeal should be re-made in the Upper Tribunal.

3. I come to decide these issues after the following have been issued by the Upper Tribunal (Immigration and Asylum Chamber) (the "Tribunal") after the "*lockdown*" due to the Covid-19 pandemic commenced on 23 March 2020:

(i) A "*Note and Directions*" by Upper Tribunal Judge Rimington dated 3 April 2020 and issued by the Upper Tribunal on 22 April 2020. Para 1 of the "*Note and Directions*" stated that, in light of the present need to take precautions against the spread of Covid-19, Judge Rimington had reached the provisional view, having reviewed the file in this case, that it would be appropriate to determine questions (i)(a) and (b) above without a hearing.

Para 2 of the "*Note and Directions*" issued directions which provided for the party who had sought permission to make submissions, within 14 days of the "*Note and Directions*" being sent to the parties, in support of the assertion of an error of law and on the question whether the decision of the First-tier Tribunal ("FtT") should be set aside if error of law is found; for any other party to file and serve, within 21 days of the "*Note and Directions*" being sent, submissions in response; and, if such submissions in response were made, for the party who sought permission to file a reply no later than 28 days of the "*Note and Directions*" being sent.

Para 3 of the "*Note and Directions*" stated that any party who considered that despite the foregoing directions a hearing was necessary to consider questions 1(a) and (b) may submit reasons for that view no later than 21 days of the "*Note and Directions*" being sent to the parties.

4. I have received the following documents from the parties:

(i) from the appellant:

(a) a document entitled "*Appellant's Written Submissions*" dated 6 May 2020 by Ms K. Smith, of Counsel, accompanied by typed notes of Ms Smith's record of the proceedings before the judge and the appellant's further representations to the respondent dated 24 June 2019, submitted to the Upper Tribunal by Ms Smith under cover of an email dated 6 May 2020 timed at 14:44 hours; and

(b) a document entitled "*Appellant's reply to the respondent's written submissions*" by Ms Smith dated 19 May 2020, submitted to the Upper Tribunal by Ms Smith under cover of an email dated 20 May 2020 timed at 09:34 hours.

(ii) From the respondent a document entitled: "*Secretary of State's response to Directions*" dated 11 May 2020, by Ms Aboni, submitted to the Upper Tribunal under cover of an email dated 11 May 2020 timed at 11:32 hours.

To the extent that any of the above submissions were late, I extend time for compliance with the relevant direction and admit them.

Issue (i) - whether it is appropriate to proceed without a hearing

5. Neither party has objected to the Upper Tribunal proceeding to decide the Issues without a hearing.

6. Whilst the limitations imposed during the lockdown have been relaxed to a certain extent, the Upper Tribunal is not yet listing appeals for hearing (whether remotely or face-to-face) at the capacity that it had been prior to the lockdown being imposed. Resolution of the appellant's appeal may therefore be unduly delayed if it is to be listed to be heard remotely or at a face-to-face hearing.

7. I have the benefit of the parties' detailed submissions on the Issues. I have considered the grounds, the parties' submissions on the Issues and the decision of the judge in order to decide whether it is appropriate for me to decide the Issues without a hearing. Given that my decision is limited to the Issues and given that the grounds of appeal to the Tribunal do not raise any ground that will require oral evidence to be heard in order to decide the Issues, there is no question of my making findings of fact or hearing oral evidence at this stage.

8. In all of the circumstances, and taking into account the overriding objective, I have concluded that it is appropriate for me to exercise my discretion and proceed to decide the Issues without a hearing.

Issues (i) (a) and (b) - whether the judge erred in law and whether his decision should be set aside

The basis of the appellant's claim

9. The appellant originates from Kirkuk in Iraq. The basis of his asylum claim in 2008 was that he feared persecution in Iraq from a man (hereafter referred to "SI") for two reasons: (i) he (the appellant) used to act for a theatre group and, in 2004, he played a role in which he had to carry a cross as a result of which SI made threats against him and, subsequently, against the entire theatre group; and (ii) due to his relationship with a Christian girl (hereafter referred to as "M") which started in June

2007 and continued until the appellant left Iraq as a result of which SI threatened to kill him unless he stopped seeing M.

The appellant's previous appeal

10. In the refusal letter dated 14 October 2008, the respondent did not challenge the appellant's credibility. The appellant's appeal against the decision of 14 October 2008 was heard before Immigration Judge Morrison on 2 December 2008. In a determination promulgated on 10 December 2008, Judge Morrison dismissed the appellant's appeal on asylum grounds, humanitarian protection grounds and human rights grounds.

11. At para 13 of his decision, Judge Morrison said that he was prepared to accept the appellant's account as credible, as he had earlier set out at para 9 of his decision and which I have summarised at para 9 above. Judge Morrison then said (para 13):

> "… The only additional comment I wish to make in relation to the findings of fact is that while I have accepted that the appellant did receive threats from [SI] there is no evidence as to [SI's] precise role and no evidence of any kind that he has any influence outside Kirkuk other than the appellant's oral evidence and for that reason my conclusion is that the appellant has not established that SI has any influence outside Kirkuk".

12. At para 20 of his decision, Judge Morrison said that he accepted that the appellant had a subjective fear of being returned to Kirkuk as a result of both his acting activities and his relationship with M. However, he found that the appellant's fear of SI due to his acting activities was not objectively well-founded because (in summary) the appellant had never encountered any personal violence or threats arising from these activities and there was noting in his account which amounted to persecution. In relation to his fear of SI due to his relationship with M, Judge Morrison accepted that the appellant's fear was objectively well-founded and that it would not be safe for the appellant to return to Kirkuk as a result of threats made by SI. However, he found (para 23) that it would be safe and not unduly harsh for the appellant to relocate either to the southern part of Iraq or the Iraqi Kurdish Region ("IKR", referred to by Judge Morrison as the Kurdish Autonomous Area or "KAA"), stating, again (at para 22):

> "The only finding in fact which I am able to make in relation to [SI] is that he is the head of the family/tribe to which the appellant and his family belong but there is no objective evidence as to the extent of his influence, if any, outside Kirkuk."

13. In the decision letter dated 19 August 2019 that was the subject of the appeal before the judge, the respondent did not take issue with the credibility of the appellant's account of the basis of his asylum claim. In this decision letter, the respondent noted (para 18) that it had been found by Judge Morrison that the appellant was at risk on return in his home area of Kirkuk due to his fear of a non-state actor. The respondent therefore considered the feasibility of internal relocation to Baghdad and the IKR.

14. The respondent noted (para 24 of the decision letter dated 19 August 2019) that the appellant had previously stated that his CSID card was in Iraq and (at para 29) that he had a National Identity card which as in Kirkuk. She considered (para 24) that the appellant had not provided any corroborative evidence to show that he could not obtain his CSID card and there was no evidence to suggest that he did not have any extended family in Iraq; that he had not provided any evidence to show that he had made any applications to the Iraqi Embassy in the United Kingdom to obtain a CSID

or travel documents or that he was unable to obtain these documents; that he has male family members who would be able to attend the relevant civil registry office in Iraq with him to obtain a CSID (para 30); and that he had not established that he had no family in Iraq (para 31).

15. It is therefore clear from the decision letter dated 19 August 2019 that the respondent did not take issue with the credibility of the appellant's account of the basis of his asylum claim, that is, his account that he had received threats from SI due to his acting activities and his relationship with M. The factual issues in the appeal before the judge were the factual issues mentioned at my para 14 above. It is also clear that Judge Morrison did not make any findings of fact on these factual issues.

Summary of the judge's decision

16. At para 19 of his decision, the judge said that he did not find the appellant a credible witness. At paras 29-31, he said:

> "29. Miss Smith submitted that I should have regard to the fact that the appellant was found to be a credible witness by Judge Morrison.
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> 30. I am not satisfied in relation to that last point that Judge Morrison's findings have any bearing on the issue of whether the appellant's evidence with regard to his CSID is credible. Judge Morrison does not positively assert that the appellant is a credible witness. He says he is prepared to accept the appellant's account as credible, there being no credibility challenge to it in the refusal letter. He then goes on to find that whilst he has accepted that the appellant did receive threats from [SI], there is no evidence as to [SI's] precise role and no evidence of any kind that he has any influence outside Kirkuk other than the appellant's oral evidence, "and for that reason my conclusion is the appellant has not established that [SI] has any influence outside Kirkuk". That is not in my opinion a wholehearted endorsement of the appellant's credibility.
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> 31. I start therefore from the position that the appellant's account must be examined ab initio, from scratch, without any precondition relating to the appellant's credibility. Looking at the appellant's account, I do not find it credible. A CSID is an important document. It was an important document in 2008. It has since that time acquired considerably more status in relation to the feasibility of return to Iraq but even in 2008, it was an important document for an Iraqi citizen. In 2008, it was at the appellant's home. He left it there when he fled Iraq. He has not given me any explanation as to why he would leave such an important document at home."

(my emphasis)

17. The judge went on to reject the appellant's evidence that he had no idea what had happened to his CSID (para 32). He considered the appellant's evidence that his parents had relocated to Syria in 2009, that his mother died in Syria in December 2012, that his father then moved to Jordan and that his contact with his father ceased in August 2018. It is clear from his reasoning at paras 33-35 that the judge did not find this evidence reliable. At paras 36-38, he said:

> "36. I am not satisfied the appellant has established to the low standard that he has lost his CSID. I am not satisfied the appellant is a credible witness. I have no reliable evidence that his father and mother are not in Iraq. On the face of it, it is unlikely that he does not have extended family in Iraq. I find it highly unlikely in such a philoprogenitive nation that his father and mother

had but one sibling between them. Even if that were the case surely his grandparents had children (plural) who have had children who in their turn have had children.

37. I am not satisfied that having known the whereabouts of his CSID, he does not know its whereabouts now. I am satisfied he has access to his CSID and I am satisfied he is in contact with his father (and possibly other relatives).

38. I am satisfied that on return to Baghdad, he will have access to his CSID and the support of family members. I am satisfied (pace Judge Morrison) that armed with his CSID, the appellant can safely relocate to a non-contested area of Iraq."

Grounds of appeal

18. There are three grounds. There are two separate limbs to ground 2. The grounds may be summarised as follows:

(i) (Ground 1) The judge erred in reaching his adverse credibility assessment because he failed to take into account, as a starting point pursuant to the guidance in Devaseelan * [2002] UKIAT 0072, the fact that Judge Morrison had found the appellant credible.

(ii) (Ground 2.a) The judge erred in assessing the credibility of the appellant's evidence that he had left his CSID in Iraq and in reaching his findings at paras 31-36, including his assessment of the appellant's evidence that he has no contact with his father. Firstly, the judge failed to take the findings of Judge Morrison as a starting point. Secondly, he failed to take account of relevant evidence. That is:

a) The fact that the premise of the Tribunal's decision in AAH (Iraqi Kurds — internal relocation) Iraq CG UKUT 00212 (IAC) was that many applicants for asylum in the UK will have left Iraq without their CSID.

b) In doubting the credibility of the appellant's claim that his parents left Iraq in 2009, the judge failed to take into account the appellant's explanation given in his further submissions that his family were assisted to leave Iraq for Syria by the UN or the country guidance that there has in the last decade been mass displacement from Iraq as a result of deteriorating country conditions.

c) In reaching his finding at para 35, that the appellant had *"done nothing*" to locate his father beyond sending one letter, the judge was mistaken as to the evidence because the appellant's evidence was that he had repeatedly tried to telephone his father without success and having had no success he then wrote to his father. Furthermore, there was no evidential basis for assuming that the appellant knew contact details for his father's neighbours in Jordan or that the appellant knew people in the UK that might be able to assist him re-establish contact with his father.

d) The judge speculated at para 36 when he said that he found it "*highly unlikely in such a philoprogenitive nation that his father and mother had but one sibling between them. Even if that were the case surely his grandparents and children (plural) who have had children who in their turn have had children."* The judge's speculation was based on a stereotype of a nation. Secondly, the judge was mistaken

and failed to have proper regard to the evidence, in that, the appellant's account given in his original asylum claim, as accepted by the respondent and Judge Morrison, was that the perpetrators of the serious harm that the appellant feared in his home area were his extended family.

(iii) (Ground 2.b) It was procedurally unfair for the judge to adversely rely at para 34 on the fact that he had not been provided with the tenancy agreement showing that the appellant's father lived in Jordan. The tenancy agreement had been sent to the respondent as part of the appellant's further representations. If the issue had been raised during the hearing, the respondent may have been in a position to provide the tenancy agreement to the judge.

(iv) (Ground 3) The judge erred in his consideration and assessment of internal flight.

Assessment

19. In her submissions on the respondent's behalf, Ms Aboni accepted that the judge had failed to give adequate consideration to the issue of internal relocation. However, she submitted that the judge had not erred in law in assessing credibility. She submitted that he had taken the findings of Judge Morrison as his starting point in line with the guidance in Devaseelan. In addition, she submitted that the judge was entitled to find that Judge Morrison had not positively asserted that the appellant was a credible witness and that he was entitled to consider the appellant's claims that he was no longer in contact with his family and did not have assess to his CSID.

20. In her reply, Ms Smith accepted that the judge was entitled to consider the credibility of the appellant's evidence that he was no longer in contact with his family and did not have access to his CSID. However, she submitted that the judge erred in his approach in assessing the appellant's credibility on these factual matters, in that, he erred in not approaching the credibility assessment from the starting point that the appellant had previously given a truthful account.

21. In relation to ground 1, I have no hesitation in rejecting Ms Aboni's submissions and accepting Ms Smith's submissions. It is clear that Judge Morrison had not made any findings concerning whether the appellant had left his CSID in Iraq. However, the fact that Judge Morrison had accepted the appellant's account of the reasons why he had been threatened by SI was a relevant consideration in deciding the credibility of his evidence concerning his CSID and whether he had any contact with any family members in Iraq. Although the judge said, at para 20 of his decision, that "*the starting point for my deliberations must be the previous determination of Judge Morrison",* it is nevertheless clear from para 31, that he decided to examine the credibility of the appellant's evidence on the factual matters that were in issue before him "*from scratch, without any precondition relating to the appellant's credibility".* This can only mean that he left out of account entirely the fact that the appellant had been accepted as credible in his accounts of the basis of his asylum claim.

22. In that regard, the fact that the respondent had not challenged the appellant's credibility was neither here nor there. Judge Morrison decided the appellant's credibility based on the case as put to him by both parties. Judge Morrison's assessment was therefore a relevant consideration in assessing the factual matters that were in issue in the instant appeal irrespective of whether or not the respondent

had challenged the appellant's credibility in the decision letter dated 14 October 2008.

23. The judge considered that the fact that Judge Morrison had stated that, whilst he accepted that the appellant had received threats from SI, "*there was no evidence as to SI's precise role and no evidence of any kind that he has any influence outside of Kirkuk other than the appellant's oral evidence"* meant that Judge Morrison had not whole-heartedly endorsed the appellant's credibility. However, even if that was the case, it cannot justify disregarding entirely, as the judge plainly did, the fact that Judge Morrison had accepted the credibility of the appellant's evidence that he had received threats from SI due to his acting activities and his relationship with M.

24. For the reasons given above, I am satisfied that ground 1 is established.

25. Ms Aboni did not address ground 2.a or ground 2.b in her submissions. I have considered grounds 2.a and 2.b. I am satisfied that each and very one of the points made in grounds 2.a and 2.b is established, for the reasons given in the said grounds and as summarised above.

26. Accordingly, I am satisfied that the judge erred in law in reaching his findings on the appellant's evidence as to the whereabouts of his CSID and his parents and whether he has any family in Iraq. This is plainly material to the outcome having regard to the country guidance in AAH (Iraqi Kurds - internal relocation) Iraq CG [2018] UKUT 00212 (IAC) that the judge had to apply. It is also plainly material having regard to the current country guidance in SMO, KSP and IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC).

27. Accordingly, I am satisfied that Grounds 1, 2.a and 2.b are material to the outcome. It is therefore not necessary for me to consider ground 3.

28. For the reasons given above, I set aside the decision of the judge in its entirety.

Issue (ii) - whether the appeal should be remitted to the First-tier Tribunal or whether the decision on the appeal should be re-made in the Upper Tribunal.

29. Ms Smith submits that the appeal should be remitted to the First-tier Tribunal for a fresh hearing. Ms Aboni accepted that, if the decision of the judge was set aside in its entirety, the appeal should be remitted to the First-tier Tribunal.

30. In view of my decision to set aside the decision of the judge in its entirety and having regard to the country guidance in SMO, I am satisfied that such is the extent of the fact-finding that is necessary in this case that a remittal to the First-tier Tribunal is the right and fair course of action.

31. I therefore remit this appeal to the First-tier Tribunal for the decision on the appellant's appeal to be re-made by a judge other than Judge of the First-tier Tribunal N Lodge. In addition, fairness requires that the decision is re-made by a Judge of the First-tier Tribunal other than Judge of the First-tier Tribunal Morrison.

Notice of Decision

32. The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside in its entirety. This appeal is remitted to the First-tier Tribunal for the decision on the appellant's appeal to be re-made by a judge other

than Judge of the First-tier Tribunal N Lodge and Judge of the First-tier Tribunal Morrison.

DIRECTION

Within 14 days of this decision being sent to the parties, the respondent to file and serve a copy of the tenancy agreement referred to at paras 25-26 of the decision of Judge Lodge or a written explanation of the reasons for not doing so.

Upper Tribunal Judge Gill Signed: 26 June 2020