



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/07663/2015

**THE IMMIGRATION ACTS**

Heard at North Shields  
On 15 December 2015

Decision & Reasons Promulgated  
On 5 January 2016

Before

The President, The Hon. Mr Justice McCloskey and  
Upper Tribunal Judge Plimmer

Between

MM

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation**

For the Appellant

Mr S Tetley (of Counsel) instructed by Legal Justice Solicitors

For the Respondent

Mr J Parkinson, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction**

1. This appeal has its origins in a decision made on behalf of the Secretary of State for the Home Department (the "*Secretary of State*") dated 21 April 2015, whereby the application of the Appellant, a national of Iraq aged 28 years, for asylum was

refused. By its decision promulgated on 02 July 2015, the First-tier Tribunal (the "FtT") dismissed the Appellant's ensuing appeal.

2. The three grounds of appeal, collectively, complain that the Appellant was denied a fair hearing (our summary), and that the FtT misapplied the established objective facts to the Appellant's case and misdirected itself as regards certain legal and factual matters. The Judge who granted permission to appeal placed particular emphasis on the first ground:

"Legal aid funding had been granted to the Appellant, shortly before the hearing, to obtain an expert report to demonstrate the changing country conditions in Iraq because of the activities of ISIS and the Appellant's claim that, as a Kurdish Sunni Muslim, [he] would not find safety anywhere within Iraq. The Judge was told that submissions would be made urging him not to follow [HM and Others (Article 15(c) Iraq) CG [2012] UKUT 409 (IAC)] because of changing conditions there ...

The Judge refused the application, saying ... that he was 'not persuaded that an expert's report would add anything to this case' ..."

The grant of permission to appeal is silent as regards the other three grounds.

3. In brief compass, as recorded in the FtT's decision, the hearing began with an application for an adjournment by counsel on behalf of the Appellant on the ground that, legal aid having been secured only the previous day for instructing an expert, the Appellant wished to do so with a view to obtaining expert evidence which would demonstrate the significant changing country conditions on account of the activities of ISIS and that such evidence could potentially support his contention that, being a Kurdish Sunni Muslim, he would not be safe anywhere within Iraq. The adjournment application was refused.

### **Consideration and Conclusions**

4. The correct approach to adjournment requests is set forth in the decision of this Tribunal in Nwaigwe (Adjournment: Fairness) [2014] UKUT 00418 (IAC), at [5] - [8]. Stated succinctly, the overarching criterion is that of fairness and the basic test to be applied in an error of law appeal is whether a refusal to adjourn the first instance hearing had the effect of depriving the appellant of his right to a fair hearing.
5. The factual matrix bearing on the adjournment issue in the present appeal, as summarised above, is uncontentious. Taking into account the additional observations of this Tribunal in Nwiagwe, there is no warrant for concluding that the adjournment application was made on trivial or spurious grounds or was tantamount to a misuse of the process of the FtT. The Judge, in refusing the adjournment application, made no reference to Nwaigwe and failed to apply the correct test. Furthermore, he failed to engage with the substance of the application. If these failings were immaterial they would not matter. However, they cannot be dismissed in this way. As the resumé in [3] above demonstrates, the core of the Appellant's case was that he would not be safe anywhere in his country of origin and, without the slightest hint of illicit tactical manoeuvring or dubious invocation of the Tribunal's process, he was inviting a course of action, lying within the powers of the Tribunal, designed to fortify and enhance his case. Further analysis is unnecessary.

6. An error of law has unmistakably been committed and we consider it indisputably material since, had it been avoided, the effect of granting an adjournment could (this being the relevant standard) have resulted in the generation of evidence which could have achieved the Appellant's objective, namely persuading the FtT not to follow HM and Others - bearing in mind in this context paragraph [11] of UTIAC Guidance Note No 2 of 2011 - and could, therefore, have succeeded in his appeal. The decision of the FtT cannot, therefore, be sustained.
7. The further material factor to be noted is the recent promulgation of the new country guidance decision of the Upper Tribunal, in AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC) which held, *inter alia*, that the Appellant's home Governorate of Diyala is in a state of internal armed conflict. Accordingly, one of the issues, foreseeably, for the FtT will be that of internal relocation.
8. Two further errors of law are canvassed in the grounds. First, it is contended that the FtT erred in law in failing to address the issue of the asserted duty on the Secretary of State to identify a point of return to the country of origin and a route to the point of relocation, where appropriate, relying on AM (Evidence - Route of Return) Somalia [2011] UKUT 54 (IAC) and HH (Somalia) - v - Secretary of State for the Home Department [2010] EWCA Civ 426.
9. The final error of law canvassed on behalf of the Appellant is that the FtT, in considering the decision of the CJEU in Elgafagi (Justice and Home Affairs) [2009] EUECJ C - 465/07 in the context of Article 15(c) of the Qualification Directive, did so "*without any proper engagement with the new country background material that the Appellant relies upon*".
10. We draw attention to these further errors of law, which it is unnecessary for this Tribunal to determine, for completeness and, in particular, to ensure that the issues which they raise, if considered material, are not overlooked by the FtT.

### **Decision**

11. On the grounds and for the reasons elaborated above, we set aside the decision of the FtT. Having regard to the nature of the main error of law identified, remittal to a differently constituted FtT is appropriate.
12. We further direct that a case management hearing be convened as soon as convenient to the FtT and, preferably, not later than 01 March 2016.

*Bernard McCloskey*

THE HON. MR JUSTICE MCCLOSKEY  
PRESIDENT OF THE UPPER TRIBUNAL  
IMMIGRATION AND ASYLUM CHAMBER

**Date:** 18 December 2015