Upper Tribunal
(Immigration and Asylum Chamber) PA/07502/2019 (V)

THE IMMIGRATION ACTS

Heard by *Skype for Business*

on 24 March 2021
and by *Microsoft Teams*
on 23 June 2021

Decision & Reasons Promulgated
On 8 July 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

HAWKAR [M]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr D Cox, of Latta & Co, Solicitors
For the Respondent: Mr M Diwyncz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a Kurdish citizen of Iraq. The respondent firstly refused his asylum claim by a decision dated 27 January 2016. Judge P G Grant-Hutchison dismissed his appeal by a decision promulgated on 13 December 2016, reference PA/01295/16.

2. The respondent refused further submissions by a decision dated 19 July 2019. FtT Judge Shand dismissed his second appeal by a decision promulgated on 5 February 2020.

3. By a decision dated 8 September 2020, UT Judge Kekic, following a concession by the respondent, set aside the decision of Judge Shand.

4. The UT made a transfer order to enable decision-making to be completed by another UT Judge.

5. The decision of Judge Shand was set aside principally for the error of applying country guidance, published after the hearing, without inviting parties to make submissions thereon; but parties did not seek to restrict the process of remaking, and the appellant, without objection, has introduced further evidence.

6. On 24 March 2021, the respondent drew attention to the fact that following proceedings in the Court of Appeal, further country guidance is pending. Mr Cox, having taken instructions, explained that the appellant did not seek adjournment, and wished his case to be decided according to the facts as they might be found, guidance so far as extant and relevant, and background evidence. Oral evidence was heard from the appellant and another witness. Due to delays through technical difficulties, and shortage of time, the hearing was not completed.

7. The appellant filed submissions on 19 April 2021. Although headed "skeleton argument", these are detailed and thorough.

8. On 23 June 2021, Mr Diwyncz made oral submissions, and Mr Cox expanded briefly upon the written submissions.

9. I reserved my decision.

10. The appellant says, and the respondent does not dispute, that he is from the village of Kharabaroot (or Kharababaroot), in the province and near the city of Kirkuk. The appellant further says that he fled from his village during an ISIS attack on 11 June 2014, and lost contact with his parents. He later learned that both died in the attack.

11. At [14 -22] the first refusal decision rejected the appellant's account of the attack on the village and the death of his parents (i) on grounds of contradictions and inconsistencies and (ii) under reference to section 8 of the 2004 Act, for not claiming in another country; and even if he came from a "contested area", the respondent considered that he could relocate to the IKR.

12. Mr Diwyncz did not refer to the reasons in that decision. It founds upon the appellant stating the walking time between two houses as 5 minutes, but at another point as 10 – 15 minutes. Nothing turned on the timing, or on the appellant's accuracy. The decision also founds upon a less than crystal clear description of fleeing on a truck. The alleged "contradictions and inconsistencies" are not striking. There is nothing in them which indicates to me that the appellant is unlikely to have been attempting to describe a real rather than an invented incident.

13. The section 8 point is adverse to the appellant, but far from determinative.

14. Before Judge Grant-Hutchison, the appellant's representative submitted that his claim was credible, and that his appeal should succeed because it was for the respondent to prove what documentation could be used to return him, and no such proof was offered. The judge noted that he did not give evidence; declined, by reference to the respondent's decision, to find him credible; and found nothing to show that he could not relocate.

15. In the refusal of the further submissions, at [22], the respondent referred to the appellant's statement at interview that he had an identification card in his house in Iraq and said that he had not established any efforts to contact or trace family members to obtain documentation. It was noted that the judge "had found that

you cannot confirm that your parents are dead". At [29], the respondent concluded that the appellant could return to Kirkuk or relocate to the IKR and could "expect assistance from male family members or government offices in obtaining your ID documents".

16. In her decision, Judge Shand applied the principles of *Devaseelan* [2002] UKIAT to the appellant's evidence. At [56] she found nothing in the appellant's evidence of a visit to the Iraqi Embassy to lead to conclusions different from those reached by Judge Grant-Hutchison and at [57] she concluded similarly on registration of his details with the Red Cross.

17. The appellant's submissions at [13 – 17] acknowledge the relevance of *Devaseelan* but ask for new evidence to be assessed on its own merits, without preconception, under reference to *TF & MA* [2018] CSIH at [50].

18. There was oral evidence before me which was not before the respondent or before the two judges who have dealt with the claim. Mr Diwyncz tested that evidence in cross-examination, but having done so, he said that he could make "no great attack" on the credibility of the appellant and of his supporting witness, Mr Mohammed Ali Amin. Nor did he suggest that I should reject the written evidence.

19. The appellant makes the same substantive claim as he did before the first and second judges, but he supports it now by evidence which was not before either of those judges. The most significant part of that evidence was not available to the appellant previously, as Mr Amin's visit to Kirkuk took place later. It does not fall to be "treated with the greatest circumspection", in terms of *Devaseelan*.

20. There is another reason why the *Devaseelan* approach does not operate at this stage against the appellant. The respondent's original challenge to credibility was rather weak. Judge Grant-Hutchison declined to reach any more favourable findings, but did not add to the reasons, apart from the absence of oral evidence from the appellant. The appellant in his statement says vaguely that was on advice from his legal adviser at the time. It appears from the decision that the strategy of that representative was to rely on the burden of proof being on the SSHD, which was a common misconception in Iraqi "identification" cases. Accordingly, the absence of the appellant's oral evidence before Grant-Hutchison is not significantly adverse to his credibility now.

21. Mr Diwyncz brought out in evidence, and touched upon in submissions, that Mr Amin, who has not had his main residence in Iraq for many years, had no problem in obtaining Iraqi documentation. When asked, Mr Amin seemed surprised at the suggestion there might have been any difficulty. However, Mr Diwyncz did not argue that this was an indication that the appellant would have no difficulty. Mr Amin had the assistance of close family in Iraq, whereas the evidence tends towards the appellant not being in a similar situation.

22. The appellant and Mr Amin both struck me as straightforward witnesses, giving clear and unexaggerated answers. Thorough cross-examination did not result in any significant challenge to their evidence. Mr Amin has been in the area and has made indirect enquiries, the results of which tend to confirm the appellant's claims about the fate of his parents.

23. The proximity and distribution of ethnic and religious groups is at the heart of Iraq's problems. It is undisputed that conflict has reduced Kharabaroot to ruins.

24. The appellant's evidence that his parents died in or soon after the attack on Kharabaroot is plausible and consistent with background evidence of events around that time.

25. Either the appellant's evidence is true, or he has fabricated loss of family contacts and ability to document himself to establish residence in the UK and enlisted Mr Amin, and others, to back him up. Fabrication cannot be entirely excluded, but the respondent makes no strong contention.

26. Drawing the threads together, I find a reasonable likelihood that the appellant's account is true.

27. It is common ground that on current guidance, the appellant might be able to re-document himself through the Iraqi Embassy; but as argued in the appellant's submissions at [26 – 28], there are strong grounds, supported by cogent evidence, for departing from guidance on that issue.

28. Mr Diwyncz accepted, under reference to the respondent's *Country Policy and Information Note Iraq: Internal relocation, civil documentation and returns, version 11.0, June 2020,* at 2.6.15 – 17, that if the appellant's position is as he claims, it is unlikely that he could obtain fresh documents, or at least not without exposing himself to real risk along the way.

29. There is a reasonable likelihood that the appellant on return would be at risk as a Sunni Kurd. Given his difficulties over documentation, he cannot reasonably be expected to avoid that risk by relocation.

30. The decision of the FtT has, of consent, been set aside. Based on the evidence led in process of remaking the decision, the appeal, as originally brought to the FtT, is allowed on the grounds that the appellant's removal would breach the UK's obligations under the Refugee Convention.

31. I am obliged to both representatives for their assistance.

32. The appellant does not ask for the anonymity direction to be maintained.

Hugh Macleman

25 June 2021
UT Judge Macleman