Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09209/2019**

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Monday 14 February 2022	**On Tuesday 29 March 2022**

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

FMA (IRAQ)

Appellant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Michael Brooks, counsel instructed by Legal Justice Solicitors
For the Respondent: Mr Esen Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

ANONYMITY ORDER

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Tribunal ORDERS that no one shall publish or reveal the name or address of the Appellant or any information which would be likely to lead to the identification of him or of any member of his family in connection with these proceedings.

Any failure to comply with this order could give rise to proceedings for contempt of court.

1. The Appellant is a citizen of Iraq, of Kurdish ethnicity, from Kirkuk. He appeals against the decision of the First-tier Tribunal promulgated on 2 March 2021, which dismissed his appeal against the Respondent's refusal of his human rights claim dated 4 April 2019.

2. At a case management hearing on 26 June 2020, before First-tier Judge O'Brien, the appellant's representatives agreed (among other things) that:

    a. the Respondent's refusal letter of 4 April 2019 contained only a refusal of a human rights claim and no refusal of any protection claim, and therefore only human rights grounds were available to the appellant in the appeal; and

    b. the Appellant was not relying on any 'very compelling circumstances' in support of his claim that deportation would violate his Article 8 ECHR rights.

3. Mr Brooks confirmed at the hearing that this was also his understanding. We are seised of Article 3 ECHR only to the limited extent that, applying the country guidance in *SMO, KSP and IM* (Article 15(c); Identification documents Iraq CG) [2019] UKUT 00400, if the appellant can satisfy the Tribunal that he cannot access a CSID or INID, there is an Article 3 risk to him in travelling internally within Iraq to reach his home area of Kirkuk.

4. **Mode of hearing.** The hearing today took place remotely by Microsoft Teams. We are satisfied that all parties were in a quiet and private place and that the hearing was completed fairly, with the cooperation of both representatives. At one point Mr Tufan had a technical issue and dropped out of the hearing. We paused the hearing immediately until he had reconnected and no unfairness was caused.

Background

5. The Appellant arrived in the UK in 2002, without leave to enter or remain, and claimed asylum on arrival. He was 19 years old and an adult. His 2002 international protection claim was refused by the Respondent and he did not appeal. He did not embark for Iraq, remaining unlawfully in the UK.

6. The Appellant has committed a number of criminal offences here. His first conviction, on 18 November 2004, when he was 21, was for having a bladed article in a public place.

7. The Appellant was then convicted of a number of motoring offences on two occasions in 2007 and 2008: on both occasions, he drove a vehicle uninsured and without a driving licence, on the second occasion also without an MOT test certificate for the car he drove. He received fines for both offences, and on the second occasion, a community order for resisting or obstructing a constable in the execution of his duty.

8. On 6 November 2009, the Appellant was convicted of the index offence, dangerous driving with alcohol level above the legal limit, using a vehicle

without insurance, driving without a licence, and using a vehicle with a defective tyre.

9. As recorded in HHJ Mooncey's sentencing remarks, the Appellant was driving at night, while tired and having been drinking (and, it follows from his convictions, without insurance or a licence) and caused a serious accident with a motorcyclist. As a result of the accident that motorcyclist (who was driving properly) has had to have his right leg amputated and has suffered a degree of brain damage. Self-evidently, these are life-changing injuries. For these offences, the Appellant was sentenced to 18 months imprisonment.

10. On 9 March 2010, the Respondent notified the Appellant that he was liable to deportation as a result of the November 2009 conviction. After having considered the Appellant's representations, the Respondent decided to make a deportation order in respect of the Appellant. The deportation order is dated 28 January 2011.

Devaseelan **starting point**

11. The Appellant appealed against his deportation order and that appeal came before First-tier Tribunal Judge Saffer on 28 April 2011. Judge Saffer dismissed the appeal ('the Saffer decision') and the appellant did not challenge that decision. The appellant was appeal rights exhausted in relation to the Saffer decision on 17 May 2011, but did not embark for Iraq, again remaining in the UK without leave.

12. The Saffer decision in 2011 is the *Devaseelan* starting point for any later decision by the First-tier Tribunal. The appeal was rejected both under the Refugee Convention and on human rights grounds. He took account of the appellant's relationship with his partner (they had no children yet) but did not consider that outweighed the public interest in removal.

13. Judge Saffer found the core of the appellant's account to lack credibility. He accepted that the Appellant was in a relationship with his British citizen partner, that they had been together since 2005 and had undergone an Islamic marriage ceremony in 2007. He accepted that she could not be expected to go and live in Iraq as 'a white English non-Muslim', although it is not clear how he reconciled that with his acceptance that the appellant's partner had undergone an Islamic marriage ceremony with him.

14. The following claimed facts and matters were rejected as not credible:

    i. That the appellant's siblings and/or mother had died;

    ii. That he did not have close family in Iraq to return to and would be unable to be met by or housed by them; and/or

    iii. That he would be at risk in Iraq either as a result of his family's alleged connections to the Ba'ath party, or as a result of anti-government leaflets allegedly having been found in his car in 2002.

15. Removal directions were set for 21 June 2011. Following an injunction granted by Mr Justice Bean (as he then was) in the Administrative Court, no removals occurred on that flight and the appellant remained in the UK. There has been no further attempt to remove him to Iraq.

The 2011 further submissions

16. On 28 July 2011 and 24 October 2011, the Appellant submitted further evidence and submissions pursuant to paragraph 353 of the Immigration Rules HC 395 (as amended). He argued that to return him to Iraq would breach the UK's international obligations under Articles 2 and 3 ECHR, alternatively that he was entitled to humanitarian protection. He relied on additional documents to show that risk.

17. On 28 March 2012, the Respondent refused to revoke the deportation order in light of these submissions and evidence, and certified his new claim as clearly unfounded. The appellant did not challenge that decision. The international protection question is therefore settled, save for the documentation issue identified in *SMO and others.*

Article 8 private and family life

18. In July 2017, the Appellant and his partner had their first child.

19. On 25 September 2017, the Appellant pleaded guilty to possession of a large quantity of heroin, with intent to supply. For this he was sentenced to 3½ years' imprisonment.

20. On 22 October 2017, the Appellant completed a prison induction during which he said that he was still in a relationship with his partner and that they had had a child together. This was treated as a new human rights claim by the Respondent. However, on 4 April 2019, the respondent refused his human rights claim.

21. The Appellant appealed to the First-tier Tribunal against the 4 April 2019 refusal of his human rights claim, in relation to his partner and child (now children). In July 2020, the Appellant and his partner had a second child.

First-tier Tribunal hearing

22. The Appellant's substantive appeal came before First-tier Judge Robertson on 3 February 2021 and was dismissed. It does not appear that the question of whether the Appellant's reliance on his family life with his second child was a 'new matter' within the meaning of s.85(6) of the Nationality, Immigration and Asylum Act 2002 was considered by the Judge or the parties at the hearing on 3 February 2021. This is a jurisdictional issue: see *Mahmud (s.85 NIAA 2002 – "new matters")* [2017] UKUT 488 (IAC).

23. It is clear from Judge Robertson's decision that the respondent made submissions on the appellant's family life with his second child. Mr Tufan accepted that this was sufficient to indicate that the respondent had given

her consent to the new matter being considered by the Tribunal. The effect of such consent is that the Tribunal had jurisdiction to consider the new matter, and we therefore need say no more about it.

Permission to appeal

24. The appellant advanced four grounds of appeal:

    a. Ground 1 – Failure to consider Article 3 / Refugee Convention

    b. Ground 2 – Failure properly to apply relevant Country Guidance

    c. Ground 3 – Failure properly to consider the 'very compelling circumstances' test; and

    d. Ground 4 – Wrong test applied in relation to cultural integration.

25. On 16 August 2021 First-tier Judge Campbell granted permission to appeal to the Upper Tribunal, as follows:

> "2. In the grounds, it is contended that the judge failed to consider of decide the appellant's case that return to Iraq [would] be contrary to Article 3 of the Human Rights Convention or the Refugee Convention. In approaching the Exceptions set out in section 33 of the [UK Borders Act 2007], the [appellant contends that] the judge failed to apply the lower standard of proof and failed to reach a conclusion in relation to risk on return.
>
> 3. This ground is arguable. The judge's self-direction on the burden and standard of proof is at paragraph 10 of the decision, and mention is made only of the civil standard. The focus of the decision is on the appellant's Article 8 case, as is clear from paragraph 6 of the decision. At paragraph 12(x), however, the assertion that the family would not be safe on return is recorded, and at paragraph 16, the judge summarises the submissions made by the appellant's Counsel, including express mention of an Article 3 risk. The judge records the Article 3 case again at paragraph 32 of the decision, and there is a conclusion reached at paragraph 35, that the appellant would be able to obtain identity documents and travel to his home area or relocate. The absence of a self-direction on the lower standard of proof makes it arguable that the inferential dismissal of the Article 3 case may be flawed.
>
> 4. This and the other grounds of appeal may be argued. "

26. In granting permission, Judge Campbell did not take account of the concession by the appellant's representatives before Judge O'Brien at the case management review, at the First-tier Tribunal hearing that the appeal sounded only in human rights, nor that 'very exceptional circumstances' were not relied upon.

Rule 24 Reply

27. On 21 September 2021, the respondent filed a Rule 24 Reply. She argued that the First-tier Tribunal was determining an Article 8 case, not a protection appeal. Article 3 had been dealt with in the decision, and the application of a lower standard of proof would not have availed the appellant.

28. The respondent accepted that there was no specific reference to the standard of proof in the decision, but that did not mean that the judge had not applied it. the judge would have been well aware of the applicable lower standard of proof, even if not mentioned.

29. The respondent contended that the country guidance in *SMO and others* had been used not to consider a free standing international protection claim, but rather to establish whether it would be unduly harsh for the appellant's partner and child to live with him in Iraq, and whether he would be able to reintegrate without significant difficulty on return.

30. That is the basis on which this appeal comes before the Upper Tribunal today.

Error of law hearing

31. The Upper Tribunal can only set aside a decision of the First-tier Tribunal where that decision involved the making of an error of law. However, where an error is not material, in that the decision-maker would have necessarily reached the same conclusion if the error of law had not been made, the Upper Tribunal will not generally exercise its power to do so.

32. We heard oral submissions from both representatives which are recorded in the Record of Proceedings and need not be set out at length here. We reserved our decision, which we now give.

33. **Grounds 1 and 2.** Mr Brooks accepted that these grounds would stand or fall together. In relation to the assertion that Article 3 and/or the Refugee Convention were not considered properly, or at all, as already stated, Mr Brooks conceded that there was no international protection claim before the First-tier Tribunal. Given that the Refugee Convention and Article 3 claim had been rejected comprehensively in the decision of First-tier Judge Saffer, he was right to do so.

34. We remind ourselves of the narrow circumstances in which it is appropriate to interfere with a finding of fact by a First-tier Judge who has heard the parties give oral evidence: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296 and *R (Iran) & Others v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [90] in the judgment of Lord Justice Brooke, with whom Lord Justice Chadwick and Lord Justice Maurice Kay agreed.

35. The only point before the Upper Tribunal in relation to Article 3 ECHR was the assertion that the appellant cannot obtain a CSID before, or shortly after, returning to Iraq, which would put him at risk, whatever the credibility

of his general account. The appellant adduced no evidence which, to any standard, would have enabled the First-tier Tribunal to go behind the Saffer decision that he does have family members alive and well in Iraq who could help him obtain a replacement document.

36. The assertion that the judge erred in finding that the appellant would be able to obtain a CSID before returning to Iraq, or shortly after his return, is without arguable merit: the judge's consideration of the CSID issue at paragraphs 32-36 takes the Saffer decision as its starting point and considers all relevant evidence and matters properly. The finding of fact at paragraph 35 was open to the judge on the evidence and submissions before him.

37. That finding is also dispositive of ground 2 as advanced, since the failure properly to apply *SMO and others* was argued as a challenge to the First-tier Judge's finding that the appellant will be able to obtain a replacement CSID card.

38. **Ground 3**. This ground is misplaced. Mr Brooks accepted that it had been agreed at the case management review before Judge O'Brien that the appellant was not relying on 'very exceptional circumstances' in these proceedings. It cannot be a material error of law for the judge not to determine issues of which he was expressly not seized.

39. **Ground 4.** That leaves Ground 4, in which the appellant contends that the judge applied the wrong test for cultural integration. It is of course right that the appellant has lived in the UK unlawfully for over 18 years and now has a partner and two small children, all British citizens. It is also right that the First-tier Judge mis-stated the test as one of 'significant cultural integration' rather than 'social and cultural integration'.

40. The appellant contends that the judge applied too high a test, failed to give proper weight to his integration here, and that social integration is not considered at all. The strongest argument advanced by Mr Brooks in this respect was that the appellant has a family, and has been offence free since 2017. However, he was in prison for much of that time and on licence until April 2021. Beyond his relationship with his partner and children, there is no evidence of social integration, or of any cultural contribution by this appellant to the community in which he lives. We are satisfied that at paragraph 36, First-tier Judge Robertson reached conclusions which were not only open to him, but inevitable given the factual basis on which the question of integration fell to be considered in this case.

41. These grounds of appeal do not disclose any material error of law in the First-tier Tribunal decision, which we uphold.

DECISION

42. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of no error on a point of law

We do not set aside the decision but order that it shall stand.

Signed: P.R. Skinner

Deputy Upper Tribunal Judge Skinner

Dated: 15 March 2022