IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004591
First-tier Tribunal No: PA/54435/2021
IA/13329/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 21 May 2023

Before

UPPER TRIBUNAL JUDGE REEDS

Between

RMW
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr F. Ahmad Counsel instructed on behalf of the appellant.
For the Respondent : Ms Young, Senior Presenting Officer

Heard at Phoenix House (Bradford) on 29 March 2023

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal (hereinafter referred to as the "FtTJ") who dismissed the appellant's protection and human rights appeal in a decision promulgated on the 29 July 2022.

2. Anonymity had been granted by the FTT and was granted because the facts of the appeal involved a protection claim. Neither party applied for or made any submissions that the order should not continue. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

3. Permission to appeal the decision of the FtTJ was sought and on 27 September 2022 permission was granted by FtTJ Eliot.

© CROWN COPYRIGHT 2023

4. The background to the appeal is set out in the decision of the FtTJ, the decision letter and the bundles provided. The appellant is a national of Iraq of Kurdish ethnicity. He arrived in the United Kingdom on 8 November 2018 and made a claim for asylum. His claim was refused on 20 September 2019 and the appellant appealed that decision. His appeal was heard by FtTJ O'Hanlon, who in a decision promulgated on 11 December 2019 dismissed his appeal. FtTJ O'Hanlon rejected the core of the appellant's account that he would be at risk of persecution or serious harm on return to as result of his relationship with a woman who had visited him in Iraq. The FtTJ in his decision gave reasons why he rejected the appellant's account that he was arrested, detained and ill-treated by the Asayish.

5. The FtTJ dismissed the appeal. On the 3 November 2020, the appellant made further submissions to the respondent based on the claimed lack of availability of documentation (CSID) and that he had engaged in " sur place "political activity in the United Kingdom which he stated would lead to a real risk of persecution or serious harm on return to Iraq. The respondent refused his fresh claim in a decision dated 21 September 2021.

6. The appellant appealed that decision. In a decision promulgated on the 29 July 2022, the FtTJ dismissed his appeal against the respondent's decision. When dealing with the core of his account, whilst the FtTJ found that the appellant had become generally politically aware and active whilst in United Kingdom and therefore had demonstrated involvement in sur place activity, it was not satisfied that the appellant had or was likely to have any profile which would mean he would be at risk of serious harm persecution on return to Iraq.

7. The appellant sought permission to appeal which was granted by FtTJ Elliot on 27 September 2022.

8. At the hearing before the Upper Tribunal, Mr Ahmad of Counsel appeared on behalf of the appellant and Ms Young, Senior Presenting Officer appeared on behalf of the respondent. Mr Ahmad relied upon the written grounds and supplemented them with his oral submissions. Ms Young on behalf of the respondent made submissions in reply. I intend to consider the grounds by reference to the parties submissions.

9. There are 9 grounds of challenge. I begin with grounds 3 and 4 as they are linked and are general grounds. It is asserted on behalf of the appellant that the FtTJ applied a higher standard of proof to the overall assessment of the appellant's political activity as the sentence starts "on balance" which is the civil standard of proof. Mr Ahmad on behalf of the appellant submitted that the reference to "on balance" continued with the rest of paragraph 25 and the judge did not correctly state or apply the "reasonable degree of likelihood". In support of the submission Mr Ahmad relied upon the decision in MAH (Egypt) v SSHD [2023] EWCA Civ 216. The Court of Appeal considered the standard of proof in asylum cases between paragraphs 49 – 56. In those paragraphs reference is made to what is commonly known as the "lower standard of proof" and the complaint made was that nowhere in the UT's judgement did the UT set out what the lower standard of proof was although using that phrase many times (see paragraph 49). The Court of Appeal made the point that setting it out expressly can be a helpful discipline as it operates as a constant reminder of precisely what question the tribunal has

to determine. At paragraph 50 various formulations including "a real risk" were set out.

10. Having considered the submissions of the parties, there is no error of law in the way ground 3 asserts. When looking at the decision of the FtTJ his self-direction on the law on this point is set out at paragraph 13 and is consistent with the formulation of the Court of Appeal as set out at paragraph 50. Furthermore as Miss Young submits it is important to look at where the phrase "on balance" is used in the context of the FtTJ's consideration of whether he found the appellant to have become generally politically aware and that it came after having considered the timing of when he had become politically aware (see (a) and (b) as against (d) and (e). On any reading of the decision, the reference to "on balance" is not carried out to the decision, and there are also references in the decision to "real risk" and at paragraph 27 "reasonable degree of likelihood". It is difficult to see any material error by using the words "on balance" when it operated in favour of the appellant. Ground 3 is not made out.

11. Ground 4 relates to the assessment of credibility of the appellant and asserts that the FtTJ held against the appellant for engaging in political activities after the earlier decision and further submitted that was an incorrect approach and contrary to the decision in Danian v SSHD [1999]EWCA Civ 3000. Reference is made to the appellant being politically active previously. However that ground fails to take into account the FtTJ's decision when read as a whole . The FtTJ plainly accepted that the appellant had originally stated that he had supported the Goran party when in Iraq (see (e)). Whilst the FtTJ found that he became politically active after the decision to refuse his previous claim, the FtTJ found that he had become genuinely politically aware and active whilst in the United Kingdom and had developed an interest and therefore any reference made at paragraph 25 (a) did not apply to the appellant as the FtTJ found that he held genuine political opinion or views. Ground 4 is not made out.

12. Against that background it is convenient to consider grounds 5, 6 and 8 together as they consider the issue of the assessment of the evidence of risk of harm. Ground 5 concerns the evidence of the threats made against the appellant, ground 6 refers to the profile of the perpetrators of the threats and links to ground 8 which refers to issues of sufficiency protection and/or internal relocation.

13. When considering ground 5, it is argued on behalf of the appellant that whilst the FtTJ accepted the threats had been made when assessing risk and that there was no requirement for the threats to be recent. Mr Ahmad relied upon paragraph 339K of the Immigration Rules. He submits that there is no requirement for a history of threats but the fact that they are made is sufficient. It is further submitted that the FtTJ's assessment that "threats are common" at paragraph 24 (b) was not based on any evidence or any objective evidence to show that there were so commonplace. Ms Young on behalf of the respondent accepts that there is no requirement threats to be given over a period of time and that it could be seen as a reflection of risk on return and that it was open to the FtTJ to consider the absence of other threats as a relevant factor. She further submitted that it was open to the FtTJ consider whether the threats were genuine or not.

14. Having considered the respective submissions I am satisfied that there is an error in the approach concerning the evidence of the threats. The background evidence to the issue is set out as follows. The judge accepted the appellant's evidence that since he had been in the UK he had become politically aware and

active and developed an interest in posting material critical of the KDP and the PUK (see paragraph 25). He described a "substantial amount of Facebook material," alongside attendance at demonstrations, and an interview broadcast on the NRT channel. The FtTJ was satisfied that the appellant to be genuinely politically active in expressing his political beliefs. It was as a result of that activity that the appellant claimed that he had received threats.

15. When looking at the threats they are described at paragraph 21 (s) and (x). The appellant received threats in August 2020, October 2020 which would have been approximately 18 months at the time of the hearing. However the appellant had also received recent threats in June 2022, a month before the hearing. The threats were described as being of a threatening nature commenting on the appellant's political views, his TV appearance and threatened him with violence because of his criticisms of the KTP and the PUK. The appellant gave evidence the profile of the men who we believe made the threats to him. Whilst the FtTJ accepted that threats be made he found that because only 2 people had made them and based on their age they were limited in scope that such threats were common as a reality of social media.

16. I accept the submission made on behalf of the appellant that the FtTJ erred in judging the risk to the appellant simply on the basis of the age of those threats. The nature of those threats and subsequent risk did not have to be determined by their age but what was said in them and also how those threats had materialised. On the appellant's evidence that occurred due to his adverse political views that he had expressed and had been viewed in Iraq. In fact there were more recent threats made in June 2022 shortly before the hearing (see paragraph 21(s) and (x)). Whilst the judge in essence discounted the threats as not genuine, this was on the basis of threatening messages being "relatively common." It is not explained on what evidence that finding was made other than a general view as to social media. That may or may not be the position in the UK but there was no reference to the circumstances pertaining to Iraq or particularly the IKR.

17. This leads to ground 6 which is in reality part of ground 5 which challenges the risk assessment as flawed based on the profile of those making the threats. The FtTJ accepted threats had been made. As to the identity of those who had made threats whilst the FtTJ did not find that they were "state actors" on the basis that there was no significant evidence that the individuals had a role in government, the judge accepted that they may be affiliated with the KDP and the PUK. The appellant had given a description of the men at paragraph 21 (w).

18. Whilst there may not have been "state actors" in the sense that the judge was not satisfied that they had any particular role, his acceptance that threats had been made by those who were affiliated or connected to the Kurdish political parties brought them within the scope of "non-state actors" and therefore the issue of whether the state could offer sufficiency protection (and if necessary the issue of internal relocation) was a live issue. Ground 8 refers to that point.

19. For those reasons grounds 5,6, and 8 are made out. It is not necessary to reach a view on the other grounds as the conclusions on grounds 5,6 and 8 are sufficient to set aside the decision as they concern the core issue of risk on return. Given the nature of the factual nature of the appeal, it is likely that further factual findings will be required on the evidence and an assessment of risk in accordance with those findings and by reference to the background evidence and any updated evidence as to sur place activity. There has been no dispute

between the parties that the FtTJ found the appellant to have become generally politically aware and active whilst in the United Kingdom (see paragraph 25) and therefore that finding is preserved. The factual findings made by Judge O'Hanlon remain as the starting point applying the decision in Devaseelan. Beyond that I do not preserve any other findings as I conclude to do so will be most likely not to assist a fair overall assessment of the evidence as a whole.

20. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal."

21. I have considered the submissions of the advocates. Mr Ahmad submitted that the appeal should be remitted to the FtT and Ms Young had no strong view other than it would depend on the error. I have considered the issue in the light of the practice statement recited and the recent decision of the Court of Appeal in AEB v SSHD [2022] EWCA Civ 1512. As to the remaking of the decision and having heard from the advocates I am satisfied that in light of the fact findings which will be necessary, the appeal falls within paragraph 7.2 (b) of the practice statement. I therefore remit the appeal to the First-tier Tribunal for that hearing to take place.

Notice of Decision

22. The decision of the FtT is set aside and shall be remitted to the FtT for rehearing.

Upper Tribunal Judge Reeds
Upper Tribunal Judge Reeds

19 May 2023