



Upper Tier Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00392/2016

THE IMMIGRATION ACTS

Heard at Bradford
On 5 July 2018

Decision and Reasons Promulgated
On 06 July 2018

Before

Deputy Upper Tribunal Judge Pickup

Between

Nashwan [A]
[No anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the appellant: Mr C Holmes, instructed by Legal Justice Solicitors

For the respondent: Ms R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Khawar promulgated 12.1.17, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 18.12.15, to refuse his protection claim.
2. The appellant did not attend the hearing.
3. First-tier Tribunal Judge Adio refused permission to appeal on 26.4.17. However when the application was renewed to the Upper Tribunal Upper Tribunal Judge Allen granted permission on 15.1.18.

Error of Law

4. For the reasons summarised below, I found such an error of law in the making of the decision of the First-tier Tribunal such as to require it to be set aside and remade.
5. The appellant's protection claim was based on a fear of Daesh (IS or ISIL) which took over his village in June 2014, causing him to go into hiding, as he had worked for an American company since 2013.
6. Judge Khawar rejected, for the reasons set out in the decision, the appellant's factual claim including being threatened or wanted by Daesh and having worked for an American company. At [57] the judge concluded that he could relocate to the IKR.
7. The grounds complain that promulgation of the decision nearly 4 months after the hearing and where adverse credibility findings founded the dismissal of the appeal was unacceptable and may have resulted in unfairness "because the judge is reliant on his memory and his notes which may or may not be extensive.'
8. The grounds also assert that the judge misapplied the country guidance of AA (Article 15(c)) Iraq CG [2015] UKUT 00433 (IAC) and in assessing relocation to the IKR and in suggesting that the appellant could be pre-cleared by an EU letter.
9. In granting permission to appeal, Judge Allen found it arguable that the judge's credibility findings are unsafe in light of the fact that the decision was promulgated nearly four months after the hearing. This appears to be the only ground on which permission was granted.
10. In the Rule 24 reply, the Secretary of State points out that the Procedure Rules do not contain any time limit for the promulgation of a decision. It is noted that the grounds simply suggest that the decision is unsafe but does not actually state what credibility findings are in error or disputed.
11. The appeal hearing took place at Manchester on 15.9.16. The decision was not promulgated until 12.1.17. However, it is clear from the court file that the decision of Judge Khawar was in fact drafted and submitted to the tribunal for promulgation on 10.10.16. It is not clear why it took another 3 months for the decision to be promulgated but I am satisfied that the delay was not in the drafting of the decision. It follows that the basis of the ground of appeal is unfounded and there is no risk that the judge may have relied on imperfect memory.
12. In any event, Mr Holmes explained that he did not pursue delay in promulgation as a ground of appeal, only the misapplication of the country guidance.
13. In relation to the application of the country guidance of AA, at [37] the judge considered that the appellant would be able to enter the IKR on temporary admission and noted factors from [38] onwards relevant to the reasonableness of expecting him to travel to the IKR from Baghdad. The judge concluded that the appellant had considerable resilience and fortitude which would stand him in good stead and also concluded that he had family in the IKR.

14. However, at [45] to [47] the judge misapplied the country guidance. Although he is a Kurd, the appellant is from Zomar, Mosul, and does not come from within the IKR, he cannot obtain pre-clearance for return there, as suggested in the decision, as only those who come from the IKR can obtain the pre-clearance. Despite having cited verbatim the country guidance of the Upper Tribunal as it then stood, the judge evidently misunderstood it. The correct paragraph was [19], relating to temporary admission. Ms Pettersen did not resist the assertion of an error of law and agreed that the decision was obviously flawed.
15. In the circumstances, the decision is flawed in respect of the assessment of risk on return and cannot stand but must be set aside as being in error of law.
16. However, the core factual findings are unimpeachable and the grounds fail to identify any specific error in those findings, so that they are to be preserved.
17. The decision of the Secretary of State accepted that in the absence of identity documentation the appellant's return to Iraq was not feasible. As Mosul is within what is still regarded by the country guidance as a contested area, and insufficient evidence has been provided thus far to this tribunal to demonstrate on cogent evidence that the guidance should be departed from on that issue, the appellant cannot be expected to return to Mosul. The only remaining issue in the appeal is that of relocation within Iraq, either to Baghdad or to the IKR.
18. Since the promulgation of the decision, matters have moved on with the Court of Appeal's correction to AA (Iraq) v SSHD [2017] EWCA Civ 944, which held that notwithstanding the feasibility of return, "*it will be necessary to decide whether P has a CSID, or will be able to obtain one, reasonably soon after arrival in Iraq. A CSID is generally required in order for an Iraqi to access financial assistance from the authorities; employment; education; housing; and medical treatment. If P shows there are no family or other members likely to be able to provide means of support, P is in general likely to face a real risk of destitution, amounting to serious harm, if, by the time any funds provided to P by the Secretary of State or her agents to assist P's return have been exhausted, it is reasonably likely that P will still have no CSID.*"
19. More recently in AAH (Iraqi Kurds - internal relocation) Iraq CG [2018] UKUT 00212 (IAC) the Upper Tribunal gave further guidance on the reasonableness of relocation and the need to be able to obtain a CSID within a reasonable time after arrival in Iraq.
20. However, AAH is now somewhat out of date in that direct international flights to the IKR resumed in March 2018. It is the policy of the Home Office that they will not enforce returns to the IKR, but if requested, flight tickets will be provided for flights to Erbil or Sulaymaniyah, within the IKR. If the appellant is to be returned to Iraq and arrives in Baghdad he will be no more than an internal transit passenger. However, the updated guidance states that it is not possible to travel onwards to the IKR on the basis of a laissez-passer and he will need a CSID to do so.
21. These are all issues that require further clarification, consideration and submission which cannot take place immediately. Whilst further oral evidence is not to be excluded, it seems unlikely that it will be necessary.

Remittal

22. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the facts are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues.
23. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. Having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the outstanding issues in the appeal on the basis of the preserved findings.

Decision

24. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided in the First-tier Tribunal in accordance with the attached directions.



Signed

Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

25. The appeal is remitted to the First-tier Tribunal sitting at Manchester;
26. The findings of fact of the First-tier Tribunal are preserved. The sole remaining issue is that of relocation;
27. The ELH is 3 hours;
28. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Khawar;

29. The appellant is to ensure that all evidence to be relied on is contained within a single consolidated, indexed and paginated bundle of all objective and subjective material, together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal will not accept materials submitted on the day of the forthcoming appeal hearing;
30. The First-tier Tribunal may give such further or alternative directions as are deemed appropriate.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, I make no anonymity order.

Fee Award

Note: this is not part of the determination.

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable.



Signed

Deputy Upper Tribunal Judge Pickup

Dated