Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07283/2016

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision & Reasons Promulgated**
On: 31st January 2018	**On: 2nd February 2018**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

KR
(Anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

For the Appellant: Mr Pratt, WTB Solicitors LLP
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Iran born in 1996. He appeals with permission[1] the decision of the First-tier Tribunal (Judge PJ Holmes), who on the 31st March 2017 dismissed his protection claim.

[1] Permission was refused by First-tier Tribunal MJ Gillespie on the 4th April 2017 but was granted upon renewed permission by Upper Tribunal Judge Taylor on the 3rd May 2017

Background

2. When he claimed asylum the Appellant stated that he had been born in Erbil, Iraqi Kurdistan (IKR), to parents who were refugees from Iran. His parents were cadres of the KDPI and had fled into Iraq sometime in the 1980s. The family had lived in Iraq but had never been granted Iraqi nationality or formal residence permits. They had also spent some time living in Turkey. The Appellant had worked as a television repair technician with his father. The Appellant left the IKR in 2015 after his relationship with a local girl had been discovered; her family wanted her to marry within their tribe and now the Appellant faced death or serious injury by them. The Appellant was unable to 'return' to Iran because his family continue to receive threats from the Iranian security service. He therefore left and made his way to the UK where he made his claim.

3. The Respondent did not accept that the Appellant was an Iranian national. The Respondent believed the Appellant to be an Iraqi Kurd and rejected the entire claim for want of credibility.

4. The First-tier Tribunal found, on the basis of documentary evidence before it, that the Appellant is in fact Iranian as he claims. That evidence included a certificate issued by the UNHCR in Baghdad which depicted the Appellant as a child, alongside his father, mother and siblings. The certificate stated the family to be Iranian refugees. There were also other UNHCR documents from Turkey, the Appellant's parents' marriage certificate which was issued in Iran and "various old photographs showing the Appellant's father in the presence of identifiable persons connected with the KDPI". The Tribunal further accepted that the Appellant's father is a member of the KDPI. Although it went on to reject the suggestion that the Appellant himself was a member (he actually denied being politically active at all) the Tribunal was satisfied that the Appellant would face a real risk of serious harm in Iran on account of his close association with the KDPI.

5. Having made a positive finding that the Appellant is in fact an Iranian refugee, the Tribunal rejected the contention for the Respondent that he was Iraqi, or that alternatively he would be entitled to Iraqi nationality. No evidence was presented to the Tribunal which would indicate that he would be so entitled. The Tribunal noted, however, that the Respondent's refusal letter had clearly expressed a view that the Appellant might be safely returned to Iraq. In light of that view, the Tribunal considered it appropriate to apply the principles set out in ST (Eritrea) [2012] UKSC 12 and RR (Syria) [2010] UKUT 422 (IAC), wherein it was held that a finding of fact that an individual is a refugee does not automatically entitle him to a grant of refugee status. Article 33 of the Convention only prohibits *refoulement* if the country of destination is one in which the individual's life or freedom

would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. Finding that the feared harm of 'honour' based violence in Iraq was not credible, the Tribunal therefore dismissed his appeal on the grounds that although he was a refugee from Iran, the Appellant could be safely returned to Iraq.

Error of Law

6. At a hearing on the 9th November 2017 the Applicant made several complaints about that decision, but before me his representative Ms Evans distilled her submissions to this: the decision of the First-tier Tribunal was procedurally unfair. The Appellant submitted that the decision should be set aside for the following reasons:

    i) The appeal was dismissed on grounds not advanced by the Respondent. Any proposed removal to Iraq was premised on the Respondent's belief that the Appellant was an Iraqi national. The Respondent had never indicated that she intended to remove him there even if he was actually Iranian. The Respondent's view on the matter remains unknown;

    ii) The applicable rule, paragraph 339J of the Immigration Rules, expressly limits 'safe third countries' to those where the claimant can assert citizenship. That being the case, the First-tier Tribunal had gone on a frolic of its own;

    iii) The fact that the matter was only raised by the Tribunal deprived both parties of the opportunity of adducing relevant evidence on the issue. This was particularly prejudicial to the Appellant who was not permitted an opportunity to prepare his case in response to the new footing upon which the Tribunal had placed it;

    iv) The Tribunal erred in applying the guidance in AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC) in respect of whether the Appellant would be able to safely access and remain in the KRG. Nowhere does that decision address the position of Iranian refugees formerly resident in the area;

    v) There was no evidential basis upon which the Tribunal could reasonably have concluded that an Iranian Kurd being returned to Iraq would be admitted to that country, or be permitted to travel on to the KRG, or be admitted and permitted to remain in that area.

vi) There being no opportunity for the Appellant (or Respondent) to investigate the Tribunal's proposed course, there was no evidence before the Tribunal (nor indeed clear findings on the matter) as to the risk of *refoulment*.

7. The Respondent was that day represented by Mr G. Harrison. He reserved his position on whether this could in the end be an 'RR (Syria)' case, but did not contest that the central complaint of the Appellant had been made out. The Respondent had not stated that she proposed to remove an Iranian to Iraq, nor had either party had an opportunity to make submissions or produce evidence on whether the Iraqis would in fact admit the Appellant, nor on whether there was any risk of *refoulement*. I accepted that for those reasons, and to that extent, the decision of the First-tier Tribunal must be set aside.

8. Having had regard to rule 5(3)(d) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (as amended) I made, by written decision dated the 19th December 2017, directions in the following terms:

> "The Respondent is directed to review the case and consider the effect of the Tribunal's unchallenged finding of fact that the Appellant is an Iranian who has a well-founded fear of persecution in that country. In the event that the Respondent is not minded to grant the Appellant leave to remain as a refugee, and if the Respondent wishes to now assert that the Appellant would be admitted to Iraq, would be permitted to reside there lawfully, would not face a real risk of persecution/serious harm, or a risk of *refoulement* to Iran, then she must issue a supplementary refusal letter to that effect, setting out the evidential basis for such assertions. I direct that the Respondent is to make her position known to the Appellant and Tribunal as soon as practicable and in any event no later than the **31st January 2018** when this matter will be set down for a 'case management review' hearing before me in Manchester.
>
> If the Respondent has not issued a further refusal letter by that time, or otherwise applied for further directions, the appeal will be allowed on asylum grounds".

The Re-Made Decision

9. The hearing resumed, as directed, on the 31st January 2018. The Respondent had not served a supplementary refusal letter, nor had she applied for further directions or time. Mr Diwnycz was able to inform me that he had spoken the previous day to the Home Office

caseworker who was not minded to follow the route taken by the First-tier Tribunal. The caseworker was of the view that it would be extremely difficult to remove a person in the Appellant's position to Iraq or the IKR and that in view of the practical challenges the Respondent would not be pursuing the RR Syria/ST Eritrea argument.

10. The Respondent does not assert that it would be reasonable to expect the Appellant to avail himself of the protection of the Iraqi authorities. In light of the findings of the First-tier Tribunal, Mr Diwnycz accepted that the consequence of that position is that the appeal must be allowed, on the grounds that the Appellant is a refugee from Iran.

Decisions

11. The decision of the First-tier Tribunal contains a material error of law and it is set aside to the extent identified above.

12. The decision is remade as follows: "the appeal is allowed on protection grounds".

13. There is an order for anonymity.

Upper Tribunal Judge Bruce
31st January 2018