Upper Tribunal
(Immigration and Asylum Chamber)

BH (policies/information: SoS's duties) Iraq [2020] UKUT 00189 (IAC)

THE IMMIGRATION ACTS

Heard at Parliament House, Edinburgh	**Decision & Reasons Promulgated**
On 9 March 2020	
	……

Before

MR JUSTICE LANE, PRESIDENT
MR C M G OCKELTON, VICE PRESIDENT
LORD MATTHEWS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)

Between

BH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr K. Forrest, Advocate, instructed by Latta & Co Solicitors
For the respondent: Mr G. McIver, instructed by the Government Legal Department

(a) *The Secretary of State has a duty to reach decisions that are in accordance with her policies in the immigration field. Where there appears to be a policy that is not otherwise apparent and which may throw doubt on the Secretary of State's case before the tribunal, she is under a duty to make a relevant policy known to the Tribunal, whether or not the policy is published and so available in the public domain. Despite their expertise, judges in the Immigration and Asylum Chambers cannot reasonably be expected to possess comprehensive knowledge of each and every policy of the Secretary of State in the immigration field.*

(b) *In protection appeals (and probably in other kinds of immigration appeals), the Secretary of State has a duty not to mislead, which requires her to draw attention to documents etc under her control or in the possession of another government department, which are not in the public domain, and which she knows or ought to know undermine or qualify her case.*

(c) *There is a clear distinction between information and policy: the fact that country information is contained in a COI (country of origin) document published by the Secretary of State does not, without more, make that information subject to the duty in sub-paragraph (a) above.*

DECISION AND REASONS

A. THE APPELLANT AND HIS APPEAL TO THE FIRST-TIER TRIBUNAL

1. The appellant, born in 1977, is a citizen of Iraq. He says he left that country in November 2007, travelling to Turkey, before moving on to the United Kingdom, where he arrived on 26 November 2007 and claimed asylum the same day. The respondent refused that claim and the appellant unsuccessfully appealed to an immigration judge of the Asylum and Immigration Tribunal. Over the intervening years, the appellant made a number of further submissions, with the aim of obtaining a fresh right of appeal, in the event of their rejection by the respondent. Eventually, the submissions made in June 2018 were treated by the respondent as a fresh claim, the refusal of which led to the appellant's appeal being heard by First-tier Tribunal Judge P A Grant-Hutchison in Glasgow on 12 September 2018.

2. Despite the fact that the Immigration Judge who dismissed the appellant's original appeal in 2009 had doubts as to whether he originated from Mosul, the present First-tier Tribunal Judge appears, like the respondent, to have accepted that the appellant's home area was Mosul. Since it was common ground that, at the relevant time, the appellant could not be expected to return to Mosul, the focus of attention was on whether the appellant, as a Kurd, could relocate to the Kurdish Zone in Northern Iraq (IKR); alternatively, whether he could relocate to Baghdad.

3. The First-tier Tribunal Judge had regard (as he was required to do) to the Upper Tribunal's country guidance in AAH (Iraqi Kurds - internal relocation) Iraq (CG) [2018] UKUT 00212, promulgated on 26 June 2018. At paragraph 13 of his decision, the First-tier Tribunal Judge recorded the respondent's Presenting Officer as telling him that, contrary to the position in AAH, there were now direct flights to the IKR from the United Kingdom. The judge, nevertheless, concluded that it was "safer to proceed on the undertaking given by the Secretary of State that individuals such as the appellant will be returned to Baghdad". As a result, at paragraph 14, the First-tier Tribunal Judge identified the question at the heart of the appeal as: "Can the appellant return to Baghdad and thereafter proceed onward to the IKR"?

4. The First-tier Tribunal Judge rejected the appellant's assertion that he had no male relatives who could assist his mother or sister to obtain a CSID, if such an identity document were needed. The judge also found that the appellant had spent time in the IKR before coming to the United Kingdom. This accorded with the findings of the earlier judge. The First-tier Tribunal Judge found that the appellant's employment and accommodation prospects were "not as bleak as described in AAH, even allowing for the passage of time. In addition he will have access to the grant under the Voluntary Returns Scheme" (paragraph 15).

5. On the totality of the evidence, the First-tier Tribunal Judge concluded, at paragraph 16, that if the appellant were returned to Iraq, there was "no real risk of serious harm in terms of the humanitarian protection provisions". At paragraph 19, the judge made the same findings in respect of Articles 2, 3 and 8 of the ECHR. So far as Article 8 was concerned, the judge had regard to paragraph 276ADE(1)(vi) of the Immigration Rules. This provides that, in order to demonstrate an Article 8 right to remain by reference to private life, a person over the age of 18 who has lived continuously in the UK for less than twenty years, needs to show that "there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK". The First-tier Tribunal Judge held that the appellant could not satisfy this requirement, on the facts the judge had found: "Although it is likely that he will return to the IKR the appellant could also go to an area where he could avail himself of the protection of" certain Sheiks, with whom the appellant had had past interactions. The First-tier Tribunal Judge had also earlier noted the fact that the appellant had spent time in the IKR and that he was "young and healthy".

6. In the light of these conclusions, the First-tier Tribunal Judge dismissed the appellant's appeal on all grounds.

B. CHALLENGES TO THE FIRST-TIER TRIBUNAL'S DECISION

7. The appellant appealed to the First-tier Tribunal for permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal Judge. The grounds regrettably misrepresented the judge's decision. They contended that, at paragraph 13, the judge had found that it would be "too harsh to expect the appellant to relocate to Baghdad on anything other than a transitory basis". That is not what the First-tier Tribunal Judge said. In paragraph 13, the judge made it plain that he was referring to the appellant's "home area of Mosul" in finding that "it would be too harsh to expect him to relocate there on anything other than a transitory basis".

8. The grounds of application also contended that the First-tier Tribunal Judge had failed to find how long the appellant would have to reside in Baghdad; that the appellant would be relocating as an IDP to the IKR; and that there were no reasons given for the finding that the appellant could not satisfy paragraph 276ADE(1)(vi) of the Immigration Rules.

9. None of these grounds found favour with First-tier Tribunal Judge Feeney, who refused permission to appeal on 6 March 2019.

10. The appellant then applied to the Upper Tribunal for permission to appeal. The grounds of application were drafted by Mr Caskie. They took a very different approach to the grounds put to the First-tier Tribunal.

11. Ground 2 of the new grounds reads as follows:-

> "2. It was the responsibility of the Home Office Presenting Officer to lodge any relevant policy document with the judge. At the date of the hearing the most up-to-date information in respect of the KRG [ie. The IKR] was contained in the Secretary of State's Humanitarian Protection Country Report of November 2018. It is within the context of that report that the guidance in AAH requires to be considered. The judge failed to do so and in so failing erred in law".

12. The document to which the grounds refer is misdescribed. What is meant is the "Country Policy and Information Note Iraq: Security and humanitarian situation Version 5.0 November 2018". The grounds were also wrong in asserting that this document was the most up-to-date information available at the date of the hearing before the First-tier Tribunal Judge. That hearing took place on 12 September 2018, weeks before Version 5.0 appeared.

13. The new grounds then embarked upon a detailed exegesis of the Country Policy and Information Note. Amongst other things, they observed that in a table at paragraph 3.1.2, the population of the IKR was estimated at around 5,300,000. This was said to compare with an estimate of approximately 4,000,000 in March 2017. From this, it was submitted that there would be "a significant obstacle to the appellant's integration".

14. The new grounds did not find favour with Upper Tribunal Judge Kekić who, on 10 April 2019, refused permission to appeal. She said:-

> "The grounds are not made out. The judge cannot be criticised for failing to make findings on evidence that was not before him. Had the appellant's representatives considered that the HO country report was relevant for their client's case, it was open to them to have submitted it as evidence. The judge reached sustainable findings. No arguable error of law has been identified".

C JUDICIAL REVIEW OF THE UPPER TRIBUNAL'S REFUSAL OF PERMISSION TO APPEAL

15. The appellant petitioned the Court of Session for judicial review of the refusal by the Upper Tribunal to grant permission to appeal. The appellant's petition contained the following:-

> "8. The grounds accurately record that evidence that could have been before the judge of the FtT in deciding the appeal was not before him. The UT advert to the appellant's representative's ability to have adduced that evidence. It is said that

the judge cannot be criticised for failing to make findings on evidence that was not before him.

9. The Secretary of State has a website containing in excess of 10,000 separate 'pages' of material relevant to immigration in the United Kingdom. The word 'pages' is enclosed in inverted commas because many of the Secretary of State's web pages would themselves be hundreds or thousands of pages long if printed in a normal font size. Only one person is expected to have a comprehensive knowledge of that material being the Secretary of State himself (sic).

10. For that reason it has been held that it is the responsibility of the Respondent, who has a comprehensive knowledge of the Secretary of State's policies, to draw a relevant policy to the attention of the FtT (UB (Sri Lanka) v SSHD [2017] EWCA Civ 85). The respondent failed to comply with that duty when this matter was before the FtT.

…

12. That the basis of challenge was rejected by the Upper Tribunal because the appellant's representative had the opportunity to lodge the relevant document. In failing to recognise that the obligation was upon the Secretary of State's representative to lodge a potentially relevant document and not on the petitioner, the Upper Tribunal reversed the onus and concluded the petitioner did not have an arguable ground of appeal because of that error. The UT therefore acted in an irrational manner.

13. … The UT had an obligation to determine whether the petitioner had a fair hearing. Notwithstanding that there were elements of a fair hearing the failure of the respondent to produce documentation to the FtT he was obliged to produce meant that there was a fundamental or complete failure by the UT to ensure that the petitioner had a fair hearing. In so failing the UT erred in law.

…

16. An important point of principle arises. It has been determined in UB (Sri Lanka) (*supra*) that the obligation is upon the Secretary of State to produce relevant policy documentation to the FtT.

17. The hearing of the appeal in the present case took place in late September 2019. The document relied upon by the petitioner in relation to the up-to-date situation in Iraq is the latest in a long line of equivalent documentation published by the Secretary of State. The document produced in November 2019 and referred to in the grounds of appeal could not have been produced at the hearing that took place in September 2019 before the FtT as it had not by then been published by the Secretary of State, albeit the similar earlier version could have been. Nonetheless the obligation remained upon the Secretary of State to draw relevant policy and factual information to the attention of the FtT Judge notwithstanding that the *hearing* before the Tribunal had finished albeit that the FtT proceedings had not been concluded as no determination had been issued. The extent to which the Secretary of State is (sic) an ongoing obligation to draw relevant matters to the attention of the FtT is an important point of principle or practice.

…"

16. The Interlocutor of the Lord Ordinary reduced the Upper Tribunal's decision to refuse permission on the basis it was arguable that the First-tier Tribunal "follows an unfair procedure if it makes a decision without sight of a policy of the Home Secretary's that: (i) is in force at the date of its decision but was not in force at the date of its hearing; (ii) is relevant to the issues before it; and (iii) might realistically affect the outcome: cf. *UB (Sri Lanka) v Secretary of State for the Home Department* [2017] EWCA Civ 85 at §§1, 16 – 22 and 25 – 26". It was further said to be arguable that the "policy is relevant to the question whether the petitioner could reasonably be expected to stay in the IKR or Baghdad" and that the policy "might realistically have affected the outcome" of the appeal in the First-tier Tribunal. All this meant that it was "arguable that the FtT erred in law by following an unfair procedure". Following the reduction of the decision, the Upper Tribunal granted permission to appeal.

D. THE HEARING ON 9 MARCH 2020

17. At the hearing on 9 March 2020, Mr Forrest sought and obtained the Upper Tribunal's permission under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 to adduce the "Home Office Country Policy and Information Note Iraq: security and humanitarian situation, Version 4.0 (March 17)", which was in existence at the date of the hearing before the First-tier Tribunal Judge in September 2018. Interestingly, Mr Forrest's written application under rule 15(2A) explained that it was not lodged before the First-tier Tribunal "because it was not thought material to the issues before the Tribunal at that time". He drew particular attention to pages 17 to 56 of this document. These contain factual information, drawn from a variety of named sources, concerning the humanitarian situation in Iraq, largely from late 2016. Mr Forrest nevertheless characterised this material as the respondent's "policy", submitting that the failure on the part of the respondent, at the date of the First-tier Tribunal hearing, to adduce this policy meant the First-tier Tribunal Judge did not have the relevant facts before him.

18. For the respondent, Mr McIver concentrated on the issue which the Court of Session decided was arguable; namely, whether the First-tier Tribunal Judge's decision was vitiated by unfairness because it did not take into account the Home Office Country Policy and Information Note Version 5.0. The key aspect of the November 2018 document, Mr McIver submitted, was that it took into account the Upper Tribunal's country guidance case of AAH. This contained comprehensive findings on the issues relevant to the appellant's appeal; namely, the appellant's ability to relocate internally to Baghdad or the IKR. The decision of the First-tier Tribunal Judge made plain that the judge had taken account of this country guidance.

19. In reply, Mr Forrest submitted that UB (Sri Lanka) should be extended to cover the position where a policy of the respondent emerged after the hearing but before the decision of the First-tier Tribunal had been promulgated.

E. UB (SRI LANKA) v SECRETARY OF STATE FOR THE HOME DEPARTMENT [2017] EWCA Civ 85

20. As we have seen, the appellant's case for overturning the decision of the First-tier Tribunal Judge rests upon the authority of the Court of Appeal of England and Wales in UB (Sri Lanka), in which the only reasoned judgment was given by Irwin LJ. He described the issue as follows:-

> "1. In this case the Appellant is a national of Sri Lanka. He has made an asylum claim based on his previous involvement with the Liberation Tigers of Tamil Eelam ['LTTE'] whilst in Sri Lanka, his participation in pro-LTTE demonstrations in the United Kingdom and his claimed membership of the Transnational Government of Tamil Eelam ['TGTE']. His appeal turns on a single ground. Policy guidance issued by the Home Office on 28 August 2014 was not brought to the attention of either the First-tier Tribunal ['FTT'] or of the Upper Tribunal ['UT']. The Appellant seeks permission to adduce the material now, and submits that since the material was issued by the Respondent, it was the responsibility of the Respondent to ensure that it was drawn to the attention of the Tribunals concerned, that the guidance was material to the decision and that its non-disclosure gave rise to procedural unfairness. As a consequence, the Appellant seeks an order quashing the decision".

21. UB's case before the First-tier Tribunal was that he feared persecution, if returned to Sri Lanka, due to his previous involvement with the LTTE and to the fact that since he had come to live in the United Kingdom he had participated in various demonstrations against the Sri Lankan government. "Critically, he provided evidence to the Tribunal that he had involvement with the TGTE" (paragraph 2).

22. The First-tier Tribunal dealt with UB's claim, applying the relevant country guidance of GJ and Others (post-civil war: returnees) Sri Lanka CG [2013] UKUT 00319. However:-

> "10. Neither the FTT nor the UT were referred to Home Office policy guidance dated 28 August 2014, entitled '*Tamil Separatism*'. The guidance is described as:
>
> > 'Guidance to Home Office decision makers on handling claims made by nationals/residents of … Sri Lanka. This includes whether claims are likely to justify the granting of asylum, humanitarian protection, or discretionary leave … Decision makers must consider claims on an individual basis, taking into account the case specific facts and all relevant evidence, including: the guidance contained with this document; the available COI, any applicable caselaw; and the Home Office casework guidance in relation to relevant policies.'
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> 11. We were asked to admit this fresh material and agreed to do so *de bene esse*.
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> 12. Annexed to the guidance is the text of two letters from the British High Commission in Sri Lanka. This material is authoritative and clearly intended to be read with the guidance. The first letter is dated 16 April 2014:
>
> > 'Proscribed Terrorist Groups

> On 1 April 2014, the government of Sri Lanka announced the designation of 16 Tamil Diaspora organisations and 424 individuals under the UN Security Council resolution 1373 on counter-terrorism. The order was issued by the Secretary of Defence. The government asserts that this action has been taken to stop attempts to revive the LTTE. The BHC [i.e. British High Commission] has asked the government of Sri Lanka to provide evidence to support this decision.
>
> Among the organisations proscribed are the Transnational Government of Tamil Eelam (*TGTE)* and the UK-based Global Tamil Forum (GTF) and British Tamil Forum (BTF). When making the announcement on 1 April, Brigadier Ruwan Wanigasooriya said that individuals belonging to these organisations would face arrest under anti-terrorism laws … [T]o date, there have been no known arrests based on membership of one of the newly proscribed groups.'

13. The later letter is dated 25 July 2014 and the relevant text reads:

> 'The spokesperson from the DIE stated that returnees may be questioned on arrival by immigration, CID, SIS and TID. They may be questioned about what they have been doing whilst out of Sri Lanka, including whether they have been involved with one of the Tamil Diaspora groups. He said that it was normal practice for returnees to be asked about their activities in the country they were returning from.
>
> The spokesperson from the SIS said that people being 'deported' will always be questioned about their overseas activities, including whether they have been involved with one of the proscribed organisations. He said that members of the organisations are not banned from returning to Sri Lanka, they are allowed to return, but will be questioned on arrival and may be detained.'

14. Essentially the appeal before this Court turns on the failure of the Respondent to bring this fresh guidance, post-dating the decision in *GJ*, to the attention of either the First-tier or Upper Tribunal. It is accepted that the guidance was published on the Home Office website before the hearings took place. It is accepted that the Appellant's representatives could themselves have brought this material to the attention of the FTT."

23. Irwin LJ held that there was "the clearest obligation on the Secretary of State to serve relevant material and ensure it was before the Tribunals at both levels". He made reference to the judgment of Keene LJ in AA (Afghanistan) v Secretary of State for the Home Department [2007] EWCA Civ 12, to which we shall turn in due course. He also noted the judgment of Lord Wilson in the Supreme Court case of Mandalia v Secretary of State for the Home Department [2015] UKSC 59, to which we shall also turn.

24. At paragraph 18, Irwin LJ held that it was necessary to distinguish "whether such policy or guidance should be regarded as material to a case in anticipation, before factual findings have crystallised, from whether it is material to the decision actually reached: in other words whether, viewed in retrospect, the guidance might realistically have affected the outcome". On the facts of UB's case, Irwin LJ considered that "this guidance was clearly material and clearly should have been served in advance". It was plain from the respondent's decision letter that the appellant "had claimed membership of the TGTE". The decision took the stance that the appellant had not shown that he was a member of the TGTE. Nevertheless, the

"possible implications of membership, as affected by the letters annexed to the policy guidance, meant this material clearly should have been served" (paragraph 20).

25. At paragraph 21, Irwin LJ deprecated "any suggestion that this obligation of service is displaced or diminished by the availability of the material online" and that Counsel for the Secretary of State was "right to decline such an argument". Apart from the fact that the clear obligation on the respondent derived from authority, "many appellants in immigration and asylum cases are unrepresented. In a number of cases where there is legal representation, the quality of representation is less than optimal" (paragraph 21).

26. At paragraph 22, Irwin LJ sounded this note of caution:-

> "22. The obligation is clear but must not be taken beyond the proper bounds. There is no obligation on the Secretary of State to serve policy or guidance which is not in truth relevant to the issues in hand, and complaints as to alleged failures of disclosure of material which is truly peripheral or irrelevant should readily be rejected."

27. Furthermore, it was not enough to show that the material should have been served. It also had to be shown that the material might have affected the outcome of the appeal. Here, Irwin LJ noted that UB's case for saying he would be at real risk on return to Sri Lanka did not turn merely on him showing that he was actually a member of the TGTE, but also that his membership would be detected on arrival in Sri Lanka. In this regard, Irwin LJ noted the findings of the First-tier Tribunal that the appellant's *sur place* activities, even if observed or recorded, were of a low-level nature and not likely to carry risks. Nor would these activities demonstrate membership of the TGTE. Nevertheless, although he had "hesitated before reaching my conclusion on this issue", Irwin LJ found that "I cannot quite preclude the possibility that these letters might affect the outcome, and thus that they are 'material' to the decision in that sense". UB's appeal was, accordingly, allowed.

F. AA (AFGHANISTAN) v SECRETARY OF STATE FOR THE HOME DEPARTMENT [2007] EWCA Civ 12

28. At paragraph 16 of his judgment, Irwin LJ set out a passage from the judgment of Keene LJ in AA (Afghanistan). For our purposes, two policies which affected AA were extant at the date of the hearing of his appeal before the Asylum and Immigration Tribunal. The first was a policy contained in a Home Office Guidance Note on Afghanistan dated February 2003, which read:-

> "Unaccompanied asylum-seeking children who have no claim to stay in the UK and who would, had they been adults have been refused outright, should continue to be dealt with under UASC [unaccompanied asylum-seeking children] policy and given ELR [exceptional leave to remain] to age 18 or for four years for those under 14, unless there are adequate reception arrangements in place."

29. Although the AIT was referred to that policy, it was not referred to a Policy Framework Document of March 2005. This made plain that the test of whether there were "adequate reception arrangements in place" was not, as the AIT believed, whether it was "reasonably likely" that such arrangements would be made for the appellant in Afghanistan, were he to return there. Rather, the Policy Framework Document explained that the test was whether the Secretary of State was "satisfied that such arrangements had been made". A further policy, to the same substantive effect, was contained in an APU Notice 2/2003.

30. At paragraph 13, Keene LJ had this to say about the matter:-

> "None of these documents were cited to the Adjudicator or the AIT. But Mr Gill, in my view rightly, submits that there is a duty on the Secretary of State at such an appeal hearing to put relevant policy material before such a Tribunal to avoid it being misled".

31. The Adjudicator and the AIT were also not informed about a further policy of the Secretary of State, which was that an unaccompanied minor seeking asylum should not be interviewed, other than in exceptional circumstances, and even then only by a specially trained officer and in the presence of a responsible adult. That did not happen in the case of AA:-

> "27. Consequently, submits Mr Gill, since no-one suggests that there were exceptional circumstances here, the asylum interview should not have taken place and the adjudicator when assessing credibility should not have taken account of the answers given by the appellant at it. The attention of the adjudicator should have been drawn by the Secretary of State's representative to the policy on interviewing unaccompanied minors, so as to avoid him being misled: see *R v. Special Adjudicator, ex parte Kerrouche* [1997] Imm AR 610.
>
> 28. As a matter of law, that is right. The Secretary of State should draw relevant parts of his policy to the adjudicator's attention. Merely because those policy documents are publicly available in print or on a website is not enough: where issues of risk of persecution are involved, a decision to return a person or not to his country of origin should not depend on the diligence of that person's representatives. Of course, at the hearing before the adjudicator the Secretary of State's presenting officer was contending that the appellant was not a minor. But he was aware that the contrary was being asserted by the appellant and therefore that the adjudicator might make such a finding. Issues of risk of persecution might therefore have to be dealt with on that factual basis".

32. The Court in AA (Afghanistan) went on to consider the materiality of the failure by the Secretary of State to disclose the relevant policies. That issue, however, need not concern us.

G. R v SPECIAL ADJUDICATOR, EX PARTE KERROUCHE [1997] Imm AR 610

33. In paragraph 27 of AA (Afghanistan), reference was made to R v Special Adjudicator, ex parte Kerrouche [1997] Imm AR 610. The applicant in that case was a citizen of Algeria, whom the Secretary of State proposed to return to France, on the basis that

France was a "safe third country", which would apply the principles of the Refugee Convention in deciding whether the applicant should be returned to Algeria.

34. The Court of Appeal unanimously dismissed the appellant's appeal. The judgment of Lord Woolf MR is of particular importance for what it says about the duty of disclosure. Although dealing with certification, as we shall see it is established that the Kerrouche duty, as it has come to be called, applies in what are now protection appeals:-

> "*The disclosure issue*
>
> Mr Nicol accepts that the Secretary of State is under no general duty to give discovery of all the material on which he concludes a country is a safe third country. He does so because of the decision of the House of Lords in *Abdi and Gawe v Secretary of State for the Home Department* [1996] Imm AR 288. Lord Slynn of Hadley gave a dissenting speech in that case pointing out that it was the practice of the Secretary of State to provide Special Adjudicators with a bundle of documents limited to those which support the Secretary of State's decision. They do not include documents which may support the appellant's contention. In giving his opinion, with which the majority of the House of Lords agreed, Lord Lloyd of Berwick recognised the arguments in favour of disclosure were strong. However he came to the conclusion that the arguments the other way were stronger. He pointed out that:
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> > 'We are concerned with the procedural question whether the substantive hearing should take place here or in a third country. The longer the delay between the arrival of the appellant in the United Kingdom and his return to a safe country the less likely it is that that country will be willing to undertake the substantive hearings.... So if the procedure... is to be effective at all it must be fast'.
>
> Lord Lloyd went on to say that if courts were to supplement the requirements of the Asylum Appeals (Procedure) Rules 1993 to require disclosure, there would be a risk of frustrating 'the evident legislative purpose' that 'without foundation' appeals should be considered with all due speed.
>
> While Lord Lloyd's approach must be the starting point for the consideration of this issue, there are limits to the approach which he indicated in that case. The decision would not justify the Secretary of State knowingly misleading the Special Adjudicator. The obligation of the Secretary of State cannot be put higher than that he must not knowingly mislead. Before the Secretary of State could be said to be in that position, he must either know or ought to have known that the material which it is said he should have disclosed materially detracts from that on which he has relied".

35. The "Kerrouche" duty of disclosure was emphasised by the Upper Tribunal in CM (EM country guidance; disclosure) Zimbabwe CG [2013] UKUT 0059; paragraphs 36 to 38: Blake J; see also Nimo (appeals: duty of disclosure) [2020] UKUT 88: paragraphs 20 to 23. What the Upper Tribunal said in CM about the duty was approved by the Court of Appeal (per Laws LJ) in [2013] EWCA Civ 1303:

> "22. The Upper Tribunal decision in the present case was founded on the approach taken in R v SSHD ex parte Kerrouche (No 1) [1997] Imm AR 610. At paragraph 38 they cited Lord Woolf's judgment in that case:

"While Lord Lloyd's approach must be the starting point for the consideration of this issue [that is, Lord Lloyd's speech in Abdi] there are limits to the approach he indicated in that case. The decision would not justify the Secretary of State knowingly misleading the Special Adjudicator. The obligation of the Secretary of State cannot be put higher than that he must not knowingly mislead. Before the Secretary of State could be said to be in that position, he must know or ought to have known that the material which it is said he should have disclosed materially detracts from that on which he has relied."

23. This reasoning was applied in R(Cindo) v IAT [2002] EWHC Admin 246. The Upper Tribunal cited that case at paragraph 39, observing:

"This observation was applied in R(Cindo) v IAT... This was a judicial review of a substantive asylum appeal on the grounds of non-disclosure. Maurice Kay J (as he then was) quoted the passage in Kerrouche and emphasised the words 'ought to have known' and said:

'10. The words I have emphasised point to the inclusion of constructive knowledge. This was taken up by Simon Brown L.J. in Konan v SSHD (CA, 20 March 2000, BAILII: [2000] EWCA Civ 3041), who also observed that (para 24):

'…..the Secretary of State's obligation in a full asylum appeal like this may well be higher than in cases like Kerrouche and …. Abdi and Gawe, cases concerned with safe third country appeals.'

11. Taking a broad view of the authorities, they appear to illuminate these principles: (1) there is a duty on the part of the Secretary of State not knowingly to mislead in the material he places before the Adjudicator or the IAT; (2) '*knowingly*' embraces that which he ought to have known; (3) a breach of that duty may found judicial review on the basis that either (a) the decision was reached on a '*wrong factual basis*' (see Wade & Forsyth, Administrative Law, 8th Ed. Pp.283-284); or (b) the proceedings were tainted with unfairness.'"

24. Then at paragraphs 45 to 46 the Upper Tribunal said this:

"45. In our judgment, in asylum appeals and Country Guidance cases, the duty not to mislead provides a sound basis for evaluation of country material. Where the respondent relies on absence of material risk by reference to Country of Origin Information Service (COIS) reports, UKBA Operational Guidance Notes (OGN), or responses to the evidence of others, she cannot make assertions that she knows or ought to know are qualified by other material under her control or in the possession of another government department.

46. We anticipate that UKBA assessments of risk in foreign countries will frequently be informed by information emanating from the UK diplomatic mission in the region or other data in the possession of the Foreign and Commonwealth Office. In the case of Zimbabwe we know that this has been substantially the

> case for some time. The UKBA relied substantially on the expertise of the British High Commission in preparing the fact-finding mission and the evaluation of political circumstances. We would expect the UKBA to ask for and be informed about any reliable material that might qualify a published assessment. We would expect COIS reports to be updated regularly and kept under review. Where new material comes to light an OGN can be issued promptly, even if it is not itself a source of independent evidence. We observe that it was on the basis of an OGN as to enhanced risk of non-Arab Darfuris in Khartoum that the AIT was able to promptly vary previous Country Guidance in AA (Non-Arab Darfuris- relocation) (Sudan) CG [2009] UKAIT 0056."

25. In my judgment this approach based on the Kerrouche line of reasoning is correct…"

H. MANDALIA v SECRETARY OF STATE FOR THE HOME DEPARTMENT [2015] UKSC 59

36. In UB (Sri Lanka), Irwin LJ made reference to the judgment of Lord Wilson in Mandalia. The appellant in that case made a points-based application for leave as a student. He supplied bank statements disclosing that he had held at least £5,400 for a consecutive period of 22 days, ending no earlier than a month prior to the date of his application. The requirement under the Immigration Rules, however, was for him to have held at least such a sum for a consecutive period of 28 days, ending no earlier than a month prior to the application. The Supreme Court held that the Secretary of State acted unlawfully in refusing the application, without first having invited Mr Mandalia to supply a further bank statement or statements which showed that he had also held at least that sum throughout the six preceding days.

37. The reason for this conclusion was that on 17 June 2011, the Secretary of State had issued a policy known as "PBS Process Instruction: Evidential Flexibility", subsequently published on the UK Border Agency's website, which would, if followed, have given the appellant the opportunity to provide the missing evidence.

38. At paragraph 19 of his judgment, Lord Wilson considered it:-

> "…unfortunate that no reference had been made to the process instruction before the First-tier Tribunal. Mr Mandalia could not be expected to have been aware of it. But, irrespective of whether the specialist judge might reasonably be expected himself to have been aware of it, the Home Office Presenting Officer clearly failed to discharge his duty to draw it to the tribunal's attention as policy of the agency which was at least arguably relevant to Mr Mandalia's appeal: see *AA (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 12 at para 13".

39. At paragraph 29, Lord Wilson explained that, in a case such as Mr Mandalia's, who was "unaware of the policy until after the determination adverse to them was

made", the legal effect of the policy did not depend upon the doctrine of legitimate expectation. Rather:-

> "29. … the applicant's right to the determination of his application in accordance with policy is now generally taken to flow from a principle, no doubt related to the doctrine of legitimate expectation but free-standing, which was best articulated by Laws LJ in *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363, as follows:
>
> > '68 … Where a public authority has issued a promise or adopted a practice which represents how it proposes to act in a given area, the law will require the promise or practice to be honoured unless there is good reason not to do so. What is the principle behind this proposition? It is not far to seek. It is said to be grounded in fairness, and no doubt in general terms that is so. I would prefer to express it rather more broadly as a requirement of good administration, by which public bodies ought to deal straightforwardly and consistently with the public.'
>
> 30. Thus, in *R (Lumba) v Secretary of State for the Home Department (JUSTICE intervening)* [2011] UKSC 12 … (in which this court reversed the decision of the Court of Appeal reported as *R (WL) (Congo)* but without doubting the observation in para 58 for which I have cited the decision in para 29 above), Lord Dyson said simply:
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> > '35. The individual has a basic public law right to have his or her case considered under whatever policy the executive sees fit to adopt provided that the adopted policy is a lawful exercise of the discretion conferred by the statute.'"

I. DISCUSSION

(a) Policies and country information

40. In order to understand the consequences of what Keene LJ said at paragraph 13 of AA (Afghanistan) about the respondent's duty "to put relevant policy material before … a Tribunal to avoid it being misled" – and its approval by Lord Wilson in paragraph 19 of Mandalia – it is important to appreciate the difference between, on the one hand, policies of the respondent in the immigration field and, on the other, purely informational material concerning the situation in the particular country from which an individual has come to the United Kingdom in order to seek international protection. The distinction is important; but its existence has been somewhat obscured in the cases.

(b) The Secretary of State's duties concerning policies

41. A policy of the respondent is, by its nature, a conscious decision on her part to treat those falling within a particular category in a certain way, absent reasons to act differently. Since it is for the respondent to determine whether to formulate a policy and, if so, to set its terms, there can be no question of the respondent not actually knowing about the policy, let alone that she ought to know about it. It is *her* policy.

That is important because it provides the rationale for the statements in the cases that it is irrelevant whether the respondent's policy was publicly available online. By not drawing the tribunal's attention to a relevant policy, the respondent could be said to have breached her "Kerrouche" duty not to mislead. As can be seen from Mandalia, however, the basis of the respondent's duty is broader and, as we shall endeavour to explain, different; namely, to decide cases in accordance with relevant policies.

42. Whether the respondent breaches her duty to reach decisions that are in accordance with her policies will, of course, be fact and context-specific. This will particularly be the position where the respondent's assessment of the facts is such as, in her view, to make the policy immaterial. The respondent's own view of this matter will not, however, necessarily absolve her from the duty of drawing the policy's existence to the attention of an appellate Tribunal. Nevertheless, one can readily see that, in some cases, any connection between the policy and the range of factual conclusions that could be drawn by a Tribunal may be so tenuous as to make it unrealistic to impose any such duty on the respondent.

43. There is nothing in the case law to which our attention has been drawn that places a legal duty on a judge in the Immigration and Asylum Chambers of the First-tier Tribunal or the Upper Tribunal to possess a comprehensive knowledge of each and every policy of the respondent in the immigration field. Despite their expertise, no such judge can be reasonably expected to possess that knowledge. The same can, of course, be said of a Home Office Presenting Officer or advocate instructed by the respondent. The difference, however, is that the Presenting Officer or advocate merely represents the respondent, who for the reasons we have given, has knowledge of the policy and a duty to reach decisions by reference to it.

(c) The nature of the Secretary of State's Country Information and Policy Notes

44. The present appellant's case is predicated on the basis that, because the Country Policy and Information Note Iraq: Security and humanitarian situation (Version 5.0) November 2018 has the word "policy" in its title, each and every piece of the plethora of factual information, drawn from various sources, contained in the "Country Information" part of the document, is material which the respondent had a duty to draw to the attention of the First-tier Tribunal Judge, before the latter completed his written decision; and that, because this did not happen, the judge committed (albeit without any fault on his part) procedural unfairness, such as to vitiate his decision.

45. The November 2018 Note begins with a preface, which contains a statement of the Note's purpose. This is to provide "country of origin information (COI) and analysis of COI for use by Home Office decision makers handling particular types of protection and human rights claims… It is not intended to be an exhaustive survey of a particular subject or theme." The preface states that the note is split into two main sections: (1) analysis and assessment of COI and other evidence; and (2) COI.

46. Unlike the March 2017 Country Policy and Information Note, the preface does not describe the note as providing "policy guidance". Nowhere in the 2018 Note is there any reference to Home Office policy. The assessment section begins with a number of generalised and entirely uncontentious statements of how to apply relevant protection law and principles. There is then an overview, in entirely factual terms, of the humanitarian situation, before one finds, at 2.3.18, the view that "the humanitarian situation is serious, but, according to the UN, no longer one of the most complex and challenging humanitarian emergencies". At 2.3.19, it is stated that "in general, the humanitarian situation is not so severe that a person is likely to face a breach of Articles 15(a) and (b) of the Qualification Directive/Articles 2 and 3 of the ECHR, requiring a grant of Humanitarian Protection … However, decision makers must consider each case on its merits". There are also said to be cases where a combination of circumstances means that a person will face a breach of a relevant provision of the Qualification Directive/ECHR on return. Factors for decision makers to consider are set out.

47. Under the heading "Security situation", reference is made to the country guidance cases of the Upper Tribunal on Iraq, as well as relevant Court of Appeal judgments. At 2.3.35, it is stated that "there are strong grounds supported by cogent evidence to depart from AA's assessment that any areas of Iraq engage the high threshold of Article 15(c)." The passage goes on to say that this does not mean the security situation is no longer serious. Furthermore, at paragraph 2.3.36, even though there are no longer generalised Article 15(c) risks, decision makers are told to consider whether a person has circumstances that might nevertheless place them at such risk.

48. Under the heading "Internal relocation" reference is made to AAH. Several of the country guidance findings of AAH are then referenced.

49. Finally in this section, decision makers are referred to guidance on certification under section 94 of the Nationality, Immigration and Asylum Act 2002.

50. The remainder of the note comprises country information. Each piece of information is referenced as to its source. The sources are, so far as we are aware, all published ones. They do not include materials directly generated by the respondent or by any other arm of the UK government. We have already noted that Mr Caskie's grounds of appeal, on behalf of the appellant, make reference to various pieces of information contained in this part of the note. We have already recorded what is said about the population of the IKR. Mr Caskie's submission that the increase in population "of itself represents a significant obstacle to the appellant's integration" is entirely his interpolation. None of the sources cited in the Note purports to make that point. The same is true of other statistical information in the Note, prayed in aid by Mr Caskie.

51. Although the March 2017 Country Policy and Information Note states in its preface that the note provides "policy guidance", there is, on analysis, no more of a "policy" element in this Note than in the one which followed it in November 2018. In neither case is there anything remotely resembling the kind of policy with which the Court of Appeal was concerned in AA (Afghanistan) or with which the Supreme Court was concerned in Mandalia. In any event, the present appellant does not complain about

any alleged failure of the respondent to follow a policy articulated in the Note. He is concerned with the alleged failure of the respondent to draw the country information to the attention of the First-tier Tribunal Judge.

(d) The "Kerrouche" duty of disclosure

52. Although, as we have seen, it has been prayed in aid in case law concerning policies, the true significance of the "Kerrouche" duty not to mislead lies in its relationship with the law of disclosure. "Kerrouche" and the House of Lords case of Abdi and Gawe, upon which it drew, concerned the unsuccessful attempt to import into asylum proceedings the principles of disclosure in civil litigation whereby a party can, in particular, be required to disclose to another party documents in the former's possession upon which he relies or which adversely affect his case. From this, "Kerrouche" has fashioned the narrow but nevertheless important duty not to mislead. Its origins in the law of disclosure mean that the duty involves informing the other party about documents etc that the respondent knows (or ought to know) she has in her possession or control, which the other party does not have; or to which the other party does not otherwise have access. It does not extend to documents that are in the public domain. So much is, in our view, plain from the judgment of Laws LJ in CM (paragraph 35 above).

(e) The true scope of UB (Sri Lanka)

53. We now need to return to UB (Sri Lanka). As we have seen, the Court of Appeal was concerned with the Sri Lanka "policy guidance and conjoined Country of Origin Information ['COI'], published on the Home Office website on 28 August 2014 and entitled '*Tamil Separatism*'" (paragraph 3 of the judgment).

54. The significant information, described by Irwin LJ as being annexed to the Guidance, comprised two letters from the British High Commission in Sri Lanka. Irwin LJ described this material as "authoritative" (paragraph 12). The first High Commission letter referred to one of the organisations proscribed by the Sri Lankan government as the TGTE. The second letter referred to a spokesperson for the Sri Lankan authorities as stating that returnees may be questioned on arrival about whether they had been involved with one or more Tamil Diaspora groups and that it was normal practice for returnees to be asked about their activities in the country from which they were returning.

55. The fact that this information came from the British High Commission was plainly regarded by the Court of Appeal as significant. The information clearly and specifically related to the TGTE. It suggested on its face that someone who had been a member of the TGTE could, as such, face serious problems on return to Sri Lanka.

56. On one view, therefore, the material in question fell within the category, identified in Kerrouche, of material that detracted from the Secretary of State's case and, conversely, supported the appellant's case. It was, however, in the public domain.

The respondent had put it there, by placing it on her website. If we are correct about our analysis of the true ambit of the "Kerrouche" duty, this meant that the duty did not apply. What, then, led the Court of Appeal to conclude as it did? The answer lies in the fact that, by choosing to place the government's own private communications from its High Commission on the website, the respondent had decided to treat them as authoritative and make them part of her policy on assessing claims to international protection made by Sri Lankan nationals. As aspects of her policy, it became the respondent's duty – as explained by the Supreme Court in Mandalia - to draw them to the attention of the First-tier Tribunal Judge, even though the appellant could have done so.

57. We have seen above that the information in the Iraq COI, relied upon by Mr Caskie, does not have the requisite policy element. Any contention that the respondent must take a policy decision to include each and every piece of country information in the COI, is met by the fact that the gathering of information from published sources is an exercise in collation (albeit one requiring skill and elements of judgment). In other words, the presence of the British High Commission letters in the Sri Lanka COI came about because the respondent's decision to release them was driven by the policy considerations described in paragraph 56 above.

58. That this must be the correct interpretation of UB (Sri Lanka) is reinforced by a consideration of the frankly remarkable consequences for protection appeals, if the present appellant is right.

59. Section 107(3)(a) of the Nationality, Immigration and Asylum Act 2002 provides that Practice Directions may require the First-tier Tribunal or the Upper Tribunal to treat a specified decision of the Upper Tribunal as authoritative in respect of a particular matter. Practice Direction 12.2 provides as follows:-

> "12.2 A reported determination of the Tribunal … bearing the letters 'CG' shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal … that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later 'CG' determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:
>
> (a) relates to the country guidance issue in question; and
> (b) depends upon the same or similar evidence".

60. As we have already seen, the First-tier Tribunal Judge followed the country guidance in AAH, as it bore upon the appellant's case. The country information collated in the March 2017 Country Policy and Information Note pre-dated the Upper Tribunal's analysis and findings in AAH. The November 2018 Country Policy and Information Note, on the other hand, paid full regard to the country guidance in AAH. None of the country information material cited in the November Note even begins to disclose a matter which could be said to have required the First-tier Tribunal Judge to depart from the country guidance in AAH, in favour of the appellant.

61. An acceptance of the appellant's interpretation of UB (Sri Lanka) would render it difficult or, indeed, impossible for the First-tier Tribunal to decide protection appeals; at least, in respect of countries such as Iraq, where country conditions can be complex and dynamic. The mere fact that the respondent's country of origin information officials are involved in the ongoing exercise of compiling country information from external sources would, according to the appellant, mean that no judge could safely write a decision, based upon the evidence put before them, because further information about that country might have been acquired by the respondent just before or even after that hearing. The respondent would have a duty to draw this material to the attention of the Tribunal, even if the appellant could do so. Despite what Irwin LJ said at paragraph 22 of UB (Sri Lanka) (see paragraphs 26 and 27 above), onward challenges would routinely involve belated factual examinations of the material, in order to determine whether any of it might have made a difference to the outcome of the First-tier Tribunal Judge's decision. Indeed, as can be seen from the following paragraphs, that is what we have had to do in the present case.

(f) The appellant's reliance on the COIs

62. As we have already explained, the country information part of the Note is an overview, taken from third party sources whose reporting dates are given in footnotes. Mr Caskie's grounds disclose nothing of any material significance. They involve the laborious accretion of statistical details, in an attempt to build a picture of the KRG that is at variance with what the First-tier Tribunal Judge found.

63. Not only is Mr Caskie's attempt conceptually incapable of demonstrating any legal error on the part of the First-tier Tribunal Judge; it is, on its own terms, inaccurate. The assertion that the population of the IKR has grown by 30% over a period of less than two years is, in fact, not borne out by a comparison of the table at 4.1.2 of the March 2017 Country Policy and Information Note with the table at 3.1.2 of the November 2018 Note. The former table gives figures for "Population (2009 estimate)". The latter table purports to be a "population projection calculated according to numbering and listing results 2009". Be that as it may, the populations of each of the governorates in Iraq (excluding the IKR) are also, in the main, larger in the second table than in the first.

64. An examination of the remainder of the grounds exposes similar issues. For example, paragraph 8 refers to paragraph 6.2.1 of the November 2018 document as indicating an internally displaced population of 1,500,000 in Iraq, as at February 2018. However, the March 2017 Country Policy and Information Note states that, as at December 2016, there were 3,100,000 currently displaced persons in Iraq; a far higher figure. In terms of numbers, therefore (which is what Mr Caskie relies on), the position has, in fact, markedly improved.

65. All this is, in effect, acknowledged in paragraph 17 of the appellant's petition to the Court of Session, which describes the November 2019 note as "similar" to the "earlier version" of March 2017.

66. Accordingly, even if we were wrong in our interpretation of UB (Sri Lanka), the appellant fails in any event. We are, however, fully satisfied for the reasons we have given that our interpretation is correct.

67. It may be helpful to summarise our conclusions on the relevant legal principles:

    (a) The respondent has a duty to reach decisions that are in accordance with her policies in the immigration field. Where there appears to be a policy that is not otherwise apparent and which may throw doubt on the respondent's case before the tribunal, she is under a duty to make a relevant policy known to the Tribunal, whether or not the policy is published and so available in the public domain. Despite their expertise, judges in the Immigration and Asylum Chambers cannot reasonably be expected to possess comprehensive knowledge of each and every policy of the respondent in the immigration field.

    (b) In protection appeals (and probably in other kinds of immigration appeal), the respondent has a duty not to mislead, by failing to draw attention to documents etc under her control or in the possession of another government department, which are not in the public domain, and which she knows or ought to know undermine or qualify her case.

    (c) The fact that country information is contained in a COI does not, without more, make that information subject to the duty in sub-paragraph (a) above.

Decision

The decision of the First-tier Tribunal Judge does not contain an error on a point of law. The appeal is, accordingly, dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) 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 him or any member of his 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.

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber