Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02236/2020 (V)**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
Working Remotely by Skype for Business	**On 03 March 2021**
On 18 February 2021	

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

H A S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Fripp instructed by KB Law Solicitors
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Iraq who was born on 30 January 1976. He is a Sunni Muslim and comes from the south of Iraq in Dhi Qar Province.

3. The appellant claims to have left Iraq in 2007 when he went to Syria. In 2011, civil war broke out in Syria and the appellant returned to Iraq. There, he claims, his home was attacked by Shi'a Militia. As a result, he went into hiding in the countryside for about five months before going to Australia where he claimed asylum on arrival on 29 October 2012. He was issued with a temporary protection visa by the Australian authorities, which was valid until 20 March 2020. In 2019, the appellant left Australia as he claimed to be subject to racism and was unemployed. He travelled to the United Kingdom arriving on 4 September 2019 when he claimed asylum.

4. The appellant claimed that he would be at risk from Shi'a Militia if he returned to Iraq and he relied upon the circumstances which had led him to leave Iraq initially in 2007 and then again in 2011 after he returned from Syria.

5. On 19 February 2020, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and on human rights grounds. The decision letter of that date was subsequently supplemented by a further decision letter dated 14 July 2020. In essence, the Secretary of State did not accept the appellant's account or that he would, as a result, be at risk in his home area from Shi'a Militia. Further, the respondent concluded that the appellant could internally relocate to Baghdad. On that basis, the Secretary of State refused the appellant's asylum claim. In addition, the Secretary of State was not satisfied that the appellant was entitled to humanitarian protection under Art 15(c) of the Qualification Directive (Council Directive 2004/83/EC) because he could not establish that there was a real risk that he would be subject to indiscriminate violence amounting to serious harm. Finally, the respondent rejected the appellant's application to remain in the UK based upon his private and family life under Art 8 of the ECHR.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the First-tier Tribunal. His appeal was heard on 3 September 2020 by Judge Page.

7. The appellant gave oral evidence before the judge and also relied upon an expert report from Dr Giustozzi dated 19 July 2020, a psychiatric report from Dr Jayawickrama dated 19 August 2020 and two pieces of background evidence, namely the *CPIN*, "Notes Iraq: Sunni (Arab Muslims)" (June 2017) and UNHCR document, "International Protection Considerations with Regard to People Fleeing the Republic of Iraq" (May 2019).

8. The appellant again relied upon the events that he claimed led him to leave Iraq initially in 2007 and finally in 2011. He claimed to be at risk as a Sunni Muslim returning to his home area from Shi'a Militia.

9. Judge Page made an adverse credibility finding and rejected the appellant's account, in particular, as regards the events in 2011 when he said his home had been attacked by Shi'a Militia which had led to him leaving Iraq. In addition, Judge Page found that the appellant could, in any event, internally relocate to Baghdad. It does not appear that the appellant specifically pursued the humanitarian protection claim under Art 15(c). Finally, Judge Page decided that the appellant's removal would not breach Art 8 of the ECHR.

The Appeal to the Upper Tribunal

10. The appellant sought permission to appeal to the Upper Tribunal on six grounds. Those grounds challenge the judge's adverse credibility finding, his conclusion that the appellant could internally relocate to Baghdad and his decision to dismiss the appellant's appeal under Art 8 of the ECHR.

11. On 7 October 2020, the First-tier Tribunal (Judge O'Brien) granted the appellant permission to appeal on all grounds.

12. The appeal was listed at the Cardiff Civil Justice Centre on 18 February 2021. The appeal was heard with the UT working remotely by Skype for Business. In addition, Mr Fripp, who represented the appellant, and Mr McVeety, who represented the respondent, joined the hearing remotely by Skype for Business.

The Appellant's Grounds

13. Mr Fripp, in his oral submissions, adopted and elaborated upon the six grounds of appeal.

14. Grounds 1, 2 and 5 challenge the judge's adverse credibility finding.

15. Ground 1 contends that the judge failed properly to take into account Dr Giustozzi's report and the background evidence, in particular the *CPIN* (June 2017) and the UNHCR document in reaching his conclusion that the appellant's account was not credible.

16. Mr Fripp submitted that the judge had reached an adverse finding, in particular in relation to the 2011 incident without taking into account that the *CPIN* stated that Sunnis may face a real risk of persecution or serious harm from Shi'a Militia in areas where there is a Shi'a Militia presence and that Sunnis are unable to avail themselves of protection of the authorities (see paras 3.1.4 and 3.1.6). Further, he relied upon the UNHCR document where – as set out in the grounds - it is said that there were "waves of displacement due to conflict and political and religious discrimination" and that "Sunnis are reportedly being targeted on account of their perceived support of ISIS". Mr Fripp submitted that this background evidence was relevant in assessing the credibility of the appellant's account, in particular in relation to the events in 2011. Mr Fripp submitted that the judge made no reference to this background material.

17. Mr Fripp also submitted that Dr Giustozzi's report provided support for the credibility of the appellant's account both as regards the 2007 situation – when the appellant claimed he left Iraq because of 'cleansing' of Sunni Muslims by Shi'a – and also the events in 2011.

18. In his oral submissions, Mr Fripp submitted that the judge had made no finding at all in relation to the 2007 event, only in relation to the 2011 incident.

19. Mr Fripp submitted that the judge had fallen into error because he had only referred to Dr Giustozzi's report at para 34 having already made an adverse credibility finding against the appellant. This, he submitted, amounted to the so-called Mibanga error (see Mibanga v SSHD [2005] EWCA Civ 367).

20. In relation to ground 5, Mr Fripp (linking it with ground 1) submitted that the judge had failed to take into account the relevant country guidance decisions. He relied upon BA (Returns to Baghdad) Iraq CG [2017] UKUT 18 (IAC) and SMO and others (Article 15(c): identity documents) Iraq CG [2019] UKUT 00400 (IAC).

21. In relation to ground 2, Mr Fripp submitted that the judge has wrongly down-played the relevance of Dr Giustozzi's evidence because he had said that the was a "risk" to the appellant on return without stating it was a "real risk". This, Mr Fripp submitted, was a strained and artificial understanding of the evidence which was, read as a whole, plainly that the risk to the appellant was relevant to his protection claim.

22. In relation to ground 3, Mr Fripp submitted that the judge, in para 33 of his determination, had concluded that the appellant could internally relocate to Baghdad simply on the basis that he had not established that he would be at risk of being kidnapped or murdered by Shi'a Militia. Mr Fripp submitted that the judge had failed to consider, in accordance with the test for internal relocation, whether (even in the absence of such a risk) it would be 'unduly harsh' or 'unreasonable' for the appellant to live in Baghdad. In that regard, Mr Fripp relied upon the well-known decisions in Januzi v SSHD [2005] UKHL 5; SSHD v AH (Sudan) [2007] UKHL 49 and, most recently, AS (Afghanistan) v SSHD [2019] EWCA Civ 873.

23. In relation to ground 4, Mr Fripp submitted that the judge had failed to address para 276ADE(1)(vi) of the Immigration Rules and whether there would be "very significant obstacles" to the appellant's integration on return to Iraq and properly to consider his claim outside the Rules under Art 8.

24. Finally, under ground 6, Mr Fripp submitted that the judge had failed properly to consider the expert psychiatric report of Dr Jayawickrama. Mr Fripp submitted that the judge had been wrong, in para 35 of his determination, to conclude that the report added little weight to the appellant's case in particular because there was no diagnosis that the appellant was suffering from "moderate depressive episode". Mr Fripp submitted that was inconsistent with the report and the expert's opinion as to the appellant's mental health. In his oral submissions, Mr Fripp accepted that the psychiatric evidence was not directly relevant to an assessment of the appellant's

evidence and credibility but was was rather relevant to the appellant's circumstances on return, including whether he could internally relocate.

Discussion

25. The appellant's case before Judge Page relied upon past incidents as being relevant to whether, on return to Iraq, he would be at risk in his home area as a Sunni Muslim. Those events occurred in 2007 and 2011. In relation to 2007, the appellant claimed that he left Iraq and went to Syria because of 'ethnic cleansing' of Sunni Muslims by Shi'a Militia in his home area. In relation to 2011, when he returned from Syria, he claimed that his home had been attacked by Shi'a Militia who had said "the dog has come back". He left because he feared for his life. His mother and elderly aunt remained in the family home but, the appellant's evidence was, that they were safe because "the ladies don't have fear and they are all over 60 years old". As a consequence, the credibility of the appellant's account, both in relation to 2007 and 2011 was central to his case. As Mr Fripp pointed out in his submissions, past persecution is a "serious indication" of future risk of persecution as para 339K of the Immigration Rules recognises.

26. In his judgment, Judge Page plainly recognised that the appellant's credibility was a crucial part of his claim. In relation to that issue, Judge Page found the appellant not to be credible and said this at paras 27–32:

> "27. I am not satisfied to the low standard of proof that the appellant would face an individual risk in Iraq because he is a Sunni Muslim. This is not an at risk category per se. The central issue in this appeal is the appellant's credibility.
>
> 28. I do not find it credible that he was targeted by Shi'a Militia when he returned to Iraq in 2011 to renew his Iraqi passport. His evidence was discrepant later in his evidence when he said that the rock throwing incident took place later than the first day when he arrived back. His witness statement that he made both to the respondent and in preparation for the appeal and indeed his Asylum Interview Record clearly was claiming that he came back and the house was attacked on the very first day and he left immediately and went into hiding for five months. It was during questioning by Mr Halt that the appellant changed his evidence and I was left with a clear impression that the appellant had forgotten the detail of an invented story and reinvented it differently.
>
> 29. His evidence was evasive when he was asked about what property his family still had in Iraq. I find that if the appellant's family remained in the house after this claimed attack it could only mean that they, as Sunni Muslims themselves, were not at risk by reason of their religion. In any event, if I were to accept the appellant's account about the attack on his home, on his evidence he successfully relocated within Iraq away from these attackers when he went to another house in another area and stayed there for five months. If this was true he exercised an internal flight alternative to seeking asylum in another country and had no need to go to Australia or the UK.
>
> 30. The appellant's immigration history is evidently that of an economic migrant, not a refugee. I do not accept his evidence that he was given US$6,000 by his colleagues in Australia who were supporting him. His evidence has been that refugees in Australia are not given work, are side-lined and effectively persecuted in Australia,

> which begs the question as to how the appellant could have had colleagues who were refugees with sufficient funds to give him Australian $6,000 to bring with him to the United Kingdom. He brought that money with him to re-establish himself here and the only sensible conclusion is the appellant, was given a document entitling him to remain in Australia must have had employment there of some kind.
>
> 31. The appellant's family, that he is still in contact with, particularly his mother that he speaks to daily are in the family home that he left when he went to Australia. He could return to them and obtain their support. The fact that he has an Iraqi passport and his identity documents with the Home Office would enable the Iraqi Embassy in London to issue the appellant with an identity document if he needed one. I conclude therefore that if the appellant *wanted* to return to Iraq he would have no difficulty in doing so. However, the fact is that the appellant does not want to return to Iraq but wishes to remain in the United Kingdom with an acquired immigration status.
>
> 32. I have made adverse credibility findings about the appellant's explanation for having the Australian $6,000 when he arrived in the United Kingdom and his account of having fled Iraq in 2011, which I find to have been an invented story of persecution. I ask whether the appellant could be returned in circumstances where he is in contact with his family who are still there and have come to no harm."

27. Then at para 33, the judge moved on to consider whether the appellant could, as he indeed he found was possible, relocate to Baghdad.

28. As will be clear, the judge, having considered the appellant's evidence, rejected it and found the appellant not to be credible. He did so exclusively in the context of the 2011 incident. As Mr Fripp submitted, the judge made no finding explictly on the 2007 events, in particular whether he could have left at that time because of a fear of Shi'a Militia. It will also be clear that in the reasoning in paras 27-32, the judge made no reference to Dr Giustozzi's expert report. Mr Fripp placed reliance upon a number of passages in Dr Giustozzi's report.

29. First he relied upon passages in paras 5–7 which is in the following terms:

> "5. There is substantial evidence that if [the appellant] returned to Iraq, he would be at risk of persecution by the Iraqi state, or at least of rogue elements within its ranks. The Sunni Arab community in Iraq has been complaining of discrimination in public sector employment for many years now alleging that on the basis of the de-Ba'athification process many Sunnis have been prevented from obtaining government jobs. Although the government established in 2015 a committee to address the issues of sectarian and ethnic imbalances in the ministry, it has been slow in taking action. As of 2018 – 2019, discrimination against Sunni Arabs continued.
>
> > 'Some Sunnis said they were often passed over for choice government jobs or lucrative contacts by the Shi'a-dominated government because the Sunnis were alleged accused of being Ba'athists who sympathised with ISIS ideology.'
>
> 6. Specifically in Dhi Qar, reports of Shi'a groups targeting Sunnis have reduced in recent years, as the focus of the media and the Shi'a Militias had shifted to northern Iraq. The last report of such threats dates back to 2014, when in February

> Dhi Qar police arrested four individuals suspected of distributing sectarian flyers demanding that Sunnis leave the area within a month or be killed. There was also a substantial cleansing of Sunni Arabs in southern Iraq already in previous years and relatively few targets are left. A 2007 poll showed that 26% of Sunni Arabs claimed having been displaced. Although the pace of the cleansing reached its peak in 2006 – 2007, it continued later as well.
>
> 7. The feeling of discrimination by the Shi majority already led to public protest by Sunni Arabs in 2011 – 2013, resulting in violent repression by security forces. Some protestors were killed, and others arrested or assaulted."

30. Then at para 30, Dr Giustozzi concluded as follows:

> "In conclusion, [the appellant's] account is plausible. Sunni Arabs had been widely targeted by both government and the militia, even when there was no indication that they had connections to the Islamic State. In the south, where [the appellant] is from, there was sectarian cleansing by Shi'a Militias. The seizure of the properties of Sunni Arabs occurred on a widescale throughout Iraq. The fact that, as he claimed, his house is still under the control of the affiliates to Shi'a Militias makes it risky for [the appellant] to return to Dhi Qar: inevitably those occupying his home will see his presence there as a risk to them, especially now that sections of the population are challenging the pro-Iranian militia even in Dhi Qar."

31. Mr Fripp accepted that, in para 30, Dr Giustozzi had misstated the appellant's case which was not that his house had been seized by Shi'a Militia because his evidence was that his mother and aunt remained living there, albeit safely as older women.

32. Judge Page referred to Dr Giustozzi's evidence at para 34 of his determination as follows:

> "I will make reference to the expert report of Antonio Giustozzi dated 19 July 2020 at pages 1, 11 of the appellant's supplementary appeal bundle which I have taken as my starting point in determining this appeal. I have not found it compelling, though I accept his expertise. Mr Giustozzi has said that there is substantial evidence if the appellant returned to Iraq, he would be at risk of persecution by the Iraqi state, or at least of rogue elements within its ranks. The Sunni Arab community in Iraq has been complaining of discrimination in public sector employment for many years now. The shortcomings of this assertion at para 5 of his report is that he does not opined to the *level of risk* that he is referring to. This could be a fanciful risk below the level of risk necessary to meet the low standard of proof. I accept all of the historic antidotal *(sic)* evidence in his report. At para 30 of his report he has opined 'relocation will lessen the danger'. I agree that if the appellant was in danger in his home area, relocation would lessen that danger to the point that he would not be in need of international protection. I have made the clear finding that the appellant has invented the danger that he claimed to have faced at his home where his mother still lives. This expert report is predicated upon a false asylum story which Mr Giustozzi had instructions to opine upon. It was not his role to make credibility findings for the Tribunal to follow."

33. Mr McVeety accepted that there were some difficulties with the judge's approach to the expert report. In particular, the judge may well have fallen into the Mibanga error of reaching an adverse credibility finding before considering the expert's report. As the 2007 events, and the claim of ethnic or religious cleansing, McVeety accepted that it was a "struggle" to see any finding on that part of the appellant's claim. However, Mr McVeety submitted that the expert report was not particularly

persuasive and therefore the error was not material. He submitted the expert evidence only showed that 26% of Sunni Arabs claim to have been displaced so, he submitted, 74% remained. Further, Dr Giustozzi could only identify a single incident in and around 2011 and this was when four protestors were arrested.

34. In my judgment, Judge Page did fall into the error identified in Mibanga. In that case, Wilson J (as he then was) identified what a judge should, and should not do, when assessing a person's credibility in the light of expert evidence. He said this at [23] – [24]:

> "23. In the light of my view as to the proper despatch of this appeal, it would be wise for me to keep my own views about the effect of the evidence to a minimum. The basis of the appeal is not that the weight of the appellant's evidence, coupled with that of the two experts, should have driven every reasonable fact-finding body to accept his account and to uphold his appeal but that he has been the victim of a flawed fact-finding exercise on the part of the adjudicator and that the tribunal fell into legal error in failing to recognise it and to remit the appeal for redetermination. In this regard Miss Braganza relies heavily upon the way in which the adjudicator folded the doctor's report into her enquiry only at a point after she had reached her conclusions and upon the way in which she jettisoned the focussed comments of the professor.
>
> 24. It seems to me to be axiomatic that a fact-finder must not reach his or her conclusion before surveying all the evidence relevant thereto. Just as, if I may take a banal if alliterative example, one cannot make a cake with only one ingredient, so also frequently one cannot make a case, in the sense of establishing its truth, otherwise than by combination of a number of pieces of evidence. Mr Tam, on behalf of the Secretary of State, argues that decisions as to the credibility of an account are to be taken by the judicial fact-finder and that, in their reports, experts, whether in relation to medical matters or in relation to in-country circumstances, cannot usurp the fact-finder's function in assessing credibility. I agree. What, however, they can offer, is a factual context in which it may be necessary for the fact-finder to survey the allegations placed before him; and such context may prove a crucial aid to the decision whether or not to accept the truth of them. What the fact-finder does at his peril is to reach a conclusion by reference only to the appellant's evidence and then, if it be negative, to ask whether the conclusion should be shifted by the expert evidence. Mr Tam has drawn the court's attention to a decision of the tribunal dated 5 November 2004, namely HE (DRC – Credibility and Psychiatric Reports) [2004] UKIAT 00321 in which, in para 22, it said:
>
> > 'Where the report is specifically relied on as a factor relevant to credibility, the Adjudicator should deal with it as an integral part of the findings on credibility rather than just as an add-on, which does not undermine the conclusions to which he would otherwise come.'"

35. Buxton LJ agreed with that approach and said at [30] – [31] the following:

> "30. …. The Adjudicator's failing was that she artificially separated the medical evidence from the rest of the evidence and reached conclusions as to credibility without reference to that medical evidence; and then, no doubt inevitably on that premise, found that the medical evidence was of no assistance to her. That was a structural failing, not just an error of appreciation, and demonstrated that the

> Adjudicator's method of approaching the evidence diverted from the procedure advised in para 22 of HE, set out by my Lord.
>
> 31. Further, though perhaps lest obviously, I agree that if an expert's view is to be rejected in the conclusive terms adopted by the adjudicator in this case, then proper procedure requires that at least some explanation is given of the terms and reasons for that rejection."

36. Subsequent cases have sought to identify the true nature of the legal error in Mibanga. So, in HH (medical evidence: effect of *Mibanga*) Ethiopia [2005] UKAIT 00164, the AIT said this at [21]:

> "The Tribunal considers that there is a danger of *Mibanga* being misunderstood. The judgments in that case are not intended to place judicial fact-finders in a form of forensic straightjacket. In particular, the Court of Appeal is not to be regarded as laying down any rule of law as to the order in which judicial fact-finders are to approach the evidential materials before them. To take Wilson J's "cake" analogy, all its ingredients cannot be thrown together into the bowl simultaneously. One has to start somewhere."

That approach was subsequently approved by the Court of Appeal in S v SSHD [2006] EWCA Civ 1153 at [32]. At [24] in S, Rix LJ at [24] recognised that the Mibanga error lies in the "structure of the Immigration Judge's reasoning" and the "artificial separation" between a judge's reasoning and finding in relation to credibility and taking into account the expert evidence.

37. As has been said on a number of occasions, this structural error does not require a judge to consider the evidence in any particular order providing that all the relevant evidence is considered. In its recent decision, the UT in QC (verification of documents; *Mibanga* duty) China [2021] UKUT 33 (IAC) (Lane J, President and Ockleton V-P), having referred to the case law beginning with Mibanga, said this at [57]:

> "57. To sum up, the judicial fact-finder has a duty to make his or her decision by reference to all the relevant evidence and needs to show in their decision that they have done so. The actual way in which the fact-finder goes about this task is a matter for them. As has been pointed out, one has to start somewhere. At the end of the day, what matters is whether the decision contains legally adequate reasons for the outcome. The greater the apparent cogency and relevance of a particular piece of evidence, the greater is the need for the judicial fact-finder to show that they have had due regard to that evidence; and, if the fact-finder's overall conclusion is contrary to the apparent thrust of that evidence, the greater is the need to explain why the evidence has not brought about a different outcome."

38. Here, Dr Giustozzi's evidence was, perhaps, to borrow Mr Fripp's word used in his submissions, not "perfect". There is certainly a difficulty with his premise in para 30 of the report that the appellant's house has been seized by Shi'a Militia. Nevertheless, the report does provide some support for the appellant's claim why he left Iraq in 2007 (upon which Judge Page made no findings) and also in relation to his leaving in 2011. The judge had to take that evidence into account and reach an assessment of it as part of the process leading to his conclusions in respect of the credibility of the appellant's account. Whilst, of course, it was not for Dr Giustozzi to

determine the appellant's credibility – that was a matter for the judge – evidence going to the plausibility of his account was a matter upon which Dr Giustozzi was entitled, as he in fact did at para 30, to express his view based upon his expert knowledge concerning the situation in Iraq. Perhaps the judge meant no more than that when in the final sentence of para 34 of he said:

> "It was not his role to make credibility findings for the Tribunal to follow."

39. However, if the judge were discounting Dr Giustozzi's report, when it stated that the appellant's "account is plausible" because that was not a matter upon which Dr Giustozzi was entitled to comment, that would be a misdirection.

40. However, the real issue in respect of this challenge to the judge's adverse credibility finding turns upon the structural issue as to whether or not he took Dr Giustozzi's report into account in assessing the credibility of the appellant's account, albeit (given his limited findings) in respect of the 2011 incident. It might well be that, this experienced Immigration Judge could be taken to have had regard to Dr Giustozzi's report if he had said no more than he did at the beginning of para 34, namely that he had taken that report "as my starting point in determining this appeal". However, reading on in para 34, it is plain that the judge did not actually adopt that approach. In the penultimate and pre-penultimate sentences the judge clearly identifies that, without having regard to Dr Giustozzi's report, he has found the appellant's account not to be credible. Indeed, in the penultimate sentence he rejects Dr Giustozzi's report on the basis that it is "predicted upon a false asylum story". That is, as Mr McVeety acknowledged in his submissions, to 'put the cart before the horse'. Whether the appellant's asylum claim was to be believed was an assessment that had to be made taking into account Dr Giustozzi's report, not without having regard to it and then discounting the report because it must be based upon a false story. That is the Mibanga error (see, e.g. Buxton LJ at [30] in Mibanga; and Rix LJ at [24] in S).

41. Whilst, as I have said, Dr Giustozzi's report would not necessarily establish the truth (or credibility) of the appellant's account, the judge was required to grapple with it as it was relevant and, in my judgment, it amounted to a error of law to reach an adverse credibility finding without considering it. It may be that the appellant's case, even taking into account Dr Giustozzi's evidence, was not one that necessarily would succeed. Not every fact-finding would inevitably be driven to accept his account. I am unable, however, to conclude that the appellant would inevitably have failed in establishing the relevant facts and so, rejecting Mr McVeety's submission, I am satisfied that the error was material.

42. As I have said, the judge did not make any findings at all in relation to the 2007 event, focusing instead upon the 2011 incident. That was also an error.

43. It follows, to that extent, I accept, based upon ground 1, that the judge materially erred in law in reaching his adverse credibility finding.

44. Of course, that error would not be material to the outcome of the appeal if the judge's finding that the appellant could internally relocate to Baghdad was sustainable. Mr

McVeety, in his submissions, did not seek with any conviction to support the judge's conclusion in para 33 of his determination that the appellant could internally relocate to Baghdad. There the judge said this:

> "The appellant could relocate to Baghdad without any risk of being kidnapped or murdered by Shi'a Muslims (*sic*). He has a passport, he could obtain identity documents and work in Baghdad. If he did not want to return to his home area. Sunni Muslims are not a generally recognised at risk category, though there is evidence that Sunni Muslims have been persecuted in Iraq by the Shi'a majority. There is no arguable case that the appellant should obtain humanitarian protection in Iraq by reason of being a Sunni Muslim per se."

45. Mr McVeety accepted that in order to determine whether internal relocation was open to the appellant the judge also had to consider whether, even if the appellant could establish a real risk of persecution or serious harm in Baghdad, it would be unduly harsh or unreasonable for him to live there. He accepted on the basis of headnote (19) of SMO and others that that was a question of fact in each case and that, despite the UT's view that it was "likely to be reasonable" for a Sunni, single, able-bodied man to relocate to Baghdad, all the appellant's circumstances had to be taken into account and the judge had not done so.

46. In my judgement, Judge Page did err in law by failing to consider whether it would be "unduly harsh" or "unreasonable" for the appellant to relocate to Baghdad. It was not sufficient simply to determine whether he would be at risk of serious harm or persecution in Baghdad. Paragraph (19) of the judicial headnote in SMO and others is as follows:

> "Relocation to Baghdad. Baghdad is generally safe for ordinary civilians but whether it is safe for a particular returnee is a question of fact in the individual case. There are no on-entry sponsorship requirements for Baghdad but there are sponsorship requirements for residency. A documented individual of working age is likely to be able to satisfy those requirements. Relocation to Baghdad is likely to be reasonable for Arab Shia and Sunni single, able-bodied men and married couples of working age without children and without specific vulnerabilities. Other individuals are likely to require external support, ie a support network of members of his or her family, extended family or tribe, who are willing and able to provide genuine support. Whether such a support network is available is to be considered with reference to the collectivist nature of Iraqi society, as considered in AAH (Iraq)."

47. Whilst para (19) does say that it is "likely to be reasonable" for a Sunni man who is single and able-bodied to return to Baghdad, the country guidance decision also notes that it is a "question of fact in the individual case". Here, Mr Fripp submitted that there were a number of factors that had to be taken into account including the appellant's mental health. There was, in this case, the expert psychiatric evidence of Dr Jayawickrama. That, of course, formed the basis of ground 6 and the judge's assessment of that evidence at para 35. The judge did not make that assessment, however, in the context of internal relocation. Suffice it to say that I accept Mr Fripp's submission that the judge was wrong to conclude that Dr Jayawickrama had not diagnosed the appellant as suffering from "moderate depressive episode". That remains an issue that needs to be considered in the context of internal relocation

along with other issues such as the length of time that the appellant has been away from Iraq. Here, again, although it was not inevitable that the appellant would succeed in establishing it would be "unduly harsh" or "unreasonable" for him to live in Baghdad, equally it was not inevitable that he would fail to do so and, of course, the judge did not engage with the issue at all. For these reasons, therefore, I am also satisfied that the judge materially erred, as set out in ground 3, in concluding that the appellant could internally relocate to Baghdad.

48. For the above reasons, the First-tier Tribunal materially erred in law and its decision to dismiss the appeal is set aside.

49. In the light of the material errors I have identified above, it is unnecessary to consider in further detail issues raised in the grounds. I would, however, say this. In relation to ground 1, the background evidence relied upon and the CG decision in SMO and others (which replaced all existing CG decisions on Iraq) were relevant to risk on return now but may have had limited importance to assessing the credibility of events in 2007 and 2011. In relation to ground 2, the judge's interpretation of Dr Giustozzi's evidence was essentially a matter for him and the proper reading of it – whether or not supporting a "real" a risk to the appellant engaging the need for international protection – will be a matter for the judge re-making the decision.

50. Both representatives acknowledged that if the internal relocation finding could not stand, and the decision had to be remade, it was appropriate also that the remaking should include Art 8 of the ECHR. The judge's brief reasoning and finding in para 37 of his determination cannot be sustained.

Decision

51. The decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of a material error of law. That decision cannot stand and is set aside.

52. In the light of the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing to remake the decision before a judge other than Judge Page.

Signed

Andrew Grubb

Judge of the Upper Tribunal
22 February 2021