Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09388/2016

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision and Reasons Promulgated**
on 24 October 2016	**On 27 October 2017**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

[H M]
~~(Anonymity direction not made)~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr S Winter, Advocate, instructed by Latta & Co, Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant sought asylum in the UK on 25 February 2016, identifying himself by the above name and as a national of Iran, born on 27 November 1997.

2. According to the immigration history provided by the respondent, the appellant had identified himself on 3 occasions in France by different names and dates of birth and as a citizen of Iraq.

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3. The respondent refused the appellant's claim for reasons explained in her letter dated 23 August 2016. She declined to accept that he is Iranian or at risk from the authorities in Iran, and found that he is Iraqi and could return to Erbil, in the IKR.

4. First-tier Tribunal Judge Porter dismissed the appellant's appeal for reasons explained in her decision promulgated on 5 June 2017. She also held that the appellant is not Iranian. No issue is now taken over that.

5. At ¶43, the judge said:

> "… given that I have not accepted the appellant's claimed nationality, I have to consider whether he would be at risk on return to Iraq … I have concluded, applying *AA* Iraq CG [2015] UKUT 544, that the appellant would be able to overcome any temporary problems over identification documents if necessary, and that he would be able to relocate safely to the IKR, where that is a majority Kurdish presence. He is able to speak Kurdish Sorani, widely spoken there. I do not accept that he would be at risk of financial destitution there, but considered he would be able to obtain employment and maintain contact with his family. Accordingly, I find … no risk … on return to Iraq."

6. The appellant's grounds of appeal are stated in the application for permission to appeal filed on 19 June 2017 (which in terms of the TP (UT) Rules 2008, rule 23 (1A), now stands as the notice of appeal to the UT).

7. The grounds refer to *AA* headnote 5 and 20 and to the statement in the refusal decision that the appellant could enter the IKR via Baghdad, and contend that the appellant would be unable to travel as he does not have and cannot obtain a passport; could not obtain employment, as he has no CSID; has stated that he has no family contact; it would be unduly harsh to expect him to settle in the IKR; and the judge did not deal with the submissions made, or give reasons for her decision.

8. Mr Winter submitted thus:

   (i) The grounds raised a short point about the adequacy of the judge's consideration and application of *AA*.

   (ii) The respondent was obliged, on the authority of *AA* at ¶170, to show that the appellant had been pre-cleared for entry to the IKR.

   (iii) Further findings were needed on whether and how the appellant might obtain a CSID, find a sponsor, and enter the IKR, and on any family assistance he might have.

   (iv) It could not reasonably be inferred from such findings as had been made by the FtT that the appellant could relocate to the IKR.

   (v) The decision should be set aside and the case listed for further hearing of evidence.

9. Mr Matthews submitted thus:

   (i) The pre-clearance point was not in the grounds, nor made to the FtT.

   (ii) No application was made to extend the grounds.

(iii) In any event, the point was not sound. The onus remained on the appellant to make his case.

(iv) As the appellant continues to maintain he is Iranian, further hearing could serve no purpose, but would be a trip to "Alice in Wonderland".

(v) Having failed to make his case, there was nowhere further for the appellant to go, either by way of evidence, or in legal consequences.

(vi) As matters stood, the appellant was not returnable, and on the authority of *AA*, confirmed by the Court of Appeal, that did not confer entitlement to protection.

(vii) The appellant's contention, "I am not Iraqi", having been disproved, and nothing else being disclosed, there was nothing by which he might be found entitled to protection from return to Iraq.

(viii) *MY* [2004] UIAT was decided in a different statutory and country context, and refers back in turn to *Hamza* [2002] UKIAT 05185. However, these cases are a good indication that an appellant cannot benefit from protection through a deceitful claim, and that the burden of proof did not reverse onto the respondent.

(ix) Given the appellant's position, and on the findings, there was no scope for a further fact-finding exercise, and there could have been no other result.

10. Mr Winter in response said that if the judge went wrong in assessing the feasibility of return, that remained material, even if it did not change the ultimate outcome, because findings would be relevant if and when return became feasible; it would not be a futile exercise if the appeal were to be dismissed for different reasons. The present decision should not be upheld on the basis of where the burden of proof lay, because once the evidence had been led, nothing turned on that.

11. I reserved my decision.

12. It was not put to the FtT that there is a burden on the SSHD to prove that a Kurd from the IKR has been pre-cleared for return, and it is not in the grounds of appeal to the UT. No reason is shown to admit the argument at this late stage.

13. In any event, I do not consider the point to be a good one.

14. *AA* as summarised in the headnote (before and after amendment by the Court of Appeal) does not state that there is any such burden.

15. In so far as any passages in *AA* (Iraq) CG [2015] UKUT 00544 may be read to suggest that there might be such a burden, that has not found its way into the formal guidance, and is contrary to principle.

16. The respondent makes travel arrangements after not before conclusion of an appeal. It would be unworkable to have to put such arrangements in place prior to appeal hearings.

17. It would generally be unlawful for the SSHD to approach the authorities of a person with an unresolved asylum claim to arrange removal.

18. Issues about practicality of return in the event of an unsuccessful appeal are for resolution later, not while the appeal process remains live.

19. The appellant has made no application to lead further evidence, either to show error of law, or if the decision were to be remade.

20. Even if the decision were to be set aside, no scope for further evidence has been established.

21. I agree that further evidence from the appellant could only be a repetition of his denial that he is from Iraq, a fruitless exercise. If he changes his position, that is another case altogether.

22. It is correct that once all evidence has been led, it often does not matter where the burden lay; but where there is either a perfect balance, or a vacuum, the outcome does turn on the burden not being discharged.

23. The burden is generally on an appellant to establish the primary facts on which his case relies, to the lower standard. If he fails to do so, his case falls to be dismissed. No basis has been established for an exception.

24. Whether on the basis of the findings made by the judge, or in absence of any findings, the appellant's case was bound to fail. There would be no reason to conclude that he would be in difficulty over availability of documentation, or otherwise, in relocating.

25. Country guidance points to relevant matters for consideration; it does not require tribunals to divine the impossible, or what has been deliberately concealed.

26. The decision of the First-tier Tribunal shall stand.

27. No anonymity direction has been requested or made.

26 October 2017
Upper Tribunal Judge Macleman