



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: PA/09406/2019**

**THE IMMIGRATION ACTS**

**Heard at Bradford (via Skype)  
On 19 March 2021**

**Decision & Reasons Promulgated  
On 30 March 2021**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**REZIN GARIB MAMKADIR**  
(Anonymity direction not made)

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms K Smith instructed by Broudie Jackson & Canter Solicitors.

For the Respondent: Mrs Pettersen Senior Home Office Presenting Officer.

**DECISION AND REASONS**

- 1.** On 9 January 2020 a panel of the First-tier Tribunal composed of Judge Hussain and Judge Kelly ('the Panel') dismissed the appellant's appeal on all grounds.
- 2.** Permission to appeal was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:
  1. The appellant seeks permission to appeal out of time, against a decision of First-tier Tribunal (Judges A K Hussain) dated 09/01/2020, whereby it

dismissed the appellant's appeal against the Secretary of State's decision to refuse his protection claim. The application is out of time by several months but the appellant's representative has stated that the decision was not received until 13/07/2020, some four days after the representative sent a chasing email to the Tribunal. In the circumstances it would be unjust and/or unfair not to extend time and time is extended.

2. It is arguable that the Tribunal may have erred in applying the new country guidance of SMO & Ors (Article 15C Identity documents) CG [2019] UKUT 00400 (IAC), promulgated after the date of the hearing, but before the date of the decision, without giving the Appellant the opportunity to make submissions on the case, in particular as to redocumentation.
3. The remaining grounds are not arguable. There is an arguable material error of law.

**3.** In the respondents Rule 24 response dated 14 October 2020 it is written:

3. The respondent accepts that the effect of the way that the permission has been given in this case does not limit the grounds.
4. It is not accepted the judge has erred respect of the findings on the appellant's family. The judge is not required to address every aspect of the appellant's evidence in this case they reached properly reason findings that were open to them on the evidence.
5. The respondent does consider, however, that the Judge should not have gone on to apply the findings in SMO without giving the parties the opportunity to make submissions. On that basis the respondent considers that this part of the determination should be set aside and remade.

**4.** The Upper Tribunal gave directions as to the conduct of the appeal, directing that the error of law hearing be listed for a remote hearing, to enable it to establish whether error of law had been made on all grounds, the operative part of those directions being in the following terms:

7. Whilst Mr Avery accepted in the Rule 24 Reply that the panel erred by failing to provide the parties with an opportunity to make submissions on the country guidance in SMO, he did not accept that the panel erred in making its findings in respect to the appellant's family. Accordingly, it is clear that the respondent does not accept the panel erred, as contended in ground one.

### **Error of law**

- 5.** Ground 1 asserts the Panel erred in law in rejecting the credibility of the appellant and finding that he is in touch with his family.
- 6.** The Panel set out their findings from [38] of the decision under challenge. In [39] the Panel write:

39. He claims that he is not in touch with his family and it is for him to show that this is the case. He has made no attempts to contact his family since at least 2016 and it was only on 24 September 2019 that he first made contact with the Red Cross, with a view to initiating the family tracing process. We are satisfied the Secretary of State is right to draw the negative inference that the appellant is in touch with his family, not least because he was inconsistent about the male members of his family who could assist him in re-documenting himself in the patrilineal system of registration that operates in Iraq, but also because anyone who has lost touch with their family would not wait three years to initiate efforts to trace them. Unless, that is, he has remained in

contact with them with the family tracing process being engaged in to bolster the false claim that he has lost contact with them.

- 7.** The submission in the grounds that as the appellant had given an otherwise credible account that should have been considered by the Panel when considering whether he has contact with his family, does not establish arguable legal error. The Panel was aware of aspects of those appellant's case that were accepted but that does not mean they had to accept all the evidence as being truthful. It is not made out when assessing the weight to be given to the evidence relating to contact with family members the Panel discounted matters that they should have taken into account.
- 8.** The Grounds also assert it was agreed the appellant will be treated as a vulnerable witness as a result of his mental health and allege the Panel had not demonstrated consideration of this when assessing the weight to be given to the evidence and the adverse credibility findings. This is made out. The record of proceeds noted Judge Kelly specifically asking at the beginning of the hearing if, due to the appellants mental health, there was a need for him to give oral evidence. It was agreed he would as there was only limited cross examination. The Panel were clearly aware this was an issue yet there is no reference in the decision to the Joint Presidential Guidance Note No 2 of 2010 or the Court of Appeal guidance in the assessment of the evidence of vulnerable witness, or any indication as to how the Panel factored the appellants vulnerability into the weight they gave to his evidence.
- 9.** There is also an assertion in the decision that the appellant was inconsistent in his evidence about his brothers that was not put to him during the hearing. While the author of the grounds tries to minimise, what is a clear inconsistency in the evidence the appellant was not given the opportunity to comment upon the same which, in any event, resulted in his disclosing he had two male relatives rather than the original claim to only have one.
- 10.** It is also claimed the appellant was not asked for an explanation about the delay in contacting the Red Cross upon which adverse finding were made. The fact the appellant was in immigration detention and then awaiting the outcome of his application does not appear to have been factored into the decision-making process in relation to this issue.
- 11.** I find Ground 1 made out for the reasons set out above. Procedural unfairness sufficient to amount to a material error of law is made out.
- 12.** In relation to Ground 2, the error is conceded by the respondent in the Rule 24 Response. That concession is properly made. In *SA (Sri Lanka) v Secretary of State for the Home Department* [2014] EWCA Civ 683 it was held that there was no error of law by the Upper Tribunal in deciding an asylum claim on the basis of the country guidance then in force. The correct remedy where the country guidance had changed was for an applicant to make further submissions under paragraph 353 of the Immigration Rules based on the new guidance. However, where the new CG decision is promulgated before the First-tier Tribunal's decision is promulgated it

is an error of law not to follow that new CG decision as the First-tier Tribunal remains seized of the case until promulgation – see NA (Libya) v SSHD [2017] EWCA Civ 143.

- 13.** The determination is set aside with no preserved findings. It was agreed the appeal is remitted to the First-tier Tribunal sitting at Bradford to be heard afresh by a judge other than Judge Hussain or Judge Kelly.

### **Decision**

- 14. The Panel materially erred in law. I set the decision aside. This appeal shall be remitted to the First-tier Tribunal sitting at Bradford to be heard afresh by a judge other than Judge Hussain or Judge Kelly.**

Anonymity.

- 15.** The First-tier Tribunal made no order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

**Upper Tribunal Judge Hanson**

**Dated 23 March 2021**