



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00703/2020

THE IMMIGRATION ACTS

Determined under rule 34
On 8 June 2021

Decision & Reasons Promulgated
On 22 June 2021

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

AH (IRAQ)
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (P)

This is a paper determination which has not been objected to by the parties. The form of remote hearing was P (paper determination that is not provisional). A face to face hearing was not held because it was not practicable, and all issues could be determined on paper.

The documents that I was referred were primarily the decision of the First-tier Tribunal promulgated on 18 May 2020, the Secretary of State's grounds of appeal, the grant of permission to appeal by Tribunal Judge Adio, and the directions of Upper Tribunal Judge Rintoul dated 28 July 2020, the contents of which I have recorded.

The order made is described at the end of these reasons.

1. This is an appeal against a decision of the Secretary of State dated 13 January 2020 to refuse the appellant's fresh claim for asylum made on 11 April 2016.

2. The appellant is a citizen of Iraq born in Jul 1966. Pursuant to unchallenged findings of fact reached by three constitutions of the First-tier Tribunal, he is excluded from the Refugee Convention under Article 1F(a). That is because during the Iraqi invasion of Kuwait in 1990, he was responsible for ordering the extrajudicial execution of 35 prisoners of war while serving as a sergeant in the Iraqi army. The appellant originally appealed to First-tier Tribunal Judge Bircher against the Secretary of State's 13 January 2020 decision. On 18 May 2020, Judge Bircher dismissed the appellant's appeal against the refusal of his fresh claim for asylum, but purported to allow the appeal on humanitarian protection grounds in the alternative. The judge also allowed the appeal on Article 3 human rights grounds, and there has been no challenge to those findings.
3. In a decision and reasons dated 9 November 2020, I found that the decision of Judge Bircher involved the making of an error of law to the extent she allowed the appeal on humanitarian protection grounds, and set it aside, with all findings of fact preserved. Please see the error of law decision in the **Annex** to this decision, which sets out the procedural and factual background to this appeal in greater depth.
4. In light of the preserved findings of fact contained in the decision of Judge Bircher, I proposed in my 9 November decision to remake the decision, allowing the appeal on Article 3 grounds. I gave the parties 14 days to provide reasoned objections to the contrary. On 8 June 2021, I was informed that the Secretary of State indicated that she was content for the appeal to be allowed on Article 3 grounds on 25 November 2020, and that the respondent had indicated his assent on 17 November 2020.
5. Accordingly, I allow the appellant's appeal against the Secretary of State's decision to refuse his protection claim on Article 3 grounds only. The appeal is dismissed on asylum and humanitarian protection grounds.
6. I maintain the anonymity order already in force.

Notice of Decision

The appeal is allowed on human rights (Article 3) grounds.

The appeal is dismissed on asylum and humanitarian protection grounds.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Stephen H Smith*

Date 8 June 2021

Upper Tribunal Judge Stephen Smith

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a reduced fee award of **£70** for the following reason. Although the appellant's appeal has been allowed on Article 3 grounds, his primary challenge to the Secretary of State's decision to treat him as excluded from the Refugee Convention failed. I consider that the appellant's recovery of the appeal fee should be reduced by 50% to **£70** to reflect his limited success.

Signed *Stephen H Smith*

Date 8 June 2021

Upper Tribunal Judge Stephen Smith



Upper Tribunal
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AH (IRAQ)
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DECISION AND REASONS (T)

This is a paper determination which has not been objected to by the parties. The form of hearing was T (triage provisional decision). A face to face hearing was not held because it was not practicable, and all issues could be determined on paper.

The documents that I was referred were primarily the decision of the First-tier Tribunal promulgated on 18 May 2020, the Secretary of State's grounds of appeal, the grant of permission to appeal by Tribunal Judge Adio, and the directions of Upper Tribunal Judge Rintoul dated 28 July 2020, the contents of which I have recorded.

The order made, and the proposed resolution for the remaking of the decision of the First-tier Tribunal, is described at the end of these reasons.

1. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal (Judge Bircher) promulgated on 18 May 2020 allowing the appeal of the claimant,

AH, against a decision to refuse his asylum and humanitarian protection claim, on humanitarian protection grounds.

2. The sole ground of appeal may be stated simply. The judge reached unchallenged findings of fact that the appellant, a citizen of Iraq born in 1966, was excluded from the Refugee Convention on the basis that he had engaged in war crimes, yet allowed the appeal on humanitarian protection grounds. The Secretary of State contends that it was perverse for the judge to allow the appeal on humanitarian protection grounds, given the appellant's commission of war crimes excluded him from the scope of subsidiary protection under the Qualification Directive (Directive 2004/83/EC). The appeal was allowed on Article 3 grounds also, and there is no challenge to that finding by the Secretary of State.

Factual background

3. The appellant arrived in the United Kingdom in 2001. The basis of the appellant's claim for asylum has evolved over the years and has been the subject of several appeals. His initial claim, submitted in August 2001, was based on his claimed role as a photographer capturing images of Kurdish collaborators for the Ba'ath Party who later rose to senior roles in the Kurdish military. That claim was refused, and an appeal against that decision was dismissed.
4. In 2003, the appellant made a fresh claim on the basis that during the Iraqi invasion of Kuwait in 1990 he was serving as a sergeant in the Iraqi army, and had ordered and overseen the summary execution of 35 prisoners of war. That factual claim was accepted by Judge Mark-Bell in a decision promulgated on 14 February 2007, who found that the appellant was excluded from the Refugee Convention under Article 1F on the grounds that he had engaged in war crimes.
5. The appellant made a further fresh claim in 2007, claiming that he was acting under duress at the time of giving the orders to kill the prisoners. In a decision promulgated on 19 November 2014 (the delay being attributable to the Secretary of State taking seven years to determine the fresh claim), Tribunal Judge Buchanan rejected the so-called "obedience to superior orders" defence that the appellant then sought to rely upon (see [6.25]).
6. The appeal before Judge Bircher arose from a further fresh claim, in which the appellant sought to distance himself from responsibility for giving the kill orders, this time in attempted reliance upon a polygraph test. Judge Bircher rejected the appellant's latest attempt to unpick the findings of Judge Mark-Bell, in these terms, at [52]:

"I therefore conclude that the appellant is excluded from refugee status under article 1F. Notwithstanding this position[,] the respondent and in turn this tribunal must then go on to consider if it is appropriate to award the applicant humanitarian protection or discretionary leave."
7. The judge allowed the appeal on humanitarian protection and article 3 grounds.

Consideration under rule 34

8. Permission to appeal was granted by First-tier Tribunal Judge Adio. On 28 July 2020, Upper Tribunal Judge Rintoul gave directions stating that it was his provisional view that the questions of whether the decision of the First-tier Tribunal involved the making of an error of law, and, if so, whether the decision should be set aside, could be determined without a hearing. The appellant was directed to provide any written submissions on those issues within 14 days. Judge Rintoul directed that the respondent had 21 days within which to respond. Neither party has responded to the directions.
9. Paragraph 4 of the Senior President of Tribunal's *Pilot Practice Direction: Contingency arrangements in the First-tier Tribunal and the Upper Tribunal* dated 19 March 2020 (subsequently renewed) provides that, "where a chamber's procedure rules allow decisions to be made without a hearing, decisions should usually be made in this way, provided this is in accordance with the overriding objective, the parties' ECHR rights in the chamber's procedure rules about notice and consent." Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides, where relevant:
 - "(1) Subject to paragraphs (2) and (3), the Upper Tribunal may make any decision without a hearing.
 - (2) The Upper Tribunal must have regard to any view expressed by a party when deciding whether to hold a hearing to consider any matter, and the form of any such hearing."
10. The starting point for my consideration as to whether it would be appropriate to determine the issues identified by Judge Rintoul without a hearing is the overriding objective. Rule 2(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 provides that the overriding objective of the Upper Tribunal is to "deal with cases fairly and justly". That includes, at (2)(c), "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings", and, at (d), "using any special expertise of the Upper Tribunal effectively". Also relevant is the need to avoid delay, so far as compatible with proper consideration of the issues: see paragraph (2)(e).
11. While I am conscious that neither party has responded to the directions, I am satisfied that they were served in accordance with the Tribunal Procedure (Upper Tribunal) Rules 2008, and that each party has had ample opportunity to respond. Accordingly, I am satisfied that it is consistent with the overriding objective, and the interests of justice, for me to proceed by considering this matter on the papers under rule 34 in the absence of further submissions.
12. As will be seen, in the operative part of my decision I allow the appeal, and propose that the appeal be re-made without a further hearing, with Judge Bircher's findings of fact preserved, to be dismissed on asylum and humanitarian protection grounds, and allowed on Article 3 grounds only. I propose to provide the parties with a further opportunity to address the tribunal on that basis, and to that extent the interests of justice will be served by providing the parties with a further opportunity to participate in the proposed written process.

Discussion

13. The unchallenged findings of fact reached by the judge precluded the appeal from being allowed on humanitarian protection grounds. So much is clear from the following.
14. First, Article 17 of the Qualification Directive provides:
 - “1. A third country national or a stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that:
 - (a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes...”
15. Secondly, paragraph 339D(i) of the Immigration Rules provides:
 - “339D. A person is excluded from a grant of humanitarian protection for the purposes of paragraph 339C (iv) where the Secretary of State is satisfied that:
 - (i) there are serious reasons for considering that they have committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes...”
16. By rejecting the appellant’s account that he had been acting under some form of duress at the time of giving the kill orders, specifically by rejecting the new account based on the polygraph evidence, the judge confirmed the earlier findings of two different judges (Judge Mark-Bell, Judge Buchanan) that the appellant is excluded from the protection of the Refugee Convention on the basis of his engagement in war crimes. The exclusion provisions for humanitarian protection mirror those applicable to the 1951 Convention and, as such, the appellant fell to be excluded from humanitarian protection also. The judge appears to have approached humanitarian protection as the “fallback” from refugee status in an exclusion situation, whereas the effect of the Qualification Directive and paragraph 339D of the Immigration Rules is that such an individual is also excluded from the scope of humanitarian protection. It was an error of law for the judge to purport to allow the appeal on humanitarian protection grounds, in circumstances when the findings of fact in the decision meant that, by definition, such a conclusion was precluded.
17. For the above reasons, the decision of Judge Bircher involved the making of an error of law.
18. As to whether it should be set aside, there has been no challenge by either party to the findings of fact reached by the judge. Those findings admit of only one conclusion, namely that the appeal must be allowed on article 3 grounds but dismissed on both asylum and humanitarian protection grounds.
19. Accordingly, I find that the decision of Judge Bircher involved the making of an error of law and is set aside.

20. I preserve all findings of fact reached by Judge Bircher and propose to allow the appeal on Article 3 grounds alone.

Notice of Decision

The decision of Judge Bircher involved the making of an error of law insofar as it allowed the appeal on humanitarian protection grounds. I allow the appeal of the Secretary of State and set aside the operative terms of Judge Bircher's decision, preserving all findings of fact.

Subject to consideration of any submissions to the contrary, I propose to remake the decision on the papers, on the basis of the preserved findings of fact, allowing the appeal on Article 3 grounds, dismissing it on asylum and humanitarian protection grounds.

Both parties have **14 days** after being sent this decision to provide reasoned objections to my preliminary view that the appeal should be allowed on Article 3 grounds only, and without a further hearing.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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Signed *Stephen H Smith*

Date 9 November 2020

Upper Tribunal Judge Stephen Smith