IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001465
First-tier Tribunal No:
IA/07292/2022 PA/52865/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 27 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

RMR (Iraq)
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: None
For the Respondent: Mr Mullen Senior Home Office Presenting Officer

Heard at Field House on 7 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) 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 (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. To avoid confusion I shall refer to the parties as they were before the First-tier Tribunal, therefore the Secretary of State is once more the respondent and RMR the appellant.

Introduction

2. The appellant appeals with permission against the decision of First-tier Tribunal Judge D S Borsada ("the Judge") dated 13 March 2023 dismissing his appeal against a decision of the respondent dated 8 July 2022 to refuse his application for asylum and humanitarian protection made on 6 February 2020.

Anonymity

3. Neither representative requested that the anonymity order be set aside. I observe that this appeal concerns international protection matters and so I conclude that the appellant's rights presently outweigh the rights of the general public to know personal issues arising in this matter, as protected by article 10 ECHR. The order made in the First-tier Tribunal is continued and is detailed above.

Background

4. The appellant is a Kurdish national of Iraq born on 31 January 2003 in the Said Saidiq District. He arrived in the UK on 13 January 2020 and claimed then asylum on 6 February 2020.

5. In essence, the appellant's protection claim was on the basis that he was forced to work on a farm and was abused by his stepmother's brother, his stepmother and his father. The appellant claimed a fear of his stepmother's brother, his stepmother and his father as they had previously abused him.

6. The respondent accepted the appellant's Kurdish ethnicity and his nationality.

7. The respondent did not accept the appellant was forced to work on a farm or that he had received adverse attention from his stepmother's brother or that he was badly treated by his father and stepmother.

8. The respondent did not accept the reasons given by the appellant for claiming protection engage the Refugee Convention .

9. In relation to the feasibility of return, the respondent considered the latest country guidance case relating to Iraq, SMO & KSP (Civil status documentation; article 15) Iraq CG [2022] UKUT 00110 (IAC) (SMO (II)), in particular paragraphs 11 to 16. The respondent did not accept the appellant had no contact with his family and considered he could seek assistance from his family to re-establish himself and redocument his CSID.

10. The respondent dismissed the appellant's claim for asylum, humanitarian protection and human rights.

11. The appellant appealed to the First-tier Tribunal.

The First-tier Tribunal Decision

12. The Judge rejected the appellant's account on the basis that there were very significant inconsistencies which went to the core credibility of the appellant's claim. The Judge noted there were significant discrepancies in the evidence in relation to the injuries he claimed to have suffered [2]. The Judge was not satisfied the appellant's age and vulnerability at the time these events occurred and at the time of the formal interview at the Home Office provided a sufficient explanation for the significant discrepancies [3].

13. The Judge considered the S.8 of the Asylum & Immigration (Treatment of Claimants, etc) Act 2004 factors and noted the appellant was a minor when he arrived in the UK and so the Judge did not make any adverse credibility findings on the basis of the appellant's failure to claim asylum before arriving in the UK [4].

14. On the issue of "returnability" to Iraq, the Judge having rejected the appellant's account, found the appellant had not demonstrated that he could not easily obtain a CSID or INID on return or that he would not have close family members who could help him obtain such documents. The Judge did not accept that these documents had been lost. In addition, the Judge did not accept the appellant is not in touch with his family in Iraq. The Judge noted that the appellant's return to Iraqi Kurdistan is something that the respondent is able to facilitate and that a laissez passer is obtainable from the Iraqi embassy in the UK [7].

15. In relation to the appellant's medical health the Judge noted that there was insufficient evidence that the appellant would not have access to proper medical care on return or that his mental health is likely to significantly and seriously deteriorate on return and so the Judge found the test in AM(Afghanistan) [2017] EWCA Civ 1123) was not satisfied [8].

16. The Judge dismissed the appellant's claim for asylum, humanitarian protection and article 8 claims.

17. The appellant appealed to the Upper Tribunal.

Permission to appeal

18. The application for permission sets out numerous challenges to the decision of Judge D S Borsada which can be summarised as follows:

19. Ground 1: The Judge failed to follow the guidance at paragraph 21 and 22 of AM(Afghanistan) and failed to take into account the appellant's age in making credibility findings and dismissed the appellant's account on the basis of inconsistency.

20. Ground 2: The Judge erred in his findings as to the appellant's ability to obtain a CSID or INID on return [7]. This ground asserts that the Judge having accepted the appellant does not have a CSID, failed to apply the latest country guidance case of SMO (II) and consider the risk to the appellant in travelling to the local Civil Status Affairs ("CSA") office to obtain a INID card. The grounds refer to paragraph 2.6.9 of the relevant Country and Policy Information Note (CPIN) which states that that those who are required to travel to a CSA office would be at risk of encountering treatment or conditions contrary to Article 3.

21. Ground 3: This ground asserts the Judge failed to consider the country guidance case of SA(Removal destinations: Iraq undertaking) Iraq [2022] UKUT 00037 IAC, which states that forced removals are to Baghdad.

22. Permission to appeal was granted by First tier Tribunal Judge Adio on 9 May 2023 on Ground 1, on the basis that although the Judge takes account of the appellant's age in relation to the section 8 findings, the Judge erred in making findings of credibility by failing to follow the guidance in AM(Afghanistan) and not taking proper account of the appellant's age, vulnerability in rejecting his account of past events based on alleged inconsistencies.

23. The grant of permission also adds that the Judge failed to refer to a letter dated 26 January 2023 from Dr F Swallow when stating that there is an absence of medical evidence and there is no indication that the Judge had taken this evidence into account in considering the appellant's overall account.

24. Judge Adio did not limit the grant of permission stating that the other grounds are arguable.

Rule 24 Response

25. There was no Rule 24 response from the respondent before me. Mr Mullen who appeared for the respondent said he was not able to give any explanation for the respondent's failure to file and serve a Rule 24 response.

Upper Tribunal hearing

26. There was no attendance by or on behalf of the appellant. The file indicated that notice of the time and place of the hearing had been sent to the appellant's representatives. I considered that it was in the interests of justice to proceed with the hearing in the absence of the appellant in accordance with rules 2 and 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

27. The hearing was a remote hearing, the mode of hearing had not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no technical difficulties during the hearing itself and the papers were all available electronically.

28. Mr Mullen submitted there was no merit to Grounds 1 and 3.

29. In relation to Ground 2, Mr Mullen stated that the case law and background evidence did not leave him much choice but to concede. Mr Mullen accepted that the decision involved the making of a material error of law in particular in the consideration of risk to the appellant when travelling to a CSA office to obtain a CSID or INID.

30. Mr Mullen acknowledged the appellant does not have a CSID and upon return to Iraq he would have to obtain a CSID or INID. Mr Mullen asserted that although the respondent has not specified the destination where the appellant would be returned, the appellant would be returned to either Erbil or Sulaymaniyah. Mr Mullen accepted that that upon arrival in either Erbil or Sulaymaniyah the appellant would be required to personally attend the CSA office at which he is registered to enrol his biometrics in order to obtain an INID or to obtain a replacement CSID (paragraphs 12 & 15 SMO (II)). He further accepted that the appellant would be at risk of encountering treatment or conditions contrary to Article 3, whilst travelling internally to the relevant CSA office to obtain either a CSID or INID

31. As to disposal, Mr Mullen's view was the appeal should be remitted to the First - tier Tribunal to determine the appellant's risk on return.

Error of law decision

32. Before proceeding to consider the grounds in detail, I remind myself of the many authorities on the approach an appellate court or tribunal should take when considering findings of fact reached by a first instance judge. A recent summary of the well settled principles can be found in Volpi & Anor v Volpi [2022] EWCA Civ 464 at [2] where Lewison LJ stated:

> "i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb "plainly" does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material

evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.

vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

33. I appreciate that judicial restraint should be exercised when examining the reasons given by the First-tier Tribunal Judge for his decision and that I should not assume too readily that the Judge misdirected himself just because not every step in his reasoning is fully set out. This is the guidance given by the Court of Appeal at paragraph [77] of KM v SSHD [2021] EWCA Civ 693.

34. In assessing the appellant's challenge, I have kept in mind the Court of Appeal's recent summary of the principles to be deployed when assessing an appeal against a Judge's findings of fact in T (Fact-Finding: Second Appeal) [2023] EWCA Civ 475 at §57.

35. Given the acceptance by Mr. Mullen that the decision involved the making of material errors of law, I do not intend to go through all of the grounds in detail.

36. Ground 1: I find that Ground 1 is not made out. Although the Judge does not make explicit reference to the guidance in AM(Afghanistan), the Judge at [3] makes specific reference to the appellant's age and vulnerability which the Judge takes into account and reiterates that he is not satisfied that this provides sufficient explanation given the nature and extent of the inconsistencies. In any event although the guidance in AM(Afghanistan) requires that consideration is given to the age, vulnerability or sensitivity of the witness where there are clear discrepancies in the evidence, it does not require that such discrepancies are necessarily ignored or excused in any assessment of credibility.

37. What matters is whether the judge has demonstrably applied the correct approach and it should be assumed that a judge in a specialist jurisdiction such as this understands the law unless the contrary is shown. It is clear that in this case the Judge had regard to the appellant's age an vulnerability in the assessment of the inconsistencies and in assessment of credibility. Accordingly, I find ground does not disclose an error of law.

38. Ground 2: Having considered the decision with care, I am satisfied that Mr Mullen properly made the concession.

39. In SMO (II), the Upper Tribunal said:

> "B. DOCUMENTATION AND FEASIBILITY OF RETURN (EXCLUDING IKR)
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> 7. Return of former residents of the Iraqi Kurdish Region (IKR) will be to the IKR and all other Iraqis will be to Baghdad. The Iraqi authorities will allow an Iraqi national (P) in the United Kingdom to enter Iraq only if P is in possession of a current or expired Iraqi passport relating to P, or a Laissez Passer.
>
> …
>
> E. IRAQI KURDISH REGION
>
> 26. There are regular direct flights from the UK to the Iraqi Kurdish Region and returns might be to Baghdad or to that region. It is for the respondent to state whether she intends to remove to Baghdad, Erbil or Sulaymaniyah."

40. As acknowledged by Mr Mullens, the respondent has not specified where in Iraq she intends to remove the appellant, however Mr Mullens confirmed that the appellant would be removed to either Erbil or Sulaymaniyah. I note that this is consistent with the SMO(II) and the CPIN, that a failed asylum seeker can be returned to any airport in the IKR.

41. The respondent at paragraph 70 of refusal notes the appellant in his own evidence has stated that he had a CSID in Iraq at one stage and that he could seek assistance from his family in Iraq to obtain a replacement CSID. The implication of this being that the appellant did at one time have a CSID but he no longer has this document (either because it has been lost, stolen, destroyed or for some other reason) and he would need to obtain a replacement.

42. The Judge whilst concluding the appellant is not a believable witness and stating that he accepts everything the respondent has stated about the appellant's return to Iraq, (which presumably includes the respondent's acceptance that the appellant once had a CSID in Iraq but that he needs to obtain a replacement CSID), then proceeds to find at paragraph 7, that these documents have not been lost as he states, "I do not accept that these documents are likely to have been lost …". The Judge proceeds to find that the appellant could rely on his close family members to help him obtain these documents.

43. Whilst the Judge considers the ability of the appellant's family to assist the appellant, the Judge does not explain how his family could help him obtain these documents, whether it would be by supplying the documents to him (which the Judge has found are not lost) or by providing him with the volume and page reference of the entry in the Family Book. In addition, the Judge makes no findings as whether the appellant would be required to travel from the airport (in Erbil or Sulaymaniyah) to the CSA Office in order to apply for an identity document (which has to be done in person) and whether as a consequence he would be at risk. In the event the appellant's

family were not able to provide him with the CSID, the appellant would need to obtain a replacement and so he would be required to attend personally at the CSA office at which he is registered to enrol his biometrics to obtain an INID or to obtain a replacement CSID. The Judge fails to consider and make findings on the risk to the appellant should he be required to travel to the CSA office.

44. This risk is acknowledged by the respondent at paragraph 2.6.9 of the respondent's CPIN: Internal relocation, civil documentation and returns, Iraq, July 2022 ("CPIN"), which states as follows:

> *"2.6.9 However, those who return to Iraq or the KRI without a CSID or INID, cannot obtain one via a family member on arrival and who would be required to travel internally to a CSA office in another area of Iraq or the IKR to obtain one would be at risk of encountering treatment or conditions which are contrary to paragraphs 339C and 339CA(iii) of the Immigration Rules/Article 3 of the ECHR. In these cases, a grant of Humanitarian Protection is therefore appropriate (unless the person is excluded from such protection)."*

45. Headnote 12 of SMO (II), states that where a CSA office has installed INID terminals, it is unlikely to issue a CSID at all, whether to an applicant in person, or to a proxy. Additionally, INID cards can only be obtained by a person attending their home CSA office in person to enrol biometrics and that INID cards cannot be obtained by proxy.

46. The Judge failed, therefore to set out with clarity what he found the appellant's circumstances would be on return to Iraq. In the light of the Judge's acceptances of the respondent's findings as to the appellant's CSID and the country guidance case of SMO (II) as well as the CPIN, it was incumbent on him to make findings as to the risk to the appellant in travelling to the relevant CSA office. In SMO (II), the Upper Tribunal set out a number of steps that a decision maker must consider in order to establish whether an individual is at risk upon return because of the lack of a CSID or INID. I find the Judge failed sufficiently to engage with the process the appellant would have to follow in order to obtain a CSID or INID.

47. I have some sympathy for the Judge, who found for good and proper reasons aspects of the appellant's account to be untrue. However those findings did not obviate the need for the Judge to apply the relevant country guidance and consider and make sufficiently detailed findings as to the appellant's risk on return particularly as the appellant would be returning without a CSID or INID.

48. Accordingly, I find that there is in my view a gap in the findings made by the Judge as to the documents and a failure to apply the relevant country guidance which amounts to a material error of law.

49. Ground 3: There is no merit to this ground. The country guidance case of SMO (II) states it replaces all existing country guidance on Iraq and so the Judge did not err in failing to consider SA which predates SMO (II).

Disposal:

50. I am mindful that a resumed hearing will usually take place in the Upper Tribunal. I agree with Mr Mullen that the most appropriate course would be for this matter to be remitted to the First-tier Tribunal as there is a likelihood of significant findings of fact to be made at the resumed hearing in so far as it relates to the issue of documentation.

51. I have carefully considered whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade. I have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

    "(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.

    (2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal."

52. I have carefully considered the exceptions in 7(2)(a) and 7(2)(b). I consider that the extent of the fact-finding necessary means that it is appropriate to remit this appeal to be reheard in the First-tier Tribunal.

Decision

53. The decision of the First-tier Tribunal involves the making of material errors of law.

54. I set the decision aside paragraph 7 of the decision pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

55. The remaining findings of facts are sustainable and are preserved.

56. The appeal is remitted to the First-tier Tribunal to be heard by any Judge other than Judge D S Borsada.

N Haria

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

15 September 2023