IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004153

First-tier Tribunal No: PA/ 54278/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 8th of October 2024

Before

TH E HONOURABLE MR JUSTICE DOVE, PRESIDENT OF THE UPPER TRIBUNAL IMMIGRATION AND ASYLUM CHAMBER

UPPER TRIBUNAL JUDGE RINTOUL

Between

BSA
(ANONYMITY DIRECTION MADE)

Applicant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Stephen Winter
For the Respondent: Mr Mullen, Senior Home Office Presenting Officer

Heard at 52 Melville Street, Edinburgh on 30th July 2024

Order Regarding Anonymity

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.

DECISION AND REASONS

1. The appellant was born on 11th December 1999 and entered the United Kingdom on 31st August 2018 and claimed asylum. This claim was refused by the respondent on 15th February 2019 and an appeal against that decision was dismissed by FtTJ Cruthers on 5th September 2019. As a result of this the appellant became appeal rights exhausted on 6th November 2019. Following this, he lodged further submissions on 28th September 2020 which were also refused on 17th August 2021. He was granted a right of appeal in respect of that decision which was heard by FtTJ Byrne on 3rd April 2023 leading to a decision refusing his appeal promulgated on 27th April 2023.

   The appellant's first appeal.

2. FtTJ Cruthers set out in the determination refusing the appellant's appeal that the essence of his claim was that he is Iranian and not Iraqi. The appellant explained to FtTJ Cruthers that if he were returned to Iraq he would be at risk from the Shwankari family as a result of the appellant's father shooting dead one of their family members in July 2018, and their desire for revenge. If he were returned to Iran he would be killed by the authorities there as a result of his failure to complete his military service and being categorised as a deserter.

3. Having heard the appellant's evidence FtTJ Cruthers accepted that the appellant was Kurdish by ethnicity and that he had lived in Sulimaniyah from a young age until his departure from Iraq. He also accepted that the Shwankari family were a well known and powerful family in northern Iraq. However, FtTJ Cruthers was unable to accept even on the lower standard applicable to an asylum claim the core of the appellant's case. He concluded that it was unreliable in the light of a number of difficulties and inconsistencies in the appellant's evidence which it is unnecessary for present purposes to set out in detail, but which were recorded in paragraphs 39 – 49 of the decision leading to a conclusion in paragraph 50 that it was FtTJ Cruthers judgment that "the evidential difficulties summarised make it far more likely that the appellant was a witness trying to remember a fabricated story, rather than a witness who was trying to recall events that had really happened". In particular the Judge concluded that the appellant's claim to Iranian nationality had not been established, nor had his account of the incident involving the Shwankari family which he contended had led to him fleeing northern Iraq. The Judge was not prepared to accept that the appellant had lost contact with his mother and other family members, nor did he accept the appellant's claim that he did not have access to relevant documentation such as a CSID which would allow him to resume living in Sulimaniyah. FtTJ Cruther's ultimate conclusion was that the appellants appeal on asylum, humanitarian protection and human rights grounds fell to be dismissed.

The second appeal.

4. As set out above, following the determination made by FtTJ Cruthers the appellant made further submissions which although refused led to a further appeal which is the subject matter of these proceedings. The appellant's case in the second appeal sustained the position which had been advanced in the first appeal. Whilst the appellant said he had lived in Sulimaniyah from the age of 4 until he left Iraq in 2018 he maintained that he was born in Mariwan Iran and is Iranian by nationality not Iraqi. The essence of his claim was again that he would be at risk from members of the Shwankari family as a result of his father having killed one of their family members in July 2018. This case was maintained along with his contention that were he to be returned to Iran he would be killed by the authorities there because he would be treated as a deserter.

5. In addition to these matters the appellant relied upon events since the determination by FtTJ Cruthers, and in particular his *sur place* activities in the United Kingdom which included demonstrating outside the Iranian embassy and posting material on social media critical of the Iranian government. He contended these activities would lead him to being at risk on return. New material was produced in the appeal before FtTJ Byrne including a "mukhtar letter", a birth certificate and translation and evidence of the *sur place* activities which have been described above.

6. In order to analyse the appellant's case FtTJ Byrne structured his determination starting with his findings of fact and addressing as the first important question "is the appellant Iranian?" At paragraph 35 of the determination FtTJ Byrne set out that he had applied the principles set out in the leading case of *Tanveer Ahmed v SSHD* [2002] Imm AR 318. His self-direction was set out in the following terms:

> "35. I apply the principles of *Tanveer Ahmed* v SSHD [2002] Imm AR 318. Documentary evidence along with its provenance needs to be weighed in the light of all the evidence in the case. Documentary evidence does not carry with it a presumption of authenticity, which specific evidence must disprove, failing which its content must be accepted. Nor does oral evidence. What is required is an appraisal by the Tribunal of the weight that can be given to a particular element of the evidence taking into account its nature, provenance, timing and background evidence, in the light of all the other available evidence in the case, especially that given by the claimant."

7. The Judge then set out the principles from the leading case of *Devaseelan v SSHD* [2002] UKIAT 00702 noting that the previous decision of FtTJ Cruthers was accepted as being the starting point for the decision in the appeal. In particular FtTJ Byrne noted that FtTJ Cruthers "comprehensively rejected the credibility of the core of the appellants claim" on the basis of a number of inconsistencies and implausibilities which were noted in the decision. FtTJ Byrne turned at paragraph 38 of the determination to the further evidence relied upon by the appellant in respect of the question of his nationality and noted that the appellant

invited particular reliance to be placed upon the "mukhtar letter" and the birth certificate. FtTJ Byrne addressed these contentions in the following paragraphs:

> "39. The HOPO questioned the appellant in some detail in relation to the "mukhtar letter" and the birth certificate. I found the appellant's responses to these questions to be vague, evasive and implausible. He could not remember when he had made contact with his father's friend, save that it was through Facebook. He offered no specific response as to how his father's friend found the mukhtar and the appellant's maternal uncle in Iran, save to suggest that he travelled to the right town and then made enquiries. He was evasive when asked why he had not taken the opportunity to make contact with his maternal uncle once his father's friend had made contact with him. He offered no particular reason as to why this could not have happened. He said he did not ask his father's friend for his uncle's contact details. He said he only made a general query of his father's friend about other members of his family in Iran but that his father's friend said he had no information about them. Looking at the case in the round, I find the appellant's remarkable lack of curiosity in establishing contact with his maternal uncle and failure to make efforts to establish such contact to be implausible.
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> 40. The appellant could not offer an explanation for why his father's friend did not obtain the original of his birth certificate, save to suggest that his uncle may have been afraid to provide the original to a stranger. Again, looking at the case in the round and bearing in mind the appellant's own account of explaining his situation in the United Kingdom to his father's friend, including the importance of his birth certificate, I find this to be implausible.
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> 41. When asked why he had not submitted evidence of messages with his father's friend, the appellant said he had the messages but he hadn't given them to his legal representative. Given the appellant's familiarity with the asylum process, I do not find it plausible that the appellant does not, certainly by this stage, understand the importance and significance of submitting any evidence relevant to his claim. Indeed, as was pointed out by the respondent, he has submitted many posts of his social media activity in the United Kingdom since 2020. I have considered the screenshots that were received unexpectedly the day after the hearing. On their face, they suggest contact through Facebook with someone called 'Awat Jabar Muhammed' at different points in 2022 and, on their face, the messages include pictures of what the appellant has asserted are the 'mukhtar letter' and his birth certificate. However, looking at the case in the round, given the context and timing of the submission of copies of those messages to the Tribunal as well as the backdrop of the various adverse credibility findings outlined in this decision, I do not find the messages to be reliable evidence in support of the appellant's claim."

8. The Judge went on to take account of the arguments in relation to the appellant's attendance at demonstrations against the Iranian regime and his social media postings but looking at the evidence in the round the Judge was unpersuaded that any weight could be afforded to this evidence as support of the appellants Iranian nationality, particularly bearing in mind the timing of the activity which commenced after FtTJ Cruthers'

adverse decision. Ultimately FtTJ Byrne could find no basis to justify a departure from the clear findings of FtTJ Cruthers in his earlier appeal decision. As a consequence of these factual findings FtTJ Byrne went on to conclude that the appellant's claims in relation to asylum, humanitarian protection and on human rights grounds all fell to be dismissed.

The proceedings in the Upper Tribunal.

9. Following the promulgation of FtTJ Byrne's determination the appellant sought permission to appeal to the Upper Tribunal from the First-tier Tribunal. In particular the appellant contended that there was an error of law in paragraph 41 of the determination which was suggested to be in the form of the Judge failing to give sufficient weight to the "mukhtar letter" as evidence of the appellant's nationality. It was suggested that the Judge had failed to adequately explain why the exchange of messages with the individual named "Awat Jabiar Muhammed" could not be relied upon. Had the Judge applied anxious scrutiny it was submitted that he would have concluded that the rejection of the appellant's Iranian nationality was unsound.

10. On 25th September 2023 a Judge of the First-tier Tribunal granted permission. The decision granting permission was expressed in the following terms:

> "2. The grounds assert in summary that the Judge materially erred in his findings, at paragraph 41 the Judge has failed to give sufficient weight to the Mukhtar letter as evidence of the Appellant's nationality.
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> 3. There is an arguable error of law that has been identified which merits further consideration. There is a reasonable prospect that a different Tribunal would reach a different decision."

The hearing on 30 July 2024

11. At the outset of the hearing we questioned the basis upon which permission to appeal had been granted and as a consequence whether we had jurisdiction to consider the appeal. It was accepted in the appellant's submissions that a failure to give sufficient weight to a particular piece of evidence was not capable of giving rise to a material error of law, in and of itself. Not withstanding this, it was submitted on behalf of the appellant that FtTJ Byrne's reasoning was inadequate, and this provided a sufficient basis for concluding that there had been a failure to provide adequate reasons in this case, and that amounted to a proper basis for setting aside the decision and remaking it. In particular reliance was placed upon a decision of the Inner House of the Court of Session in *AR (AP) v UTIAC* [2017] CSIH 52 in which the opinion of the court was given by Lord Malcom. That case had a protracted procedural history in which there were multiple trips taken between the First-tier Tribunal and the Upper Tribunal. At the heart of the case was the authenticity of documents relied upon by the appellant and in particular a First Information Report with associated documents which were deployed to corroborate the appellant's account of

his sexuality. Lord Malcom was concerned that the most recent decision of the First-tier did not set out good reasons for dismissing the documents as being unreliable. He set out his concerns in the following terms:

> "34. The submission of the First-tier Tribunal Judge did not set out any good reason for dismissing the documents as unreliable. We agree with that submission. We have studied the terms of the decision, but can find no proper support for the terms of paragraph 34. For example, what was the reason for placing the FIR in the unreliable category? While no doubt there is "a high incidence of false 'official' documents", there must also be some genuine documents. One cannot simply rely on doubts as to the veracity of the account given by the claimant as a reason for rejecting the documents, when on their face, they support his asylum claim. The "holistic" approach endorsed by Judge Macleman would require the overall assessment to be made after all of the evidence has been considered and assessed. In other words, and by way of example, one might ask – do the documents support the claim? If yes, is there any reason arising from the documents themselves to reject their authenticity? If no, how does this affect, if it does affect, doubts that have arisen as to the claimants account?"

12. On behalf of the appellant it was submitted that these observations epitomised the error in the decision of FtTJ Byrne, and that inadequate reasons had been provided for him concluding that the appellant's claim to Iranian nationality was not supported by the "mukhtar letter" and other documents that had been submitted by him.

Decision.

13. It is necessary at the outset to provide some observations in relation to the grant of appeal in this case. The terms of a grant of appeal are of obvious importance to the Upper Tribunal as founding the jurisdiction at the Upper Tribunal it is exercising and providing the starting point for the consideration of any error of law. Unfortunately, in the present case the reasons for the decision to grant permission to appeal do not on their face legitimately identify any error of law. Paragraph 2 of the order merely identifies that in paragraph 41 of the determination the Judge "has failed to give sufficient weight to the Mukhtar letter". Questions of the weight to be attached to individual pieces of the evidence before the Judge are factual issues for the Judge to resolve. Giving weight in and of itself does not amount to a matter giving rise to an error of law, but rather a disagreement in respect of the factual conclusions. Unfortunately, therefore, it appears that permission may well have been granted in this case on the basis of a misconception. It could be argued convincingly that this is sufficient to lead to the appeal being dismissed. Nonetheless, as we observed at the hearing and out of respect to the appellant's submissions, we propose nevertheless to engage with the arguments which were raised and in particular those which were founded upon the case of *AR (AP).* The question which arises is whether or not there is an error of law in the judge's decision in paragraph 41 of the determination based upon a failure

to give adequate reasons in respect of the documents and in particular the "mukhtar letter" and the birth certificate.

14. In our judgment there are two points which should be immediately observed in relation to the case of *AR (AP)*. The first is that paragraphs 34 and 35 of Lord Malcolm's opinion clearly support a conventional approach consonant with the decision in *Tanveer Ali* to documentary evidence, namely that a decision maker should stand back and view all of the evidence in the round before deciding which evidence to accept and which to reject. Furthermore in doing so it is obviously necessary in order to discharge the judge's duty to give reasons for the judge to explain the conclusions which have been reached in relation to the evidence including the documents that are relied upon. Not every individual document may need to be the subject of the reasons since the reasons need to bear upon the principle controversial issues raised in the appeal and some of the documentation may not bear upon those matters.

15. Secondly, it is to be noted that there is an important difference between the case of *AR (AP)* and the present case, namely that in the present case there was a previous decision of FtTJ Cruthers which, in accordance with the *Deevaseelan* principles, was the starting point of FtTJ Byrne's decision. At the very least, that previous decision provided a clear background for the decisions which needed to be reached in the present appeal.

16. The conclusions which the Judge reached in paragraph 41 have to be read in the context of his determination as a whole. The reasoning in relation to the "mukhtar letter" and the birth certificate commences at paragraph 39 and engages with the evidence provided by the appellant about that documentation and its origins. The Judge concluded, as he was entitled to, that the answers provided by the appellant in relation to the "mukhtar letter" and the birth certificate in cross examination were "vague, evasive and implausible". The challenges in cross examination related to how he had obtained possession of the documents and where they had originated from. In paragraph 40 the Judge found the absence of any explanation as to why the original of the birth certificate had not been obtained to be implausible. Paragraph 41 is properly to be seen as part of this sequence of reasoning, addressing as it does the material which was provided by the appellant the day after the hearing to seek to engage with the question of why he had not submitted in evidence the messages with his father's friend who was the source of the documentation. In the final sentence of paragraph 41 the Judge provides clear and adequate reasons to explain why the messages produced the day after the hearing are unreliable. The "context and timing" of the submissions had been set out above in relation to the exchanges at the hearing and the fact that the material arrived after the hearing had concluded. This material had to be taken in the round which included all of those matters as well as the earlier adverse credibility findings which had been reached by FtTJ Cruthers. In our judgment the conclusions in paragraph 41 are not only clear but appropriately supported by reasoning which explains the conclusions which the Judge had reached.

17. Notwithstanding the frailties of the grant of permission to appeal in this case we have nevertheless examined the detail of the submissions made in support of the appellant's case. Having done so we are not satisfied that there is any error of law in the decision which was reached by FtTJ Byrne in this case and therefore this appeal must be dismissed.

Notice of Decision

The appeal is dismissed.

Ian Dove
Mr Justice Dove

Judge of the Upper Tribunal
Immigration and Asylum Chamber