Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/13475/2018**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated:**
On 29 July 2019	**On 21st August 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

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(ANONYMITY DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Hussain (Counsel)
For the Respondent: Mrs R Pettersen (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the claimant's appeal to the Upper Tribunal, brought with the permission of a Judge of the Upper Tribunal, from a decision of the First-tier Tribunal (the tribunal) which it made on 11 February 2019 following a hearing of 4 February 2019. The tribunal decided to dismiss the claimant's appeal from the Secretary of State's decision of 13 November 2018, refusing to grant him international protection.

2. Although the tribunal did not grant the claimant anonymity I have decided to do so.

3. The claimant has given his date of birth as 1 April 1991. He claims to be a national of Iran. He is Kurdish. He says he is a Sunni Muslim. He speaks Kurdish Sorani and also claims to speak Farsi. The tribunal (unusually) did not set out the claimants immigration history and the paperwork in front of me is somewhat confused and contradictory as to that. But it appears that the claimant has indicated that, having left Iran, he travelled through Turkey and Greece before arriving in Croatia where he was detained. He says that, whilst there, he asked that he be sent to Iraq (despite saying that he is a national of Iran) because he feared being sent to Iran. He says that having secured some false documents he was able to go from Croatia to Iraq before departing that country and making his way to the United Kingdom. In claiming asylum, the claimant said that he had become involved with an oppositionist pro-Kurdish group in Iran, that he had distributed leaflets for that group, that his family home was raided as a result, that leaflets kept at his home were discovered by the authorities, that his father was arrested albeit subsequently released, and that he will be of adverse interest to the authorities if he is returned to Iran.

4. The Secretary of State did not accept that the claimant had given a truthful account of events and did not even accept that the claimant is a national of Iran. As to all of that, the Secretary of State set out his position in a decision letter of 13 November 2018. In that decision letter the Secretary of State identified what he perceived to be elements of inconsistency in the account. As to nationality, the Secretary of State expressed the view that the claimant had, when interviewed, given inaccurate or incorrect information about Iran. The Secretary of State clearly took the view that there was a likelihood that the claimant is, in fact, a national of Iraq but did not actually assert, in terms, that he thought that to be the case. But it is clear Iranian nationality was not accepted.

5. The tribunal heard the appeal on 4 February 2019. It received oral evidence from the claimant. Both parties were represented before it. It is clear from what it said that it, like the Secretary of State, did not find the claimant to be a witness of truth. This is what it initially had to say with respect to that:

> "*Introduction*
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> 1. The appellant's nationality is disputed but he claims to be an Iranian citizen of Kurdish ethnicity. His date of birth is 1 April 1991. As will become clear, the issue around his nationality will be key to the determination of this appeal.
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> 2. The appellant says he is a Kurd from Iran, that he is illiterate and that he was educated predominantly in Farsi. Until his involvement in the matter to which this appeal relates, the appellant says he had not suffered any personal difficulties as a result of his Kurdish ethnicity. He says he speaks Farsi in addition to Kurdish Sorani, the latter being a language spoken both in Iran and Iraq. Given that his claimed Iranian nationality was disputed, it was surprising that he provided no credible evidence to show that he could speak Farsi. He gave evidence in Kurdish Sorani.
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> 3. The issues around his nationality create a stark choice: the asylum claim has prospects only if he is found to be an Iranian. If he is found to be an Iraqi, the claim falls away. It goes without saying that establishing that he is Iranian was fundamental to his case.

4. The appellant's account is that he worked as a shepherd for his father who had a herd of 50 to 60 sheep. He was friendly with a shopkeeper by the name of Jamal who he tended to visit in the evenings after completing his shepherding duties. He says Jamal spoke to him regularly of the injustices visited upon the Kurdish people by the Iranian authorities and persuaded him to become a supporter by helping him to collect leaflets for distribution and to distribute them, thus highlighting the Kurdish cause. He gave an inconsistent account of the age that he got involved in these activities ranging from 17 to 22, was inconsistent about whether the material was brought to him in the fields or he went to collect it, was inconsistent about delivering all the material collected to Jamal or whether, despite the dangers to his family, he retained some at home, was inconsistent about where he kept the leaflets at home – in his substantive interview, he said he kept it under the wardrobe and in his oral evidence said he kept it between the bed and the mattress – and despite claiming to be illiterate, explained the discrepancy on the dates he provided was caused by his using both the Gregorian and Farsi calendars interchangeably during the interview which caused the interpreter to fall into error. He was asked about his Shenasnameh, the Iranian birth certificate in his screening interview to which his recorded response was 'what is a Shenasnameh?' He has since said that he thought the interpreter had said 'Shenasnumber?' but did not seek to check this with the interviewer as the normal response would have been. The Secretary of State's version of events is supported by the interview record and the fact that the appellant confirmed at the end of the screening interview that he had understood all the questions that he had been asked. If he had had a doubt about the Shenasnameh, this was the time to raise it if not immediately after the question had been asked. I am satisfied, taking his overall credibility into account, that the appellant's response as captured in the Screening interview was the response that he gave.

5. When distributing leaflets, he, Jamal and the other person involved took precautions to ensure they were not caught. The appellant says he was conscious of not creating any danger for his family. However this is exactly what he did for after distributing the leaflets for the first time, he took the remaining leaflets home where they were subsequently found by the Iranian authorities. This was against all his evidence of the lengths he had gone to to ensure that he delivered the leaflets that he had been given or collected to Jamal the same day.

6. On the second occasion that he, Jamal and the other person went to distribute leaflets, he says Jamal did not return. The arrangement between them had been that if one did not return, they should assume that he had been captured and they should not return to their homes. Relying on this arrangement, the appellant says he went to his cousin Ali's house. Ali thought it was too dangerous for him to remain with him and sent him on further to stay with his mother in law.

7. Ali worked on his family's chicken farm. The appellant's house was raided and the authorities found the leaflets that he had kept at home and duly arrested his father. He was asked what happened to his father after his arrest and at first, denied having any knowledge despite having been in regular contact with his cousin Ali since the arrest and during his journeys through Europe. The appellant changed his story when pressed and confirmed that Ali had told him in subsequent conversations after he had left the country, that his father had been detained but released and that no

further action had bene taken against him since, this, I add, despite the 'hair-trigger' approach of the Iranian authorities to even low level Kurdish activism involving even the possession of leaflets, as identified in HB (Kurds) Iran CB [2018] UKUT 00430 (IAC).

8. According to the appellant, his cousin Ali arranged for him to leave the country paying a large amount of money to an agent to enable this to be done. The appellant was not party to the arrangement or how or where the money was paid over.

9. The appellant got as far as Croatia where he was detained. The appellant says he did not wish to be sent back to Iran. He contacted his cousin Ali again. Apparently the other detainees had told him that a Croatian man could, for $3000, provide papers to get him into Iraq. It was not explained how but Ali managed to contact the Croatian directly, paid him the money and the man turned up as a visitor to see the appellant two days later with the Iraqi papers which enabled him to leave Croatia for Iraq. The appellant did not say what the Iraqi papers were but in his witness statement identifies these as his CSID document. His account of the event is however inconsistent. In his substantive interview, the account was that the man and Ali had an arrangement. In his witness statement, he says he was introduced to the man who assisted him in obtaining the CSID documents and that he had to pay him for the documents. There is no mention of Ali's involvement in the witness statement.

10. Following receipt of the papers, the appellant was returned without difficulty to the IKR. He says, implausibly, that the Croatians took the CSID off him. But this is a document that they would know he needs to sustain himself in Iraq and it is unlikely that they would have done so. Likewise, as it is clear from objective evidence, entry to the IKR can only be obtained for those who originate in the IKR whose identity has been pre-cleared with the IKR authorities in the absence of an expired or current passport. As the appellant, on his account, did not have an Iraqi passport, current or expired, he could only have been allowed entry on the basis of his CSID and that his identity had been pre-cleared. This is further confirmed by the fact that the appellant, upon arrival, was allowed to leave the airport without restriction after which he went to seek help directly from the KDPI at their headquarters. The appellant says, again implausibly, that he was maintained by the KDPI for some months until such time, that he says he refused to become a Peshmerga. With support being withdrawn at which time, he again contacted his cousin Ali who made arrangement, again implausible, in my judgement that someone working on a chicken farm in Iran would have the contacts and the very large amounts of money involved, to make the arrangements and make the payments that the appellant says that Ali was able to do remotely with agents operating in Iraq and Croatia and to be able to pay them the large amounts of money involved almost instantly and across borders directly.

11. The appellant's account that he was supported by the KDPI is implausible. He after all had a CSID that was accepted to be genuine. A CSID would have enable him to obtain employment, health care, accommodation etc. He did not need to rely on the KDPI so that his reasons for leaving Iraq do not stand up particularly given the enormous costs he kept putting on his cousin Ali.

12. As I hope I have demonstrated, the appellant's account is implausible and littered with inconsistencies. He did not provide what was easily obtainable

> evidence to show that he could speak Farsi, or obtain supportive evidence from the KDPI's European office to confirm his involvement in their activities in Iran or even evidence from someone in the United Kingdom to show his involvement in UK KEPI activities such as the event he says he attended in Manchester in January 2018. I found the appellant was not credible. I am satisfied that the photographs provided, in light of his lack of credibility, are self-serving in that they were taken to bolster a false claim.

6. But the tribunal did not then to go on to simply say that it was dismissing the appeal in light of its adverse credibility finding. In fact, it moved on to consider what it thought to be a culpable failure of the claimant to approach the Iraqi Embassy in the United Kingdom and obtain or try to obtain documentation from it which would indicate whether he is or whether he is not a national of Iraq. In concluding that the claimant was essentially obliged to make such an attempt, it relied upon what had been said in MA (Ethiopia) [2009] EWCA Civ 289. This is what it said about all of that.

> "13. However, this is not the primary reason for my decision. I mention it to put things in context and to illustrate that the appellant is not credible. In arriving at this conclusion, I have not ignored the points identified by Mr Sills in his submission but despite the low civil standard involved, they do not affect the overall conclusion that I have come to. The main reason, in addition to his lack of credibility that his appeal fails is that he is not Iranian as he claims.
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> 14. He came to the United Kingdom form Iraq. The Secretary of State says he is Iraqi. The appellant says he is not Iraqi. As against that contention is the fact that he has a CSID which was accepted as genuine by the Iraqi authorities and on the basis of which he was able to be returned to the IKR where, upon arrival, he was allowed to leave the airport and do as he wished. He says the CSID he obtained was false. Given my view of his credibility, I do not accept that – not least because it is implausible that a fake document created within two days would have managed to dupe not one but two national authorities, those from Croatia and the IKR. Be that as it may, even if what he says is true, all he had to do was to attend at the Iraqi embassy in the United Kingdom and make a bona fide application and take all reasonably practical steps to try to obtain Iraqi nationality papers in line with the process identified in MA (Ethiopia) [2009] EWCA Civ 289 to show that he was unable to do so and that therefore he was no6t an Iraqi. Neither he nor his family face a persecutory risk in Iraq as he has not identified any. As the Court of Appeal said at [51]
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> > "there is no injustice to the appellant in this approach: it does not put her at risk. The real risk test is adopted in asylum cases because of the difficulty of predicting what will happen in the future in another country, and because the consequences of reaching the wrong decision will often be so serious for the applicant. That is not the case here. As Ms Giovannetti pointed out, there is no risk of ill treatment if an application to the embassy is made from the United Kingdom, even if it is refused"
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> And at [79]
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> > "… there may be cases in which the application to the foreign embassy may put relatives or friends who are in the country of origin at risk of harm. If here is a real risk that they will suffer harm as a result of such an application, it would not be reasonable for the

> person claiming asylum to have to make it". The present is not such a case.

15. There is no reason why the appellant could not himself have visited the embassy to seek to obtain the relevant papers and no explanation has been put forward as to why he was not able to do so or that if was unreasonable to expect him to do so. As the court of appeal said at [52],

> "this approach to the issue of return is entirely consistent with the well-established principle that, before an applicant for asylum can claim the protection of a surrogate state, he or she must first take all steps to secure protection from the home state"

16. And at [53]

> "it would be strange if by the appellant's wilful inaction she could prevent the Tribunal from having the best evidence there is of the state's attitude to her return".

17. There is no evidence that the appellant has been unable to obtain Iraqi papers, let alone evidence that he is unable to do so for Convention reasons.

18. The appellant has not shown on a balance of probabilities, that is to say, the standard established in MA, that he has not been able to obtain Iraqi travel documents thereby giving credence to his evidence that he is an Iranian national. Refugee status is not a matter of choice. A person cannot be entitled to refugee status solely because he or she refuses to make an application to her embassy, or refuses or fails to take reasonable steps to obtain recognition and evidence of their nationality. In the circumstances I am not satisfied that the appellant is an Iraqi national. The persecutory risk that he has identified does not therefore arise. If it turns out that he cannot obtain papers from the Iraqi embassy, he can make a fresh claim based on the refusal provided that he has taken all reasonably practical steps to make a bona fide application for them. Telling the Iraqi embassy that he is Iranian will undermine the requirement that he has a bona fide application."

7. The appeal having been dismissed, an application for permission to appeal to the Upper Tribunal followed. The grounds of appeal (I summarise and truncate) provided to the Upper Tribunal may be summarised as follows:

> Ground 1 – The tribunal had misunderstood MA (Ethiopia) and, in consequence, had failed to appreciate that the principles set out in that judgment only apply "when an individual is not recognised by their country of nationality". So, it had wrongly applied that judgement and had, in consequence, wrongly thought the claimant was obliged to approach the Iraqi embassy to obtain evidence that he is not an Iraqi national.
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> Ground 2 – even if the above is not correct, the tribunal had not raised an issue regarding the lack of any approach to the Iraqi embassy at the hearing. In those circumstances it was procedurally unfair for it to subsequently rely upon the claimant's failure to approach the Iraqi embassy.
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> Ground 3 – the tribunal had, with respect to credibility, failed to take a structured approach such that its conclusions as to that were "unclear and the reasons inadequate".

8. Although not a ground as such, it was contended that if error had been made with respect to the application of MA (Ethiopia) or the fairness of relying upon it, such would necessarily be material because of the tribunal's own indication that its view as to that was the basis for its decision.

9. A careful and quite detailed grant of permission to appeal to the Upper Tribunal followed. That grant was unlimited. Permission having been granted the case was listed for a hearing before the Upper Tribunal (before me) so that it could be decided whether the tribunal had erred in law and, if it had, what should flow from that. Representation at that hearing was as stated above and I am grateful to each representative. I have taken full account of what was said by the representatives in deciding the error of law issue. I have concluded, though, that the tribunal did not materially err in law. What follows is my explanation as to why.

10. Mr Hussain argued that there was merit in the view (though he had not drafted the grounds) that MA was only applicable in cases involving deprivation of nationality. But he did not seek to take the point further than had the written grounds. In any event, although the contention is an interesting one, it has not been necessary for me to decide it.

11. Mr Hussain argued that there had, indeed, been procedural unfairness whatever view ought to be taken as to what the principles were in MA, through the failure of the tribunal to indicate that it was contemplating taking a point against the claimant in consequence of a failure to approach the Iraqi embassy. Mrs Pettersen, did not, in fact, make a serious attempt to dissuade me from that view. I note that the Secretary of State, in his detailed written decision of 13 November 2018, did not take a point against the claimant through his not approaching the Iraqi embassy. There is an argument to say that the claimant's own representatives should have advised the claimant to approach the embassy anyway, given the quite strong indication in the Secretary of State's written reasons that he thought the claimant probably was Iraqi. Indeed, Mr Hussain very fairly acknowledged that there might be some merit to that argument. I have hesitated over that but, in the end, I have concluded that given the absence of any reference to MA and the absence of any suggestion that the claimant might have been under a duty to approach the Iraqi embassy, there was unfairness in the tribunal taking the point without, at least, making it clear to the parties, at the hearing, that it was contemplating doing so, and inviting views as to whether, in those circumstances, it might be fair to adjourn in order to give the claimant an opportunity either to make the approach to the embassy or to deal with what would have been, if raised, a new issue. So, I would conclude that the tribunal did, in that respect, err in law. It matters not whether MA is limited in its application to the extent that the claimant says it is because error with respect to MA is made out anyway on the procedural unfairness basis.

12. The next point I have had to consider is whether or not the error I have identified is a material one. That was a point which I raised with Mr Hussain and which he had clearly anticipated I might. His argument as to that was to the effect that the tribunal's credibility assessment (excluding what it had to say about MA) was thin. It was only encapsulated, argued Mr Hussain, at paragraphs 12 and 13 of the written reasons. However, I am not able to agree with that submission. I have set out, above, what the tribunal had to say in the passage from paragraph 1 to paragraph 12 of its written reasons. There are a number of different credibility

concerns set out there. Whatever the tribunal itself might have thought as to what was the most important basis for its dismissing the appeal, that credibility assessment was, on any view, careful, thorough and substantial.

13. There is then the criticism in the written grounds to the effect that the credibility assessment was unclear and inadequate. But that argument is barely developed in the written grounds and was not developed before me. It is right to say, though, that the tribunal did set out a number of adverse credibility points under the heading "Background to the case". That is an unusual and potentially confusing way of doing things. Ordinarily one would expect to see, under such a heading, agreed facts and an account of the claim for international protection as it had been put. But I have to look at the substance of the written reasons. It is clear that in fact, notwithstanding the heading it had chosen to use, it was carrying out an evaluation as to the truth or otherwise of the account which underpinned the claimant's application for international protection. There is to some extent, as the grounds suggest, a mixing of "recitation of facts with comments and criticisms" but it is, nevertheless, clear that the tribunal was disbelieving key aspects of the account and it is clear why it was doing so. I base that conclusion on what was said from paragraph 1 to paragraph 12 of the written reasons.

14. There is then the point, again made in the written grounds, that the tribunal itself had highlighted the importance of its view with respect to the applicability of MA. Having said what it had to say at paragraphs 1 to 12 of its written reasons it did immediately say that that was "not the primary reason" for its decision, before going on to say what it did about MA and what it thought to be the considerable significance of the claimant's failure to approach the Iraqi embassy. But, nevertheless, the tribunal's adverse credibility assessment, ending at paragraph 12, was, in my judgment, legally sound. It had concluded, by the end of paragraph 12, that the claimant had made a false claim and the tribunal had reached that view, on my reading, prior to its considering the failure to approach the Iraqi embassy. So, I would reject any argument to the effect that the failure to approach the embassy was an integral part of the overall credibility assessment. In truth, notwithstanding the MA point, the tribunal had given other clear reasons as to why it did not believe the claimant. Those reasons were open to it and have been adequately explained. That disbelief, of itself, meant the claimant did not make out his claim.

15. Finally, Mr Hussain sought to argue that the tribunal had not properly considered the question of whether or not the claimant still had a CSID card. That is an important identity document in the context of Iraqi returnees. The point had not been taken in the written grounds but, in any event, the claimant's application for international protection and his appeal to the Upper Tribunal had been put on the basis that he is Iranian. The tribunal, correctly, dealt with the appeal before it on that basis. His claim and never been put on the basis that he is Iraqi and without identity documents.

16. For all of the above reasons the claimant's appeal to the Upper Tribunal is dismissed. That is because although the tribunal erred in law it did not materially do so.

Decision

The claimant's appeal to the Upper Tribunal is dismissed.

I grant the claimant anonymity pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Accordingly, no report of these proceedings shall identify the claimant or any member of his family. This grant applies to all parties to the proceedings. Failure to comply may lead to contempt of court proceedings.

Signed

M R Hemingway
Judge of the Upper Tribunal

Dated **14 August 2019**