Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/13599/2019**

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons**
Remotely by Microsoft Teams	**Promulgated**
On 25 November 2021	**On 09 December 2021**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

HEMAN JAMAL QUADER

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Schwenk instructed by Freedom Solicitors
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Iraq who was born on 1 December 1977. He arrived in the United Kingdom on 27 January 2009 clandestinely. He claimed asylum but that claim was refused on 16 March 2009 and he unsuccessfully appealed, becoming appeal rights exhausted on 26 April 2010.

2. On 10 October 2011, further submissions were made on his behalf but these were rejected under para 353 of the Immigration Rules (HC 395) on 18 October 2011.

3. On 4 July 2012, the appellant was granted three years' discretionary leave valid until 3 July 2015.

4. On 15 June 2015, the appellant made an application for further leave to remain and, on 26 February 2016, the appellant was granted a further period of three years' discretionary leave valid until 25 February 2019.

5. On 12 February 2019, the appellant made an application for further leave and also a human rights claim.

6. On 25 July 2019, the Secretary of State refused the appellant's claim for further leave under the Immigration Rules and under Art 8.

7. The appellant appealed to the First-tier Tribunal. In a determination sent on 13 February 2020, Judge Andrew dismissed the appellant's appeal on all grounds.

8. The appellant sought permission to appeal to the Upper Tribunal. On 30 January 2021, the First-tier Tribunal (Judge O'Keeffe) refused the appellant's application. However, on renewal, the Upper Tribunal (UTJ Stephen Smith) granted the appellant permission to appeal on the three grounds upon which permission to appeal was sought. The grounds challenge the judge's finding that the appellant would have, or could obtain a replacement, CSID either in the UK at the Iraqi Embassy or on return to his home area, Kirkuk.

9. The appeal was listed for hearing at the Cardiff Civil Justice Centre on 25 November 2021. I was present in court whilst Mr Schwenk, who represented the appellant, and Mr Tan, who represented the respondent, joined the hearing remotely by Microsoft Teams. The appellant also attended remotely.

10. I heard oral submissions from Mr Schwenk who adopted the grounds and invited me to find that the judge had erred in law in reaching her adverse finding in relation to the appellant having, or being able to obtain, a CSID either in the UK or on return to Iraq. In particular, he relied on the fact that the judge had taken into account that the appellant would know the relevant volume and page number in the family register applying [391] of SMO and Others (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC). Mr Schwenk pointed out that the Court of Appeal had, by consent, set aside the country guidance in SMO and Others at [391] as unsustainable in law and remitted the appeal to the Upper Tribunal to reconsider that issue. He submitted that in reaching her finding the judge had, therefore, also erred in law in concluding that the appellant would be able to obtain a replacement CSID. In addition, he submitted that the judge had failed properly to consider the appellant's circumstances in Kirkuk applying the country guidance in SMO and Others, in particular all the factual circumstances given that the appellant was Kurdish as set out in headnote (13).

11. Having heard Mr Schwenk's submissions, Mr Tan conceded that the judge's decision should be set aside on the basis of error of law. He accepted that the judge had erred in law in concluding that the appellant did not succeed in his human rights claim whether under Art 8 or Art 3 of the ECHR. However, he invited me to preserve the judge's finding in para 20 that the appellant, as a result of his criminal conviction in 2007 for sexual assault could not meet the "suitability" requirement in S-LTR.1.5 on the basis that his presence was "not conducive to the public good" because his "offending has caused serious harm". Subject to that, Mr Tan accepted that the judge should, on remittal, make fresh findings of fact based upon the evidence presented.

12. Mr Schwenk agreed that the appeal should be remitted to the First-tier Tribunal on that basis. However, he indicated that the appellant might again seek the respondent's consent under s.85(5) of the Nationality, Immigration and Asylum Act 2002 in order to raise a "new matter" relating to the appellant's relationship with his former partner and children which, before Judge Andrew, the respondent had refused consent (see para 6 of the decision). Mr Tan acknowledged that the appellant was entitled to raise this issue again at the remitted First-tier Tribunal hearing.

13. I agree with Mr Tan's concession that the judge's decision is unsustainable in law. Her reliance upon [391] in SMO and Others, though appropriate at the time of her decision, in retrospect gave rise to a legal error as the country guidance was legally flawed (see OM (*AA*(1) wrong in law) Zimbabwe CG [2006] UKAIT 0077). Further, I am satisfied that the judge failed properly to consider the country guidance in SMO and Others in assessing the appellant's circumstances on return to Kirkuk. I am satisfied that the judge erred in law, for the reasons set out in the appellant's grounds and developed in Mr Schwenk's submissions, in concluding that the appellant would, on return to Iraq, have (or be able to obtain) a CSID. For these reasons, therefore, the judge erred in law and her decision cannot stand.

Decision

14. The decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. That decision cannot stand and is set aside.

15. Given the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal (by a judge other than Judge Andrew) in order to make a fresh decision in relation to the appellant's human rights claims under Arts 8 and 3 of the ECHR. In re-making the decision, the judge's finding in relation to 'suitability' in para 20 of her determination is preserved. Otherwise, no findings are preserved.

Signed

Andrew Grubb

Judge of the Upper Tribunal
1 December 2021