



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-001936
First-tier Tribunal No:
PA/03300/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 08 August 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

VOM
(ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms E Gunn, Counsel, instructed by Migrant Legal Project
For the Respondent: Miss S Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 27 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant is a national of Iraq. He claims to have arrived in the United Kingdom on 20 May 2019. He claimed asylum as an

unaccompanied asylum-seeking child on 5 June 2019. The claim was refused by the respondent for reasons set out in a decision dated 4 May 2020.

2. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge O'Rourke for reasons set out in a decision promulgated on 10 March 2021.
3. In the grounds of appeal, the appellant claims the judge decided, under rule 25(1)(g) of The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 ("the Tribunal Rules"), that the appeal should be heard on the papers as the parties raised no objection and evidence bundles and skeleton arguments had been provided.
4. The appellant advances three grounds of appeal. First, he claims that in a short determination the judge dismissed the appeal on the grounds that the appellant should have been able to give more persuasive evidence of his uncles activities and the appellant had offered no evidence as to why or when he lost contact with his family. The judge had decided that the appeal should proceed without a hearing and in the absence of any cross-examination it was fundamentally unfair for the appellant not to be given an opportunity to deal with the concerns of the respondent or the judge, prior to the disposal of the appeal. Second, the finding that the appellant's family can help him redocument was made without reference to the respondent's CPIN which states re-documentation in the UK through the Iraqi Embassy is highly unlikely. Third, the judge made adverse credibility findings against the appellant without due regard to the appellant's vulnerability as a result of his age and mental health.
5. Permission to appeal was granted by Upper Tribunal Judge Pitt on 23 February 2023. She said:

"It is arguable that the First-tier Tribunal erred in the approach to the up-to-date country evidence and case law on whether the appellant could obtain documents allowing him to return to Iraq. It is also arguable that the First-tier Tribunal erred in failing to take into account the applicant's vulnerable status having provided evidence of mental health issues."

Error of Law

6. At the hearing before me, nether Ms Gunn nor Miss Rushforth were able to assist me as to the events leading to the appeal being determined on the papers. I note that on the 'Form IAFT-5' that had been filed with the First-tier Tribunal, the appellant's representatives at that time, had indicated that the appeal should be decided at an oral hearing. At paragraph [8] of his decision, Judge O'Rourke said:

"The Parties having raised no objection to the Tribunal's notice as to this appeal being heard on the papers and both parties having provided evidence bundles and skeleton arguments, I considered, applying Rule 25(1)(g) of the Tribunal Procedure Rules 2014 that I can justly determine the matter without a hearing."

7. Neither Ms Gunn nor Miss Rushforth were aware of the Notice that appears to have been sent by the Tribunal to the parties and neither were they aware of any written response sent to such a Notice with representations as to whether there should be an oral hearing. In the absence of a paper file, I have been unable to determine whether the required notice under paragraph 25(2) of the Tribunal Rules was in fact served upon the representatives and whether any response was received. It is odd that neither party has a record of the Notice and although I accept there has been a change of representative as far as the appellant is concerned, as the respondent has no record of such a Notice having been received, I am satisfied that there is a real risk that the required Notice was not in fact provided.
8. Having canvassed the above with the parties, Ms Rushforth, quite properly in my judgment, accepted there is an error of law in the decision of the First-tier Tribunal such that the decision should be set aside.
9. I am satisfied that the appellant should not suffer any prejudice because of a procedural error, even if such an error arose by reason of any failure on the part of his representatives to make written representations of any Notice served under paragraph 25(2) of the Tribunal Rules. It is in the wider interests of justice to set aside the decision of the First-tier Tribunal given the way in which matters appear to have developed, in circumstances whether the appellant's former representative had requested an oral hearing initially, and where the respondent had rejected the core of the appellant's account. In MM (unfairness; E & R) Sudan [2014] UKUT 00105 (IAC) the Upper Tribunal held that where there is a defect or impropriety of a procedural nature in the proceedings at first instance, this may amount to a material error of law requiring the decision of the First-tier Tribunal to be set aside. The authorities referred to by the Upper Tribunal in MM make it clear that upon an appeal such as this, the criterion to be applied is fairness and not reasonableness.
10. I wish to re-iterate that there can be no criticism of Judge O'Rourke, but I accept that the decision of Judge O'Rourke is infected by an error of law arising from the unfairness that arose by reason of the fact that adverse credibility findings were made in an appeal determined on the papers, in these particular circumstances. Plainly, if the appellant had expressly consented to the appeal being determined on the papers he could not complain if adverse credibility findings were made against him, but I cannot be satisfied that that is what happened here.
11. In my judgment the appropriate course is for the decision of First-tier Tribunal Judge O'Rourke to be set aside. In the circumstances I do not need to address the other grounds of appeal relied upon by the appellant. As to disposal, the parties agree that the appropriate course is for the matter to be remitted to the FtT for hearing de novo with no findings preserved. I have decided that it is appropriate to remit this appeal back to the First-tier Tribunal, having considered paragraph 7.2 of the Senior President's Practice Statement of 25th September 2012. In my view, in determining the appeal, the nature and extent of any judicial fact-finding necessary will be extensive.

Notice of Decision

12. The decision of First-tier Tribunal Judge O'Rourke is set aside with no findings preserved.
13. The appeal is remitted to the First-tier Tribunal for hearing afresh.
14. The appeal will be listed for an oral hearing with a Kurdish Sorani interpreter.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 July 2023