Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/14037/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 October 2019	**On 17 October 2019**
Extempore decision	

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

RABIA SALMAN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms N Ahmad, Counsel, instructed by Malik & Malik Solicitors
For the Respondent: Ms A Everett, Home Office Presenting Officer

DECISION AND REASONS

This is an appeal against the decision of First-tier Tribunal Judge Gandhi promulgated on 29 April 2019 dismissing the appellant's appeal against the respondent's decision dated 15 June 2018 to refuse her human rights claim made on the basis that she cannot return to Iraq as a lone female woman. The judge dismissed the appeal because she found that the appellant lacked credibility when asserting that she had no family support remaining in Iraq.

Factual background

The appellant is a citizen of Iraq, born 1 July 1945. She is now 74. She claimed to have arrived in the United Kingdom in February 2006. She made a claim for asylum shortly afterwards. That claim was refused, and her appeal against that refusal was dismissed by Immigration Judge Birkby in a Decision and Reasons promulgated on 5 May 2006. The substance of that decision concerned the appellant's protection-based claim arising from her account of her son having worked for the American military during and after the war in Iraq. Judge Birkby also considered the appellant's Article 8 rights. The appellant had claimed to have no remaining family in Iraq. At [16] the judge rejected that limb of her case in these terms:

> "I have not accepted her [the appellant's] account of the events in Iraq and I am not satisfied that she does not have family in Iraq. I therefore do not accept that the appellant has proved on the balance of probabilities that her right to a private or family life would be breached if the decisions of the Secretary of State were to be implemented."

Before Judge Gandhi, it was common ground that the central issue in the appellant's Article 8 appeal related to whether she would have any family members in Iraq. At [18], the judge records a concession by the respondent that, in the event that she were to find that the appellant would be without family or other support in Iraq, it would follow that she would be destitute and the requirements of paragraph 276ADE(1)(vi) (very significant obstacles to integration) would be satisfied. As such, the sole and central issue in the case was whether the appellant would right to Iraq with the benefit of any family support or assistance or whether, as she contended, she would return as a lone and therefore likely to be destitute single woman in her 70s.

Permission to appeal was granted by Judge Grant-Hutchison on the basis that the judge arguably failed to consider the evidence of three new witnesses who had been produced for the hearing before Judge Gandhi. Secondly, that the findings in relation to the appellant's friends who gave evidence were irrational or arguably irrational, on account of the judge's findings that they could not be aware of any secret correspondence the appellant may have had with her family in Iraq. Thirdly, Judge Grant-Hutchison considered that it was arguable that the judge erred by discounting the supporting evidence of the three witnesses as carrying less weight because they recited simply what they had been told by the appellant. Fourthly, the judge had not made findings as to the strength or otherwise of the witness evidence individually and fifth, that the judge brought her own subjective assumptions as to what a relationship with a daughter-in-law and a grandmother would look like in the very different cultural context of family life in Iraq.

Discussion

The starting point for my consideration pursuant to Devaseelan (Second Appeals – ECHR – Extra-Territorial Effect) Sri Lanka [2002] UKIAT 00702 is that the previous decision of Judge Birkby represented the starting point for any subsequent judicial consideration. Pursuant to the guidelines issued in Devaseelan, facts happening since an earlier decision may always be taken into account, but facts relating to matters which were already in existence at

the time of the earlier decision which are now sought to be relied upon must be treated with the greatest of circumspection. As such, the appellant, who was legally represented before Judge Gandhi, was on notice that the starting point of Judge Birkby's findings would need to be displaced by reference to evidence of facts happening in the thirteen years since that decision had been promulgated.

In order to seek to depart from the starting point of Judge Birkby, the appellant provided live evidence in the form of three witnesses. Those witnesses had not given evidence before Judge Birkby. Judge Gandhi rejected the evidence of the three witnesses on the following bases.

First, she had not received a satisfactory explanation as to why the evidence provided by the witnesses on this occasion had not been available to the judge previously.

Secondly, the evidence of the three new witnesses was based entirely on the account that the appellant had provided to them of her claimed lack of contact with any of her family in Iraq. The judge observed that the three witnesses would not know the full extent of the private correspondence that the appellant may have with any of the remaining family that Judge Birkby found that she still had in Iraq and therefore little weight could be ascribed to their evidence.

Thirdly, the judge noted that one of the witnesses, Ms Amol, had said in her live evidence that the appellant had used the Red Cross international family tracing service in order to obtain or make contact with her family in Iraq but had done so unsuccessfully. That contrasted with the appellant's own evidence that she had not used any such tracing services as she did not wish to trouble anybody with that burden.

The question now arises as to whether the judge reached an irrational finding when drawing these conclusions? I do not consider that the judge's findings were irrational. Ms Ahmad submitted that the judge should have put the concerns that she had to the witnesses or to the appellant. In my view, it was not unfair or irrational for her not to air her concerns in that way. It was for the appellant, through her counsel if necessary, to address why the evidence now presented by the appellant had changed. Pursuant to Devaseelan, the appellant has been on notice for the past thirteen years that there would be a significant judicial starting point finding of fact concerning her family which needed to be displaced.

Under the Devaseelan guidelines, any evidence which could have been available previously but was not provided is now to be treated with the greatest of circumspection. It was not irrational or otherwise unfair for the judge to analyse the evidence through the requirements of Devaseelan, without having revealed each step of her emergent thinking in the hearing. It should have been clear to those representing the appellant that the starting point of Judge Birkby's findings would need to be displaced by reference to clear and cogent evidence. It cannot now be said that there is a material error of law arising from her approach.

In some circumstances, judges can be required to air their concerns about the evidence in a case, particularly where they propose to resolve a case on grounds other than those canvassed by the parties: see AM (Fair hearing) Sudan [2015] UKUT 656 (IAC). Headnote (v) provides:

> *"Fairness may require a Tribunal to canvas an issue which has not been ventilated by the parties or their representatives, in fulfilment of each party's right to a fair hearing."*

The issue of the judge's findings concerning the three new witnesses in the present matter is not in AM (Sudan) territory. The refusal letter highlighted the absence of evidence concerning the appellant's claims to have no family support in Iraq. The respondent relied on the decision of Judge Birkby. It was common ground that Devaseelan applied. The appellant was therefore on notice that the issue of family support in Iraq was a live issue, and that the appellant's case that she did not have any such support had already been rejected. The judge was not under a duty to give running commentary on the issues in the case during the hearing.

Similarly, in relation to the second ground of appeal, namely that the judge made an irrational finding that the appellant could secretly be in contact with her family in Iraq, I do not consider this to have any merit. The appellant lives with a number of different supporters and rotates from place to place on a fairly regular basis. Ms Ahmad submitted that it would not be possible for the appellant to maintain secret correspondence with any family in Iraq without the other witnesses with whom she lives finding out. I reject this assertion. There is no suggestion in any of the evidence to which my attention has been drawn that the witnesses had sight of any private correspondence of the appellant. There is no suggestion that they would know about any correspondence she received, whether electronically or through friends and family or by means of conventional airmail. It was an entirely apposite observation for the judge to find that unless the three witnesses had full sight of all the appellant's private correspondence, it could not be said that they could definitively rule out the possibility that she remains in contact with her family.

I do not consider that anything turns on the judge's treatment of the three witnesses' evidence together. The observation that none had appeared for the appellant before Judge Birkby applied equally to each of them. The judge had, in any event, observed in her decision that there were limits to what the three witnesses were able to say about the appellant's contact with her family in Iraq. It has not been demonstrated to me how there were features of any of the witnesses' individual evidence which could or should have led to a different conclusion on this point. This is a criticism of form rather than substance. It is well established that judges do not need to labour over each individual piece of evidence. See Lord Justice Haddon-Cave in PA (Iran) v Secretary of State for the Home Department [2018] EWCA Civ 2495 at [42]:

> "There is an increasing tendency for First-Tier judgments to be overly long and to contain unnecessary detail. This can, itself, cause problems of consistency and cogency. Laborious recitation of every piece of evidence is not necessary or desirable and simply adds to the already

> heavy burden on First-Tier judges. It is only necessary to refer to evidence that is relevant to the issue or issues for determination. Length is no substitute for analysis."

In relation to ground 3, it is contended that the judge reached irrational findings when contrasting the evidence of Ms Amol concerning the appellant's attempts to use the Red Cross international family tracing service with the appellant's own evidence that she had not used the service. This was a plain credibility finding that was open to the judge on the evidence. One witness said one thing, another witness said another. The judge analysed the differences and reached conclusions that were entirely open to her on the facts. There is no merit to this ground of appeal.

There is some superficial force in the final ground of appeal concerning the judge's assumptions surrounding the attempts she considers the appellant be likely to have made to contact her daughter-in-law in Iraq. Although a judge should be slow to impose his or her subjective cultural expectations as to how members of the family would conduct themselves in a very different cultural context, I do not consider the judge to have strayed beyond the boundaries of what was appropriate on this occasion. The appellant has been subject to a finding of fact from Judge Birkby for the last thirteen years that she and continues to remain in contact with her family in Iraq. On that basis, it was entirely reasonable of this judge to make a finding that the evidence of the appellant that she had not made any attempts to contact the very family members which Judge Birkby had found her to be in contact with. It was entirely open to the judge to find that the evidence of the appellant in this respect lacked credibility.

Drawing this analysis together, the judge reached findings of fact which were open to her on the evidence and which cannot be said to be irrational. Although another judge may have reached different findings, the task of the Upper Tribunal is to consider whether the decision involved the making of an error of law. In relation to matters of fact, that means determining whether the judge reached irrational findings, not whether another judge may have resolved the case on a different basis. The judge's findings were not irrational or otherwise infected by legal error. This appeal is dismissed.

Notice of Decision

The appeal is dismissed on human rights grounds.

Signed *Stephen H Smith* Date 10 October 2019

Upper Tribunal Judge Stephen Smith