Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00776/2019

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
on 26th July 2019	**On 21st August 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MR MOHAMMED BAQY RASHID
(No anonymity direction made)

Respondent

For the Appellant: Mr A Govan, Senior Home Office Presenting Officer
For the Respondent: Mr A Caskie, Advocate, instructed by Latta & Co, Solicitors

DECISION AND REASONS

1. This appeal is brought by the Secretary of State against a decision by Judge of the First-tier Tribunal McGrade allowing an appeal by Mr Mohammed Baqy Rashid (hereinafter referred to as "the Claimant") on the grounds of humanitarian protection.

2. The claimant is a national of Iraq of Kurdish ethnicity. He claimed asylum on the day of his arrival in the UK in July 2015 but his claim

was refused and an appeal against the refusal was dismissed in 2017. The claimant made further submissions to the Secretary of State in October 2017. These were refused in January 2019. This appeal was made to the First-tier Tribunal against the refusal.

3. It does not appear to have been disputed that the claimant originates from a village known as Dara Bag in the district of Daquq in the Kirkuk Governorate. According to the claimant he could not return there because of difficulties he had experienced with ISIS, the Peshmerga and the Iraqi security forces. In his 2017 appeal to the First-tier Tribunal the claimant's evidence about his alleged difficulties in Iraq was not believed.

4. In the current appeal the Judge of the First-tier Tribunal observed that ISIS now controlled almost no territory in Iraq but violence was still a regular feature of life in Kirkuk, where ISIS targeted civilian as well as military targets. The judge considered the possibility of relocation to the KRG, or IKR. At paragraph 21 the judge recorded two concessions by the claimant's counsel. The first of these was that it would be open to the claimant to obtain a CSID. The second was that there were direct flights from the UK to IKR. Accordingly the judge noted that there was no suggestion of the claimant returning via Baghdad.

5. The Judge of the First-tier Tribunal had regard to the decision in AAH (Iraqi Kurds – internal relocation) [2018] UKUT 00212 on the viability of relocation to IKR. The judge found, at paragraph 23, that the claimant has no family or other contacts in IKR. He was a farmworker with few specialist skills. While he was capable of working, unemployment in IKR was very high, particularly among IDPs. There was also considerable pressure on accommodation, and rent was very high. Any funds the claimant received to assist him on his return would be quickly exhausted. In accordance with AAH, without family support the claimant would have limited options for accommodation. Without family support or employment there was a substantial likelihood that the claimant would find himself in a critical housing shelter, without access to basic necessities such as food, clean water and clothing. The judge concluded that it would be unduly harsh to expect the claimant to relocate to IKR.

6. The Secretary of State sought permission to appeal on four grounds. The first of these was that the Judge of the First-tier Tribunal had not taken as his starting point the findings in the previous appeal, in accordance with Devaseelan [2001] UKIAT 00702. The finding that the claimant would be destitute ran contrary to the findings in the previous appeal and was neither properly substantiated nor properly reasoned. Secondly, the Judge of the First-tier Tribunal made contradictory findings on the existence of the claimant's family and on whether the claimant

would be able to avoid destitution by working. Thirdly, the judge failed to take into account that Kirkuk is no longer a contested area. The judge should have departed from the relevant country guidance and did not give adequate reasons for not accepting the Secretary of State's evidence in relation to this. Fourthly, in summary, the judge was wrong not to admit a Home Office Country Information and Policy Note (CPIN) of 2108 because it was not lodged before the Tribunal. Permission to appeal was granted on all these grounds.

Submissions

7. Before me Mr Govan state that he would not be relying on the last ground, which he described as being based upon procedural irregularity. I observed that although in theory as all CPINs were available online it was not necessary for them to be produced on paper, the fourth ground as drafted would not succeed. Mr Caskie objected that in the fourth ground he was said to have described the CPIN as "spin". Mr Caskie explained that each CPIN was composed of several sections. The second section, which contained policy of the Secretary of State, was what he had described as "spin". The third section, which contained country information, he would not at any time have described as "spin". I accept Mr Caskie's clarification of this point.

8. Mr Govan addressed me on the remaining three grounds. In response Mr Caskie submitted that the Judge of the First-tier Tribunal had referred to the Devaseelan principle and had had regard to it. The judge accepted the claimant's evidence that he was from Kirkuk, which was a matter which was not addressed in the previous appeal decision. Mr Caskie observed that at paragraph 23 of his decision the judge drew a negative inference from an attempt by the claimant to trace his family. Nevertheless there was no submission from the Secretary of State that the claimant had family in IKR and there was no finding by the judge that he had. The judge did not accept, however, that the claimant had done everything possible to trace his family. Mr Caskie acknowledged that the burden of proof was on the claimant to show what his family circumstances were. Nevertheless the Judge of the First-tier Tribunal had taken into account all the relevant evidence and given adequate reasons for his decision. It was the lack of adequate accommodation, even if the claimant found employment, which led the judge to find relocation would be unduly harsh. Mr Caskie further submitted that the judge was entitled to find that Kirkuk was not a safe area.

Discussion

9. As the Judge of the First-tier Tribunal recorded at paragraph 26, in order to find that the claimant would not have adequate

accommodation in Iraq, in accordance with AAH, it had to be established that the claimant would be without the assistance of family there. In this regard the findings made by the judge at paragraph 23 are crucial. The judge noted that in a statement of 27th February 2019 the claimant stated that he had not been in touch with his family but the last he knew they were living in Kirkuk. Then in a statement of 4th March 2019 the claimant wrote that a few months previously he had contacted the Red Cross with a view to making contact with his family. He had no documents to support this and he had not told his solicitor about it until that day.

10. The judge observed that the claimant had been in the UK for more than three years but had not taken any steps to trace his family until a few months ago. The claimant had given no explanation for his delay in attempting to trace his family. The judge did not accept that if the claimant genuinely did not know the whereabouts of his family he would have delayed taking steps to trace them for three years. The judge concluded that the claimant knows where his family is.

11. The judge then recorded the following, in the remainder of paragraph 23: “However, it is not possible for me to reach any conclusion as to where his family is, nor is it possible for me to make any assessment as to the level of financial support he might receive from them. It is possible the Appellant’s family may be in the KRG. However, I have no evidence before me to indicate that this is the case. There was no submission by the Respondent that he has family there. Given the low standard of proof that applies in these appeals, I am prepared to accept that the Appellant has no family or other contacts in the KRG.”

12. In writing this the Judge of the First-tier Tribunal reversed the burden of proof. It was for the claimant to show that it would be unduly harsh to expect him to relocate to IKR. It was for the claimant to show, in particular, that he has no family there to assist him. The judge’s finding in the first part of paragraph 23 was that the claimant knows where his family are. Once this finding was made, it was not then for the Secretary of State to show the claimant has family in IKR, or for the judge to ponder about whether or not the claimant might have family there. Once the judge found that the claimant knew where his family were, the burden was on the claimant to show that his family were not in IKR and would not be able to provide him with assistance there.

13. The judge erred in law when he stated that he could not make a finding on the possibility of family support because there was no evidence before him to indicate where the claimant’s family were or whether they could assist him. Upon the judge finding that the claimant knew the whereabouts of his family, it was for the claimant to show where they were and whether they could assist

him. By not adducing any evidence upon these matters the claimant failed to discharge the evidential burden upon him. By not recognising that the burden of proof on this issue fell upon the claimant, the judge erred in law.

14. There was a discussion at the hearing about how to respond to the error by the Judge of the First-tier Tribunal. It was suggested that there might be a further hearing before the Upper Tribunal to allow the claimant to give evidence about the whereabouts of his family. In response to this suggestion Mr Govan pointed out that the First-tier Tribunal did not hear any oral evidence at the hearing on 4th March 2019 which gave rise to the decision under appeal. The hearing proceeded on the basis of submissions upon written evidence.

15. It seems inappropriate that where the First-tier Tribunal made a conclusive finding based upon written evidence the Upper Tribunal should then seek to go behind this finding by inviting the claimant to give oral evidence in an attempt to explain it or diminish its importance. The Judge of the First-tier Tribunal made a finding he was entitled to make upon the evidence to the effect that the claimant knows the whereabouts of his family. The judge then erred by not applying the correct reasoning following from this finding, but this was a deficiency in the judge's reasoning, not in the evidence. Even supposing there is evidence on this issue which was not adduced before the First-tier Tribunal when there was an opportunity to do so, why should another opportunity be given to adduce such evidence? An adequate justification for holding a further hearing has not been established. This is not a case in which there is readily available new and apparently credible evidence of the type discussed in Ladd v Marshall [1954] 1 WLR 1489.

16. What of the other alleged errors in the judge's decision? In relation to the first ground of the application for permission to appeal I accept a submission by Mr Caskie that the judge recognised and applied the Devaseelan principle so far as it was necessary for him to do so. The judge was seeking to apply country guidance in AAH which was not available at the time of the previous appeal and therefore had to some extent different issues to consider. I also accept, as Mr Caskie submitted, that the judge was entitled to follow the still current country guidance in finding that Kirkuk would not be a safe area.

17. I have, however, found that the Judge of the First-tier Tribunal erred in law in relation to the finding that the claimant would not have family support in IKR. This issue arises from the second ground of the application, although I have characterised it as the judge reversing the burden of proof rather than making contradictory findings. Had he not made this error the judge could

not have found upon the available evidence that it would be unduly harsh to expect the claimant to relocate to IKR to avoid a risk of serious harm in Kirkuk. Once this finding is set aside, it is clear that the claimant has not shown it would be unduly harsh to expect him to relocate to IKR. Because the claimant has a viable alternative of internal relocation, his claim for protection will not succeed and the appeal falls to be dismissed.

Conclusions

18. The making of the decision of the First-tier Tribunal involved the making of an error of law.

19. The decision is set aside.

20. The decision is re-made by dismissing the appeal.

Anonymity

The First-tier Tribunal did not make a direction for anonymity. I have not been asked to make such a direction and I see no reason of substance for doing so.

M E Deans
Deputy Upper Tribunal Judge

14th August 2019