



**Upper Tribunal
(Immigration and Asylum Chamber)
Number: PA021842016**

Appeal

THE IMMIGRATION ACTS

Heard at North Shields
On 27 June 2017

Decision Promulgated
On 3 July 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

**[B T]
(~~ANONYMITY DIRECTION NOT MADE~~)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms V Adams (counsel) instructed by Fountain solicitors
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge CM Bell promulgated on 12 January 2017, which dismissed

the Appellant's appeal on protection grounds, but allowed it on Humanitarian protection grounds.

Background

3. The Appellant was born on 01/07/1995 and is a Kurdish Iraqi. On 24/02/2016 the Secretary of State refused the Appellant's protection claim.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge CM Bell ("the Judge") dismissed the appeal against the Respondent's asylum and ECHR claims, but allowed the appeal on Humanitarian protection grounds.

5. Grounds of appeal were lodged and on 8 February 2017 Judge Andrew gave permission to appeal stating

"1. The appellant seeks permission to appeal, in time, against a decision of the First-tier Tribunal (Judge CM Bell) who, in a determination promulgated on 12th January 2017 dismissed the appellant's appeal against the respondent's decision to refuse to grant asylum.

2. Although the appellant's representative stated he was not pursuing the refugee convention with any vigour (paragraph 19) this does not mean that he conceded the claim under the Refugee Convention was not met. The Judge made no findings in this regard and this amounts to an arguable error of law."

The Hearing

6. For the appellant, Miss Adams moved the grounds of appeal. She took me to [19] of the decision where the Judge records

"Mr Hussain confirmed in his submissions that he was not pursuing the refugee convention reason with any vigour."

She told me that what had been said by counsel at the First-tier did not amount to abandoning a ground of appeal. Instead, what counsel had done was explained that greater emphasis would be put on some arguments than others.

(b) Ms Adams told me that the first sentence of [19] is in stark contrast to the first sentence of [23], where the Judge says

"Mr Hussain did not seek to argue that the appellant had a well-founded fear of persecution for a refugee convention reason."

She told me that comparison of [19] and [23] of the decision shows that the Judge made a material error of law because the Judge misinterpreted

counsel's statement that some arguments were stronger than others, and erroneously believed that no refugee convention reason was argued.

(c) The Judge's record of proceedings is typewritten. I read an extract to parties' agents. The Judge clearly notes that counsel said

'Not pursuing the convention reason with any vigour - focusing on my strongest arguments.

Not instructed to withdraw any element of the case ...'

(d) Ms Adams told me that the Judge's error led the Judge to make no findings at all on the appellant's ethnicity. She told me that that has relevance because the appellant's brother's application for asylum was initially refused, but his appeal was finally dealt with by a decision of Deputy Upper Tribunal Judge McCarthy, promulgated on 19 February 2016. A copy of that decision can now be found between pages 69 and 71 of the appellant's bundle.

(e) Deputy Upper Tribunal Judge McCarthy found that the appellant's brother is entitled to protection as a refugee on the basis of his ethnicity. Ms Adams told me that that finding of the Upper Tribunal indicates that the First-tier's decision, promulgated on 12 January 2017, should be set aside because it is tainted by material errors of law. She urged me to substitute my own decision allowing the appeal in line with the Upper Tribunal decision in the appellant's brother's case.

7. For the respondent, Mr Diwnycz relied on the rule 24 response dated 27 February 2017, but, having done so, conceded that the Upper Tribunal's decision in respect of the appellants brother is a decision which followed the same factual matrix as the appellant's claim. As he put it, one brother cannot be more Kurdish than the other brother. He candidly stated that he could not offer resistance to the grounds of appeal.

Analysis

8. The Judge's record of proceedings quite clearly indicates that the argument under the refugee convention was not abandoned. At [19] of the decision the Judge correctly records Counsel's submission that no great force was to be put behind the refugee convention argument. It is clear from what is recorded at [23] of the decision that the Judge has been wrongfooted by counsel's decision to place greater emphasis on the qualification directive that on the refugee convention.

9. It is clear from the record of proceedings that the Judge misinterpreted what was said by counsel, and, believing that no argument was advanced under the refugee convention, did not make findings of fact in relation to that ground of appeal.

10. In DC (Philippines) 2005 UKIAT 00011 the Tribunal said that a failure to make findings on points raised in the notice of refusal (in an immigration appeal) was an error of law.

11. The Judge did not have a copy of the Upper Tribunal's decision in the appellant's brother's case, which would have alerted the Judge to the significance of the appellant's ethnicity. The appellant's original claim for asylum proceeds on the basis of his imputed political opinion and race. It is now clear that the appellant's brother's claim was ultimately successful on the ground of ethnicity alone. It was probably the confused way in which the case was presented which prevented the Judge from making findings of fact in relation to the refugee convention. The absence of those findings of fact amount to a material error of law. I must set the decision aside.

12. There is sufficient material before me to enable me to substitute my own decision.

13. At paragraph 31 of the reasons for refusal letter the respondent accepts that the appellant is an Iraqi national of Kurdish ethnicity. In the decision of the Upper Tribunal promulgated on 19 February 2016, the appellant's brother's protection claim is allowed because there is a real risk of serious harm to the appellant's brother because of his ethnicity. The appellant and his brother are both Iraqi Kurds from Mosul.

14. Counsel for the appellant invites me to substitute my own decision relying on the Upper Tribunal decision promulgated on 19 February 2016. The Senior Home Office Presenting Officer adopts a neutral position. I find that as the Upper Tribunal has already found that the appellant's brother is a refugee because of his ethnicity, then by analysis the appellant must be a refugee as he and his brother share the same ethnicity.

15. As I have found the appellant is a refugee I cannot consider whether he qualifies for humanitarian protection.

16. Therefore, I find the appellant is not eligible for humanitarian protection.

17. As I have found the appellant has established a well-founded fear of persecution, by analogy I find that his claim engages article 3 of the Human Rights Convention because he would face a real risk of torture, inhuman or degrading treatment if he were returned to his country of origin.

Decision

18. The decision of the First-tier Tribunal promulgated on 12 January 2017 contains a material error of law. I therefore set aside

19. I am able to substitute my own decision.

20. The appellant's appeal is allowed on asylum grounds.

21. The appellant's appeal is dismissed on humanitarian protection grounds.

22. The appellant's appeal is allowed on article 3 ECHR grounds.

Signed Paul Doyle
Deputy Upper Tribunal Judge Doyle

Date 30 June 2017