IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-000862

First-tier Tribunal No: HU/53107/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 26 May 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Qadr Abdullah Rasull
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr F Aziz of Lei Dat & Baig
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard by remote video at Field House on 10 May 2023

DECISION AND REASONS

1. The appellant, a citizen of Iraq of Kurdish ethnicity, has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Alis) following the First-tier Tribunal appeal hearing on 1.12.21, dismissing the appeal on all grounds.

2. In summary, the grounds assert (i) undue focus on the previous determination without proper consideration of the evidence before the Tribunal (including new evidence from the appellant's wife and former employer) and without reasonable explanation for dismissal of that evidence; (ii) application of the incorrect test in relation to the CSID card; (iii) failure to take into account the appellant's explanation as to loss of his CSID and failure to provide adequate reasons.

3. In granting permission on 27.4.22, Upper Tribunal Judge Hanson considered it arguable that the judge's failure to properly consider the new evidence was not in accordance with Secretary of State v Patel [2022] EWCA Civ 36, which held that

whilst the findings of an earlier Tribunal will be an important starting point, the second judge cannot avoid the obligation to address the merits of the case on the evidence then available. However, the second judge will necessarily look for a very good reason to depart from the earlier findings. Whether the evidence could have been adduced at the previous hearing may be relevant to that issue. Equally, a very good reason may be that the new evidence is so cogent and compelling as to justify different findings. Judge Hanson observed, "The judge's finding they were not there simply to relitigate these proceedings is arguably erroneous if the circumstances justify such an approach. It will be necessary at the error of law hearing for the appellant to establish that the new evidence satisfied this test such that any error is material."

4. Judge Hanson also considered it arguable that the judge's dismissal of the CSID point on the basis of previous credibility findings may not be sustainable and the findings will need to be considered in the light of the guidance now provided in SMO & KSP (Civil status documentation; article 15) Iraq Country Guidance [2022] UKUT 00110 (IAC), referred to as SMO1.

5. I am not entirely clear on the basis for granting permission, as Patel related to the application of Devaseelan where different parties appear but with an overlap of evidence previously adjudicated upon. That is not this case. Similarly, I do not understand the basis for granting permission in relation to the CSID ground.

6. Before reaching any conclusion, I have carefully considered the helpful submissions of both representatives, who put their points succinctly and cogently at the error of law hearing before me.

7. Mr Aziz submitted that what appears at [45] of the decision amounts to an error of law as no reasons are given for rejecting the new evidence. Whilst the further statement of the appellant as well as that of Mr Sidiq is referred to in that paragraph, there is no specific assessment of the statement of the appellant's wife, the absence of which had been a concern raised in the earlier Tribunal decision. Mr Aziz suggests [45] reveals that no weight to the new evidence only because, in the judge's view, the new statements "amount to nothing more than an attempt to try and deal with the previous adverse findings of the previous Tribunal and I am not here to simply relitigate these proceedings."

8. Mr Terrell pointed out that between [42] and [44] of the decision the judge explained his scepticism of the explanation for apparent inconsistency as to employment. That the judge was cognisant of the wife's statement is confirmed by the references at [19] and [20] of the decision and the summary at [31] of the decision of the submissions on the appellant's behalf by Mr Aziz. In his submissions, Mr Aziz suggested that had the judge stated that he rejected the evidence for specific reasons, there would have been no error. It follows that the question is whether the judge's treatment of the new evidence was adequate.

9. It is clear from a reading of the decision as a whole that the First-tier Tribunal was alive to the new evidence. At [7] the judge explained that the parties had agreed the issues, including whether the appellant had established new factors to justify his claim to fear persecution and whether he could obtain the necessary documentation to return to Iraq and whether he would require INID for travel in Iraq. It is important to note that at [40] the judge confirmed that he had considered all the evidence in the round, as a whole, before reaching any findings of fact. That must be taken to include the new evidence, which was subsequently addressed within the decision's reasoning. The appellant's case and explanations as to apparent inconsistencies are fairly summarised from [43] onwards of the decision.

10. In relation to the previous Tribunal findings, at [13] of the decision Judge Alis made a correct Devaseelan self-direction and at [14] confirmed that he would not view the evidence in isolation but as part of the totality of the evidence before the Tribunal. The judge must be taken at his word. In that regard, I bear in mind that in Budhatkoki [2014] UKUT 00041 (IAC), the Upper Tribunal held that "it is generally unnecessary and unhelpful for First-tier Tribunal judgements to rehearse every detail or issue raised in a case. This leads to judgements becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost."

11. The findings from the previous appeal decision are set out at [18] of the decision and the new evidence identified at [19], the effect of which was fairly summarised in the succeeding paragraphs. At [31] the judge acknowledged the submission of Mr Aziz that he should depart from the previous findings given that there were now statements from the appellant's wife and his employer. It is beyond argument that the judge was fully aware of the new evidence and the reliance placed on it by the appellant.

12. However, it is clear that when referring to not re-litigating the previous appeal, Judge Alis had in mind Devaseelan guidance point (6). I reproduce below that part of the decision in Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702,:

> "41. The final major category of case is where the Appellant claims that his removal would breach Article 3 for the same reason that he claimed to be a refugee.
>
> **If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator,** and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, **the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and *make his findings in line with that determination*** rather than allowing the matter to be re-litigated. We draw attention to the phrase 'the same evidence as that *available to the Appellant'* at the time of the first determination. We have chosen this phrase not only in order to accommodate guidelines (4) and (5) above, but also because, in respect of evidence that was available to the Appellant, he must be taken to have made his choices about how it should be presented. An Appellant cannot be expected to present evidence of which he has no knowledge: but if (for example) he chooses not to give oral evidence in his first appeal, that does not mean that the issues or the available evidence in the second appeal are rendered any different by his proposal to give oral evidence (of the same facts) on this occasion.
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> 42. We offer two further comments, which are not less important than what precedes then.
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> (7) **The force of the reasoning underlying guidelines (4) and (6) is greatly reduced if there is *some very good reason* why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him.** We think such reasons will be rare. There is an increasing tendency to suggest that unfavourable decisions by Adjudicators are brought about by error or

> incompetence on the part of representatives. New representatives blame old representatives; sometimes representatives blame themselves for prolonging the litigation by their inadequacy (without, of course, offering the public any compensation for the wrong from which they have profited by fees). Immigration practitioners come within the supervision of the Immigration Services Commissioner under part V of the 1999 Act. He has power to register, investigate and cancel the registration of any practitioner, and solicitors and counsel are, in addition, subject to their own professional bodies. An Adjudicator should be very slow to conclude that an appeal before another Adjudicator has been materially affected by a representative's error or incompetence; and such a finding should *always* be reported (through arrangements made by the Chief Adjudicator) to the Immigration Services Commissioner.
>
> Having said that, we do accept that there will be occasional cases where the circumstances of the first appeal were such that it would be right for the second Adjudicator to look at the matter as if the first determination had never been made. (We think it unlikely that the second Adjudicator would, in such a case, be able to build very meaningfully on the first Adjudicator's determination; but we emphasise that, even in such a case, the first determination stands as the determination of the first appeal.)
>
> (8) **We do not suggest that, in the foregoing, we have covered every possibility.** By covering the major categories into which second appeals fall, we intend to indicate the *principles* for dealing with such appeals. It will be for the second Adjudicator to decide which of them is or are appropriate in any given case."

13. It is important to observe that, as found by the First-tier Tribunal, the so-called new evidence was available to the appellant at the time of the previous appeal before Judge Hillis in 2018. Its absence was in part a reason for rejection of the appellant's factual claim in 2018. However, as Judge Alis observed, it is not sufficient merely to fill the criticised evidential gap with statements and expect the factual claim to now be accepted. As explained in Devaseelan at guidance (6), "in respect of evidence that was available to the Appellant, he must be taken to have made his choices about how it should be presented." Clearly, he cannot say it was evidence of which he had no knowledge. Neither has it been argued before me that the evidence was not available to the appellant in 2018 or that, referring to Devaseelan at guidance (7), there was "some very good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him."

14. It follows from the above that Judge Alis was entitled to rely on Devaseelan guidance (6) and, as the evidence could and should have been adduced at the 2018 appeal hearing, regard the factual dispute as having been already determined against the appellant. There was no properly arguable basis to depart from those findings. It follows that there was no error of law in the judge stating that his role was not to re-litigate the appellant's claim, or in the judge's treatment of the new evidence. This does not appear to be one of those rare cases where it was right for the second judge to look at the matter as if the earlier decision had never been made.

15. In relation to the grounds relating to the CSID, I am satisfied that the judge unarguably provided cogent reasoning for the adverse credibility findings rejecting the appellant's claim to have lost or to no longer have access to his CSID. The appeal had to proceed from that point onwards on the basis that he did have access to his CSID and would be able to use it on his return to Iraq.

16. The appellant's case was that he lived in Ranya, which is within the IKR. On the basis of SMO1, with a CSID, he would be able to travel to the IKR (I understand that there are now enforced returns direct to the IKR). At [57] of the decision, the judge found that as he has access to his CSID, return to Baghdad would not infringe article 3 ECHR as he would be able to return safely to either his home area or the IKR. That was entirely consistent with the findings of fact and the then applicable Country Guidance of SMO1. The finding was not based on previous credibility findings of the earlier Tribunal but the judge's own assessment of the evidence as a whole and the overall credibility findings. It follows that no error of law is disclosed by this ground.

17. In all the circumstances, and for the reasons explained above, the grounds do not establish any error of law in the making of the decision of the First-tier Tribunal.

Notice of Decision

The appellant's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands as made and the appeal remains dismissed.

I make no order for costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10 May 2023