Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00739/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 28 September 2018	**On 15 October 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

KM (IRAQ)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Allison, Counsel instructed by Solomon Solicitors
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals from the decision of the First-tier Tribunal dismissing her appeal against the decision to refuse her refugee *sur place* claim which she had brought on the basis that she had a well-founded fear on return to the autonomous Kurdistan region in the north of Iraq, which is administered by the Kurdistan Regional Government ("KRG"), on account of her setting up and maintaining an internet blog on which she

periodically post articles promoting the rights of Kurdish women.

Relevant Background

2. The appellant is a national of Iraq who is of Kurdish ethnicity, and whose habitual residence is in the city of Sulaymaniyah in the KRG (also known as the "IKR"). She first entered the United Kingdom in May 2011 as the dependant of a Tier 4 (General migrant) student. This was her husband, "AS", who is also an Iraqi national of Kurdish ethnicity.

3. Accordingly to her immigration history, she had last returned to Iraq in December 2015, coming back to the UK on 18 February 2016.

4. Her claim was that in June 2015 she started a blog called *"Action for Women"* which relates to Iraqi women, their struggles and the abuse and mistrust which they experience. The blog is written in Kurdish.

5. She said that she came across a video made by a woman from East Kurdistan who had been raped and threatened by Ardalan Nuraddin. She posted an article about this on her blog on 16 June 2017. She said that her article criticised the membership of the Patriotic Union of Kurdistan, and also of the Kurdish Democratic Party (KDP), for their treatment of women. She said that the article named 7 members of political parties.

6. On 19 June 2017, she received a threatening text from Ardalan Nuraddin, and on the same day she received a threatening email from Hakim Kadir, one of the prominent politicians named in the same article. She reported the matter to the police on 19 June 2017. On 30 June 2017, she received a further threatening email from Hakim Kadir.

7. On the basis of the information which she gave in her asylum interview, the respondent understood her to fear that on her return to the KRG she would be killed by Hakim Kadir or by Ardalan Nuraddin or by the authorities on their behalf due to her posting a political article in which they were named.

8. On 3 January 2018, the respondent gave her reasons for refusing the appellant's refugee *sur place* claim. The evidence which she provided comprised untranslated emails and text messages; an untranslated copy of her blog; and a list of names which she said were contained in her article of 16 June 2017.

9. It was accepted that she was a blogger who posted articles on a website called *"Action for Women"* which was said to be written by women for women in the Kurdish language, and whose goal was to help and improve female lives in the Kurdish society where gender and culture intersected. It was a matter of speculation that the persons who sent the emails or text messages were Hakim Kadir and Dr Ardalan Nuraddin. Also, a Google search revealed no independent verifiable evidence that either of these men had been highlighted in the public domain, under various spellings of their names, in conjunction with the terms "*rape"* and "*accused".* She

claimed that her father's boss had called her father and told him that they were aware of what she had done, and that his boss had made threats against her. This was considered to be hearsay evidence.

10. It was also noted that she claimed that her husband, who was a champion chess player in Iraq, had been targeted in a terrorist attack in Baghdad in December 2016. This claim was inconsistent with the objective information of the World Chess Federation rankings for Iraqi chess players. In the light of the above, her credibility was considered to have been damaged and this aspect of her claim was rejected.

The Hearing Before, and the Decision of, the First-tier Tribunal

11. The appellant's appeal came before Judge Henderson sitting at Taylor House on 13 February 2018. Both parties were legally represented. The appellant was represented by Ms Muzira of Solomon Solicitors. The Judge received oral evidence from the appellant, her husband and from the appellant's sister-in-law, "SAS".

12. In her subsequent decision, the Judge noted that on the day of the hearing the appellant had provided a supplementary bundle containing translations of the threatening texts and emails, and translations of her blogs.

13. Under the heading of "*Evidence and Findings of Fact",* the Judge referred in detail to the evidence given by the appellant and her husband, and also made findings and observations on their evidence as she went along.

14. At paragraph [23], she held as follows: "*The appellant confirmed in her oral evidence that she had received no further threats since 30 June 2017 (after she deleted her blog of 16 June 2017) and that she had not been physically harmed in any way. I accept the appellant was concerned at the time and appropriately reported the incident to the police, but she has not been the subject of any actual violence or further intimidation. It appears that, having achieved the desired result of the deletion of the offending blog, the threats have ceased."*

15. At paragraph [24], the Judge addressed the evidence that the appellant had given about threats made to her father in July 2017. The appellant said that he had been called to a meeting by his boss at the Water Board where he worked, and was told the appellant had written an article about "*us"*: and that "*we"* knew how to silence her. But he had not been physically harmed and he still worked at the Water Board. The Judge did not make any further comment at this stage on this aspect of the appellant's evidence.

16. At paragraph [25], she addressed the appellant's evidence about contact with her family in Sulaymaniyah. The appellant said that she feared to contact them direct, as she did not wish to endanger them. The Judge did not find her evidence on this issue to be "*plausible"*. The appellant's

sister-in-law, SAS, also gave oral evidence, and said that she was aware of the threats in July 2017, but not of any further incidents. On the basis of SAS's evidence, she found that the appellant's family in IKR were not in any apparent danger.

17. The Judge went on to address the evidence of the appellant's husband. She found, at paragraph [26], that he had given evidence about the circumstances in which he had gone to Baghdad in December 2015 which contradicted the evidence given by the appellant on the same issue. She went on to find that it was plausible that AS had been shot at while in Baghdad, but she was not persuaded to the lower standard of proof that he was attacked because he was Kurdish.

18. At paragraph [28], she recorded the appellant and her husband as confirming that, but for the threats relating to the blog, they and their family would be safe in IKR.

19. In her conclusions, the Judge found the appellant and AS to be credible witnesses on most matters. However, while she accepted much of the evidence they gave, she did not find that the totality of the evidence demonstrated, even to the lower standard of proof, a serious or real risk that on return to IKR the appellant would be persecuted because of her political opinion, "*namely the content of her blogs".*

20. She found that the blog of 16 June 2017 was deleted and the threats ceased after 30 June 2017, most likely because the authors of the emails and texts had achieved the desired result. She also accepted the appellant's evidence about her father's meeting with his boss in July 2017. This was "*a warning"* so he could influence his daughter to remove the blog. While this was still unacceptable and intimidating behaviour, it did not amount to persecution and there would be no adverse consequences to the appellant's family in IKR.

The Application for Permission to Appeal to the Upper Tribunal

21. The appellant's solicitors settled an application for permission to appeal to the Upper Tribunal. Ground 1 was that the Judge had made a mistake as to an existing fact. The Judge had mistakenly held that the appellant's blog post of 16 June 2017 had been permanently deleted. There was, however, subsequent evidence following the email of 30 June 2107 indicating that the post was still in the public domain, "*the appellant stating she had merely temporarily de-activated the relevant blog post soon after receiving the threats but thereafter re-activated it on her blog."*

22. Ground 2 was that the Judge failed to take into account relevant key background evidence in assessing risk on return. At paragraph 43 of her witness statement for the appeal, the appellant had said that she would always write and always express herself in relation to inequalities, criticisms of politicians, and raising awareness in relation to women's rights. These subjects were considered 'no go' areas in Iraq, and she

would be at risk wherever she went in Iraq. The Judge had erred in not considering whether - apart from the offending blog post of 16 June 2017 - the appellant would be at risk on return as the result of her other writings on her blog in relation to women's rights and her public criticisms of prominent political figures in Kurdistan.

The Reasons for the Grant of Permission to Appeal

23. Permission to appeal was refused by the First-tier Tribunal, but was granted on a renewed application to the Upper Tribunal. On 6 August 2018 Upper Tribunal Judge Storey granted permission to appeal for the following reasons: "*It is arguable that the Judge erred in finding that the appellant had permanently deleted her blog in June 2017 whereas the relevant blog was still in the public domain. Given that the Judge found the appellant and AS to be credible witnesses, this arguable mistake of fact may have had a bearing on the outcome of the appeal.*"

The Hearing in the Upper Tribunal

24. At the hearing before me to determine whether an error of law was made out, Mr Allison took me through the evidence given in the asylum interview and in the witness statement for the appeal by the appellant on the topic of how she had reacted to the threatening messages apparently triggered by her blog post of 16 June 2017. She at no point said that she had temporarily deleted the blog. She did say, however, that she had deleted her telephone number. I also reviewed the Judge's manuscript record of proceedings, but I was unable to ascertain from them what, if anything, the appellant had said on this topic in her oral evidence.

25. Mr Walker conceded that an error of law was made out on the ground that the Judge had been mistaken about the evidence and/or on the ground that she had not given adequate consideration to the issue of risk on return, having regard to **HJ (Iran)**. In the light of this concession, I held that an error of law was made out, but after hearing further submissions from both representatives, I reserved on the issue of whether the appeal should be retained by the Upper Tribunal or remitted to the First-tier Tribunal, and I also reserved my decision on whether the Judge's positive credibility findings should be preserved.

Discussion

26. With regard to Ground 1 (alleged mistake of fact), I consider that the evidence is unsatisfactory and I find that it does not establish that the Judge either misunderstood or misrepresented the oral evidence given by the appellant at the hearing.

27. Firstly, the solicitor who appeared for the appellant at the hearing before

Judge Henderson has not produced her note of the evidence. Secondly, as I have already indicated, the Judge's record of proceedings does not cast light on the issue one way or the other. Insofar as I could decipher the Judge's manuscript record, I could find no reference to the blog being de-activated. But, equally, I could find no reference to the blog being temporarily de-activated and then re-activated a month later.

28. Thirdly, on a careful reading of the permission application, the mistake of fact allegation seems to be largely, if not wholly, based upon *ex post facto* rationalisation. For example, as Mr Allison also highlighted in his oral submissions, the untranslated series of blog posts in the Home Office bundle, running from D1 to D29, all contain in the top right hand corner the date of 20/11/2017. These blog posts include the blog post of 16 June 2017, and so, the argument runs: *"This blog post must have been on the website on 20 November 2017 in order to be downloaded from the website on that date."*

29. There is one exception to this, which is the blog post at D1-D3, which was apparently downloaded on 20 June 2017. This has the appellant's telephone number on it, whereas all the subsequent blogs from D4 onwards only have her email address.

30. While I accept that the documentary evidence is supportive of the case of re-activation of the offending blog, the fact remains that it is not clearly demonstrated that the Judge was wrong to understand from the appellant's oral evidence that the blog had been permanently deleted.

31. But even if there was a mistake of fact by the judge for which the appellant or the legal representative at the hearing was not responsible, it is necessary to consider whether the mistake of fact is material.

32. It is strongly arguable that the risk on return is objectively reduced, rather than increased, by the offending post being re-activated after only one month. For despite it being in the public domain all this time, on the appellant's case there have been no further threats to her by email or any further threats made to her father in Sulaymaniyah.

33. For the above reasons, I am not persuaded that an error of law is made out under Ground 1. However, an error of law is made out under Ground 2. This is because the Judge failed to engage with the objective evidence in the appellant's main bundle to the effect that, while generally a person will not be at risk of serious harm or persecution on the basis of political activity within the Kurdistan region of Iraq, decision-makers must consider that those most likely at risk of such treatment include journalists, media workers and human rights defenders - particularly those who write about certain subjects including corruption, the lack of human rights in the region, women's rights, and anything that could be construed as endangering the security of the region or public morality.

34. The Judge failed to ask herself the question whether the appellant would

be able to maintain her blog on return to her home country, and/or to post further blogs, without engendering a real risk of persecution. Accordingly, the decision of the First-tier Tribunal must be set aside and remade.

Future Disposal

35. I have given careful consideration as to whether this is a suitable case for retention by the Upper Tribunal, and I answer the question in the negative. It was never in dispute that the appellant was a blogger. The core issue was, and remains, whether her blogging activity is such to engender a real risk of persecution on return to the KRG at the hands of state or non-state actors. I consider that this issue partially turns on background evidence, but it also requires a careful evaluation of the nature and content of the appellant's blog posts thus far, including whether they contain information already in the public domain or whether they make what can be characterised as "*new*" allegations against prominent politicians in the KRG, the extent of publication (i.e. the number of hits on the blog), the degree of accessibility (i.e. how easily the blog is found by entering key words into a search engine), and on the appellant's general credibility. While I accept that the Judge found the appellant mostly credible, he did not find her credible on all matters.

36. For the above reasons, I consider that the extensive judicial fact-finding that will be required to remake the decision means that the re-making is an exercise that would be more appropriately undertaken in the First-tier Tribunal. As there is no cross-appeal by the respondent in respect of the positive credibility findings made by the Judge, it will be open to the First-tier Tribunal to take these findings as a starting point, following **Devaseelan**. But equally it will be open to the First-tier Tribunal to take the Judge's negative credibility findings as a starting point, following **Devaseelan**. Hence, procedural fairness requires that none of the Judge's findings of fact should be formally preserved.

Notice of Decision

The decision of the First-tier Tribunal contained an error of law such that the decision must be set aside and remade.

Directions

This appeal is remitted to the First-tier Tribunal at Taylor House for a fresh hearing (Judge Nicholson incompatible) with none of the findings of fact made by the previous Tribunal being preserved.

Direction Regarding Anonymity – rule 12 of the Upper Tribunal Procedure 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 her 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 1 October 2018

Judge Monson
Deputy Upper Tribunal Judge