Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06610/2017

THE IMMIGRATION ACTS

Heard at Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On 30 October 2019	**On 13 November 2019**
Extempore	

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

M R
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Holmes, instructed by GMIAU
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against a decision of First-tier Tribunal Judge Meyler promulgated on 26 April 2018 in which the judge dismissed the appellant's appeal against the decision by the respondent to refuse his protection and asylum claim. Although permission to appeal was initially refused by the Upper Tribunal the application for permission was eventually remitted to the Upper Tribunal following a successful "Cart" judicial review which was pursued to the Court of Appeal.

2. It is necessary to set out to the background of this case to give it some context before reaching my conclusions. The appellant entered the United Kingdom with his older brother and his sister-in-law. Their cases are that they are Iranian Kurds and face persecution on return to Iran on that basis. It is important to note that subsequent to their arrival in the United Kingdom together their cases were treated separately owing to the older brother being convicted of domestic violence against the sister-in-law and the appellant being taken into care.

3. The fact that there were three separate decisions is important because of what then happened in the appeal before the First-tier Tribunal in this case. That is because the Secretary of State sought, quite properly, to adduce evidence relating to both the appellant's, brother and sister-in-law's respective appeals, in particular language analysis carried out by Sprakab and LOID and also the decisions in relation to the brother. It should, I consider at this point, also be noted that the conclusions as to the nationalities of the family are divergent. Differently constituted First-tier Tribunals found that the appellant's brother is Iraqi but found the sister-in-law was Iranian. In this case the judge concluded that the appellant was Iraqi.

4. In this appeal, the judge concluded that the appellant was not entitled to humanitarian protection but did allow the appeal under Article 8 given that the appellant was at the relevant time a minor and entitled to benefit from the unaccompanied asylum seeking child policy. But she did not accept that he was Iranian, nor did she accept his account of what happened in Iran.

5. Much of this appeal centres around two specific issues in the determination of nationality. The first is the existence of what is described as a "crib sheet" said to have been found by the Home Office in the lorry in which the family entered the United Kingdom. The second to which I have already alluded are the Sprakab and LOID Reports. Both of these were considered in different ways by the judge and it is those which the grounds of appeal address in some detail.

6. The first ground of challenge is that the judge failed properly to deal with the challenge to the CID notes. The second and third grounds which are taken together is the criticism of the judge's treatment of the brother's appeal, of the evidence from Sprakab and LOID which appeared in person. Grounds 4 and 5 are relatively narrow, being a challenge to a specific finding of fact; ground 5 is a reasons challenge.

7. Turning to ground 1 the submission is that the judge erred in her approach to the crib sheet. It is submitted by Mr Holmes that this was a document which met the norms of elegance. The crib sheet itself has not been provided. The evidence which is in the form of a CID note states that a number of ripped up pieces of paper were found, put together and translated. It observed that they were written in Kurdish and it is stated that they "form a cheat sheet that a person would use if they were trying

to pass themselves off as Iranian". As Mr Holmes submits there is no copy of the crib sheet, and no indication of who put the document together; nor is there any indication if whether a properly certified translation was obtained.

8. The point put is in summary this: what the judge did is that she in effect reversed the burden of proof. It is for he who asserts that the authenticity of the fact as to bear the burden of fact and whilst the appellant needs to prove his case the respondent can seek to undermine that, that is not what has happened here. Here the respondent had asserted and sought to prove that the crib sheet existed, and was by implication used by the appellant and his family.

9. A further criticism put by Mr Holmes is that the judge wrongly expected the appellant to have sought to call evidence about the nature of the crib sheet, specifically the judge who at paragraph [41] stated that she had considered Mr Holmes' submissions but at paragraph [42],although acknowledging that Mr Holmes had made some fair points, stated that no evidence was placed before her to show the appellant's representatives had requested the original document or a copy of it in its translation, had not asked the identity and credentials of the translator, had not sought to call the officer who found the note, stating " The reason for this is doubtless because the appellant does not actually deny the truth of what was asserted by the officer who found the document, that is the appellant has not denied the existence of the document or the fact that it was found [in the lorry used by] his family." Mr Holmes submits that in the circumstances if it were the appellant seeking to rely on such a document no weight could properly be attached to it.

10. Mr McVeety in response accepted that he who wishes to assert a fact must prove it. It was submitted that on the basis of the production of the CID note that that was sufficient on this basis and the criticisms of the judge were unfair. Whilst he accepted that the analysis was not perfect, it needed to be seen in the context of how the judge had approached the evidence in the round. In particular, he drew attention to the fact that at paragraph [45] of the decision the judge had considered other evidence regarding this issue.

11. Despite Mr McVeety's submissions I considered that the judge's approach to the "crib sheet" was flawed. It was for the Secretary of State to show that the crib sheet existed. Without its existence then inferences could not be drawn from it. In this case it cannot be said that it was incumbent on the appellant to ask for evidence from the respondent that is even going to the extent of requiring an officer to attend to give evidence in order to in effect support the Secretary of State's case.

12. It is important to note in this context that the actual document has never been produced. That in itself sets this case apart from the cases involving primarily Sri Lanka in which documents have been provided, often letters from lawyers and court documents, where it has been said to the

Secretary of State that steps ought to have been taken to verify. Those cases are given the significantly different factual scenario applied here less relevant.

13. In essence it was for the Secretary of State who made the allegation that the appellant had used a crib sheet, to show that the crib sheet existed and had been used by him and whilst the judge does note the evidence that there was nobody else in the container. What the judge does not address is the point that was raised in evidence is that he could have been there prior to the use of the lorry by the appellant and his family and accordingly I find that ground 1 is made out.

14. I turn next to grounds 2 and 3 which are primarily criticisms of the judge's approach to the evidence from the brother's appeal. There are I consider some significant difficulties arising from the decision in the brother's appeal where the judge, although this was not challenged, appears to have confused herself as to who had to prove what and to what standard of proof with regards to nationality.

15. Putting that to one side, as Mr Holmes accepted, the judge does appear to have directed herself properly at paragraph [21] as to the relevant law but he submits that the judge erred in following too closely the approach taken in **Devaseelan** given that that is not directly applicable in this case because the parties involved were different. There is I consider some merit in that. The judge does appear to acknowledge that there is a problem in that this is not an appeal by the same person but equally I consider that there is, despite Mr McVeety's submissions to the contrary, a significant degree to which the judge has in effect considered that the decision of the First-tier Tribunal in the brother's case was determinative. That is not so and it was incumbent on the judge to reach her own conclusions on the evidence particularly whereas here Mr Holmes had set out detailed criticisms of the reports by Sprakab and LOID and it is to those reports that I turn next.

16. There are problems with the Sprakab and LOID Reports as has been noted by the Supreme Court in SSHD v MN & KY [2014] UKSC 30. Whilst I accept there is some force in Mr McVeety's submission that what ought to have been produced is expert evidence to refute or contradict the evidence put forward by Sprakab that does not absolve the Tribunal from properly interrogating an expert report put before it. It is always open to a party, as the Secretary of State frequently does, to attack the methodology, logic and reasoning of a report. That does not necessarily involve bringing one's own expertise to it but simply an application of logic and reasoning. In this case I consider that the judge did not properly take into account the criticisms of the Sprakab and LOID Reports made by Mr Holmes for the appellant.

17. It is I consider fair to note that the findings are particularly in the LOID Report equivocal although that is less so in respect of the Sprakab Reports. Mr McVeety does make the relatively strong point that it has to

be borne in mind that there is a balance of probabilities issue. Whilst that is correct, the reports needed to be looked at in the round because that is of course what is said about the linguistic reports. As Mr Holmes submitted, there are a number of defects with the reports not least of which is the age of some of the source material and also with regards to the approach by way of hypothesis. It is perfectly legitimate to start off with the hypothesis that somebody is from a particular area, in this case a part of Iran and then to go through the linguistic signifiers which would suggest that somebody is or is not from that area.

18. Where the difficulty arises is then having identified those signifiers, and having concluded that a person is not from the area claimed, to then assume that there is another alternative, that is a single alternative in this case the Sulaymaniah area of Iraq. The problem is best illustrated by this. Some of these lexicological and morphological indicators would be prevalent not just in the area of Sulaymaniah they would be present elsewhere. It will be necessary to consider whether those other possibilities were relevant because the phenomena described are not unique nor does the report say that they are unique to Sulaymaniah. Accordingly taking all of this in the round I consider that the appellant is correct in submitting that the judge erred in the approach to the issue of the Sprakab Reports and nationality.

19. Turning then to grounds 4 and 5. Ground 4 has properly been conceded by Mr McVeety. In the light of the findings that I have already reached, ground 5 is of limited relevance.

20. To conclude, therefore, despite the fact the judge has made other findings which are not directly challenged, I considered that the decision in this case did involve the making of an error of law for the reasons set out in grounds 1 to 4 which for the reasons I have just given I find are sustainable.

21. It therefore follows that the decision must be set aside and to be remade.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. Given that it will be necessary for a remaking of substantially all the core issues in this case, I conclude that it is appropriate to remit it to the First-tier Tribunal for a fresh hearing on all issues.

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 Date 11 November 2019

Upper Tribunal Judge Rintoul