Upper Tribunal
(Immigration and Asylum Chamber) Case No: UI-2023-002685

First-tier Tribunal No: PA/52563/2022

THE IMMIGRATION ACTS

Heard at Field House
On 30 January 2024

Decision & Reasons Promulgated

12th February 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

BWM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify SJ or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:
For the appellant: Mr N Aslam, Counsel, instructed by Duncan Ellis Solicitors
For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant brings this appeal against the decision of First-tier Tribunal Judge G M Clarke ("the judge"), signed on 12 June 2023, by which he

dismissed the appellant's appeal against the refusal of his protection and human rights claims.

2. The appellant is accepted as being a citizen of Iraq of Kurdish ethnicity. His home area is in the Salah Al-Din governorate. He arrived in the United Kingdom on 28 October 2016 and claimed asylum. His claim was refused and his appeal dismissed by First-tier Tribunal Judge Ford. His appeal against that decision was refused by Upper Tribunal Judge Coker and he became appeal rights exhausted on 8 August 2018. The refusal of further submissions led to a second appeal but this was also dismissed by First-tier Tribunal Judge Dearden and the appellant again became appeal rights exhausted on 24 September 2020. The decision now under appeal was made on 24 June 2022, responding to further submissions made on 18 February 2022.

The decision of the First-tier Tribunal

3. The judge noted that the appellant claimed to be at risk from the Iraqi government, the Kurdish authorities and all political parties in Iraq on account of his political opinions. He also claimed to be undocumented and at risk of destitution on return. The judge had sight of the two previous tribunal decisions and he directed himself that the findings made by the tribunal in those earlier decisions were his starting point in accordance with the guidance in Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka Starred [2002] UKIAT 00702 [25].

4. In relation to the findings of Judge Ford, the judge noted that she had rejected as not credible the appellant's account of being at risk because his father had worked as a spy for the Saddam Hussein regime. She went on to find that the appellant had thrown his passport away but that either he was in possession of a CSID or he could retrieve it from his father. She rejected his claim that he was not in contact with his father. She found his father was wealthy. She found the appellant had a safe and viable internal flight alternative to Baghdad. Judge Coker found no material error of law in Judge Ford's decision. She found that the appellant's CSID was either in his possession or with his family in Turkey.

5. In relation to the findings of Judge Dearden, the judge noted that he also concluded the appellant had brought his CSID with him or he could obtain it from his father.

6. The judge recorded that the appellant continued to maintain that he had left his CSID in a box at home and that his family had fled from their home, which had been raided by the authorities. The judge gave reasons why he did not find this evidence credible at [33] to [35]. The judge noted that the appellant had provided fresh evidence in the shape of a letter from the British Red Cross stating they had not been able to trace his family [42] but, having analysed it, found it did not justify a departure from the previous tribunals' findings [44]. The judge concluded the appellant has access to his CSID.

7. At [48] to [73] the judge analysed with great care the appellant's evidence of sur place activities, including attendance at demonstrations and posts on Facebook. He concluded the appellant was a low-profile participant in the demonstrations which he had attended [63] but rejected the claim he had any involvement in organising them or that his involvement would be known about so as to place him at risk in Iraq or the [IKR] [62]. He also rejected the claim that the appellant had posted anything on Facebook which would bring him to the attention of the authorities in Iraq [70-71]. The judge concluded the appellant did not hold a genuine political opinion against the government of Iraq or the government of the [IKR] or any political party [79].

8. The judge begins his consideration of the risk on return and documentation at [81]. He reminds himself of the country guidance provided by SMO & KSP (Civil status documentation; article 15) Iraq CG [2022] UKUT 00110 (IAC). He also reminds himself that the appellant's home area is in Salah Al-Din province. The guidance in SMO was that the situation in the Formerly Contested Areas is "complex" and whether return to this area would breach article 15(c) requires a fact-sensitive, "sliding-scale" assessment.

9. Having found the appellant could be returned safely on a Laissez Passer [83]. The judge continued as follows:

> "85. Paragraph 7 of the headnote in SMO No. 2 confirms that "Return of former residents of the Iraqi Kurdish Region (IKR) will be to the IKR and all other Iraqis will be to Baghdad…"
>
> 86. I therefore find that the Appellant will be returned to the IKR. On my earlier findings, he will be returning with his CSID card."

10. The judge set out the section of the headnote from SMO dealing with the return of Kurds to the Iraqi Kurdish Region and, at [88] to [100] set out his reasons for concluding the appellant would not be at a real risk of persecution or serious harm such that returning him to the IKR would breach article 3 of the Human Rights convention or article 15(c) of the Qualification Directive. He dismissed the appeal.

The grounds of appeal and grant of permission

11. The grounds of appeal point out the appellant is an ethnic Kurd and the respondent intends to remove him to Iraq, asserting he can either return to his home area or relocate to the IKR. At [85] and [86] the judge had made a material error of fact as to the appellant's home area. The judge had failed to assess, using the "sliding scale", whether the appellant would be safe in his home area. The grounds assert it would be unduly harsh for an ethnic Kurd from a Formerly Contested Area to relocate to the IKR if he would have no viable support network or the means to find accommodation and employment.

12. In relation to the judge's consideration of the appellant's sur place activities, the grounds note the judge recorded that the photographs of the

appellant attending demonstrations did not have dates or show how the appellant would have come to the attention of the authorities [61]. He had failed to note that the photographs in the respondent's bundle were accompanied by notes of the date and place they were taken. At [77] the judge noted there was no credible evidence the appellant started attending demonstrations in 2019 but this had been accepted by the respondent.

13. Permission was granted to argue all the grounds.

14. The respondent filed a rule 24 response which opposed the appeal but in extremely brief terms. It states,

> "3. The appellant has been found to either have his CSID or to have easy access to it. He would be admitted to the [IKR] and would, in time, be able to remain there."

The hearing

15. Mr Aslam did not pursue the ground of appeal regarding the judge's assessment of the appellant's sur place activities. He said the judge appeared to have become muddled about the appellant's home area from [81] onwards. He had not applied the "sliding scale" assessment.

16. Mr Tufan acknowledged that the judge had definitely made a mistake as to the appellant's home area. However, he submitted the error was immaterial because the appellant had access to his CSID and he could therefore safely relocate to the IKR regardless of where he was returned to in Iraq. He confirmed that, at the time of the judge's decision, return would have been to Baghdad for this appellant.

17. At the end of the hearing I reserved my decision.

Conclusions on error of law

18. The jurisdiction of the Upper Tribunal on an appeal from the First-tier Tribunal lies only in relation to an error of law, not a disagreement of fact. The following are possible categories of error of law, as summarised in R (Iran) & Ors v SSHD [2005] EWCA Civ 982 at [9]:

> "i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");
>
> ii) Failing to give reasons or any adequate reasons for findings on material matters;
>
> iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> iv) Giving weight to immaterial matters;
>
> v) Making a material misdirection of law on any material matter;
>
> vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;

vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

19. At [10] Brooke LJ stated that each of these grounds contain the word "material" or "immaterial" so errors of law which do not make a difference to the outcome do not matter.

20. There was agreement between the parties that the only way to read the judge's decision is that he made a clear error of fact at a critical point in his decision. That the appellant was an ethnic Kurd from the Salah Al-Din governorate was never in issue. The judge noted that much in the early stages of his decision, such as at [23] and when dealing with the findings of the previous tribunals (see [29] and [41]). He also analysed the risk to the appellant from the Government of Iraq as a consequence of his claimed sur place activities, which would not have been relevant if return had been to the IKR.

21. Despite this otherwise being a thorough and well-structured decision, there is no escaping the conclusion that the judge lost focus on the appellant's home area and wrongly completed his assessment on the basis the appellant would be returned directly to the IKR. So much is clear from [81] onwards. Whilst the judge's conclusions on article 8 are not in issue in this appeal, the same error is visible from the paragraphs dealing with the possibility of reintegration on return.

22. The issue is therefore whether the outcome of the appeal could have been different had the judge not made the error.

23. I begin by noting that there has been no successful challenge against any of the findings made by the judge up to [81]. His findings that the conclusions of the previous tribunals were his starting point and that there was no reason to depart from them stand. His findings regarding the appellant's political activities and his political opinions also stand. As said, Mr Aslam did not pursue this ground of challenge, accepting my indication at the hearing that it was not a strong ground. The judge directed himself in terms of BA (Demonstrators in Britain – risk on return) Iran CG [2011] UKUT 36 (IAC) at [54] and any error concerning his failure to see the dates on the photographs (presumably handwritten on the reverse and photocopied separately in the bundle) could not have affected his conclusion that the appellant did not have a relevant profile as a consequence of his attendance. The appellant was not a mobiliser or speaker and there was no satisfactory evidence the appellant would have come to the attention of the authorities. Nor could the appellant be described as a frequent attender and the judge noted his evidence as to why he had not attended any demonstrations since January 2022 at [55].

24. No less than three tribunals have found the appellant to lack credibility. The appellant therefore either has his CSID in his possession or he can retrieve it from his father. His family are wealthy and he is educated. Judge

Dearden adopted the findings of Judge Ford that the appellant speaks Kurdish Sorani and he has relatives in the IKR as well as his father's work associates. He does not have a passport.

25. Absent from the judge's assessment is any consideration of the safety of return to the appellant's home area of Salah Al-Din. The reference in the headnote of SMO to a "sliding scale" assessment is to the question of whether an individual with particular characteristics might be more specifically affected by indiscriminate violence under article 15(c), as explained in Elgafaji v Staatssecretaris van Jutsitie (C-465/07); [2009] 2 CMLR 45, at [39]. SMO describes in some detail the conditions in the appellant's home area, including to this home town of Tuz Khurmato (see [79] and [87]).

26. At [263] the Upper Tribunal noted,

> "Problems remain, however. Tuz Khurmato saw heavy violence in the aftermath of the Independence Referendum and has suffered serious damage. Violence continued into 2018. It is now ruled by a powerful Shia militia and, as Dr Fatah stated, the problems which remain are essentially of an ethnic nature, with Kurds in that area more likely to face difficulty from the controlling PMU. We accept Dr Fatah's evidence that Salah al-Din is one of the governorates in which there is particular resentment to the presence of Shia militia, since it was formerly the seat of Sunni power in the country. This is a governorate in which Shia control is most acutely felt, with Dr Fatah giving examples of the Kurdish flag being removed and a university's name being changed by the Shias."

27. This was picked up again in the consideration of the categories of individuals at an enhanced risk of indiscriminate violence at [300] and it is clear that the appellant's ethnicity as a Kurd in Tuz Khurmato would require careful assessment.

28. In terms of the application of the law to the facts, the judge should have begun with consideration of the safety of travel from Baghdad to Tuz Khurmato and, if necessary, consider the safety and reasonableness of internal relocation. As a result of his error, he skipped any assessment of the risk on return to the appellant's home area and internal flight within Iraq and went straight to consideration of return to the IKR in the belief that the appellant's home area was the IKR. This is a significant error.

29. However, Mr Tufan's submission that the error was not material gains traction when considered in the context of what SMO has to say about the feasibility and safety of travel to the IKR from Baghdad and the requirements for entry and residence in the IKR for ethnic Kurds.

30. In SMO, the Upper Tribunal found as follows:

> "424. … In respect of a Kurdish individual from the Formerly Contested Areas, the UNHCR's stance essentially replicates the guidance given in AAH(Iraq), albeit in a more compressed form. Decision makers must consider whether a Kurdish returnee has a viable support network in accordance with that decision. In the event that they do not, consideration must be given to their individual's specific circumstances with a view to determining their ability to secure

accommodation and employment in the IKR. It will be unreasonable for a Kurdish individual to relocate from the Formerly Contested Areas to the IKR in the absence of a viable support network or the means to find accommodation and employment in accordance with the guidance in AAH (Iraq), the ongoing application of which is confirmed."

31. SMO confirmed much of what was found in AAH (Iraqi Kurds – internal relocation) Iraq CG [2018] UKUT 00212 (IAC), including that,

> *"Kurds*
>
> 50. For an Iraqi national returnee (P) of Kurdish origin in possession of a valid CSID or Iraqi National Identity Card (INID), the journey from Baghdad to the IKR by land is affordable and practical and can be made without a real risk of P suffering persecution, serious harm, or Article 3 ill treatment nor would any difficulties on the journey make relocation unduly harsh.
>
> 51. P is unable to board a domestic flight between Baghdad and the IKR without either a CSID, an INID or a valid passport. If P has one of those documents, the journey from Baghdad to the IKR by land is affordable and practical and can be made without a real risk of P suffering persecution, serious harm, or Article 3 ill treatment nor would any difficulties on the journey make relocation unduly harsh.
>
> 52….
>
> 53. Once at the IKR border (land or air) P would normally be granted entry to the territory. Subject to security screening, and registering presence with the local mukhtar, P would be permitted to enter and reside in the IKR with no further legal impediments or requirements. There are no sponsorship requirements for entry or residence in any of the three IKR Governorates for Kurds.
>
> 54. Whether P would be at particular risk of ill-treatment during the security screening process must be assessed on a case-by-case basis. Additional factors that may increase risk include: (i) coming from a family with a known association with ISIL, (ii) coming from an area associated with ISIL and (iii) being a single male of fighting age. P is likely to be able to evidence the fact of recent arrival from the UK, which would dispel any suggestion of having arrived directly from ISIL territory.
>
> 55. If P has family members living in the IKR cultural norms would require that family to accommodate P. In such circumstances P would, in general, have sufficient assistance from the family so as to lead a 'relatively normal life', which would not be unduly harsh. It is nevertheless important for decision-makers to determine the extent of any assistance likely to be provided by P's family on a case by case basis."

32. Even though he asked himself the wrong questions, the findings of the judge come very close indeed to showing that the appellant's journey to the IKR border would be safe despite the error. He found the appellant, who is a Kurd and who speaks Sorani, has a CSID and family support in Iraq and, crucially, within the IKR as well. The judge was entitled to rely on "cultural norms" suggesting his family members and his father's business associates in the IKR would assist him on arrival. From those findings and

applying SMO it can be inferred that, had he directed himself correctly, the judge would have to have found that, if his home area was unsafe, the appellant could safely travel to the IKR by air or overland from Baghdad.

33. The judge asked himself the correct questions regarding the screening process on arrival in the IKR, albeit he did so at the point of return to the airport, rather than at a border post. He was entitled to find the appellant had no genuine political beliefs which would create any risk to him. The appellant would be able to show he had been living in the United Kingdom so he would not be perceived as having links to ISIL. I cannot see there is any material difference to the entry procedure between the airport and a border post.

34. I have therefore carefully considered how to dispose of this appeal.

35. In Degorce v The Commissioners for HMRC [2017] EWCA Civ 1427 Henderson LJ said at [95],

> " … That said, however, I consider that a test of materiality will still have a crucial, and usually decisive, role to play in the decision of the Upper Tribunal whether or not to set aside the decision of the FTT, and likewise in the decision of this court if an error of law by the Upper Tribunal is established. At least in cases of the present type, I find it difficult to envisage circumstances in which the Upper Tribunal could properly leave the decision of the FTT to stand, once it is satisfied that the error of law might (not would) have made a difference to that decision. As a taxpayer, Mr Degorce is entitled to be taxed according to the law, and if an error of law is detected in the FTT's decision, which is material in the sense I have mentioned, justice will normally require nothing less than that the decision be set aside. Conversely, if an error of law is made, but the Upper Tribunal is satisfied that it was immaterial, there will be no injustice to Mr Degorce in allowing the decision of the FTT to stand. …"

36. In SSHD v AJ (Angola) [2014] EWCA Civ 1636 Sales LJ explained at [49]:

> "… There are two categories of case in which an identified error of law by the FTT or the Upper Tribunal might be said to be immaterial: if it is clear that on the materials before the tribunal any rational tribunal must have come to the same conclusion or if it is clear that, despite its failure to refer to the relevant legal instruments, the tribunal has in fact applied the test which it was supposed to apply according to those instruments."

37. Despite the serious nature of the error made by the judge in this case I do not consider that there is any injustice to the appellant in finding that the error was immaterial. The preserved findings are such that any tribunal applying the country guidance in SMO would have been bound to dismiss the appeal, albeit by a different route.

38. I conclude the judge's decision dismissing the appellant's appeal on all grounds does not contain a material error of law and shall stand. The appellant's appeal is dismissed.

Anonymity

The First-tier Tribunal made an anonymity direction, presumably because the appellant seeks international protection. Whilst the appellant has been found on multiple occasions not to be credible, I conclude that the direction should remain in place.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

The appeal to the Upper Tribunal is dismissed and the decision of the First-tier Tribunal shall stand.

Signed: ***N Froom*** Date: 9 February 2024

Deputy Upper Tribunal