IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004812

First-tier Tribunal No: PA/52976/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 11th October 2024

Before

UPPER TRIBUNAL JUDGE MEAH

Between

SJS
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Chohan, Counsel instructed by Kings Law Solicitors
For the Respondent: Ms Rushforth, Senior Home Office Presenting Officer

Heard at Field House on 3 October 2024

DECISION AND REASONS

Introduction and Background

1. The appellant appeals against the decision of First-tier Tribunal Judge Anthony promulgated on 29 September 2023 ("the decision").

2. By the decision, the First-tier Tribunal dismissed the appeal against the respondent's decision dated 05 July 2022, to refuse the appellant's protection and human rights claims.

3. The appellant claimed he arrived in the UK clandestinely on 05 April 2005. He applied for asylum on the same day. The application was refused and the appellant was either not given a right of appeal against the decision, or no right of appeal was exercised if there was a right of appeal. The appellant then made further submissions to the respondent on 16 July 2009. These were refused on 13 December 2012. He then applied for leave to remain on human rights

grounds on 19 August 2014. This application was refused on 31 October 2014. The appellant then made further submissions again based on the original protection grounds and on human rights grounds on 25 November 2019. This appeal relates to the refusal of those submissions. The appellant claims he cannot return to Iraq owing to a fear of honour killing by the family of a person he had a pre-marital relationship with. He also claims to have been politically involved with the New Generation Movement hence he feared both the Kurdistan Regional and the Iraqi governments. This included a surplace claim on this basis. His Article 8 ECHR claim both within and outside the framework of the Immigration Rules was based primarily on the length of time he has resided in the UK.

The Grounds

4. The appellant's grounds seeking permission to appeal to the First-tier Tribunal were as follows:

> "INTRODUCTION
> 1. The Appellant seeks permission to Appeal to the Upper Tribunal against the decision of First-Tier Tribunal (FTT) judge Anthony, dated on 9 October 2023, dismissing his Appeal under the Refugee Convention and the ECHR.
>
> BACKGROUND
> 2. The subject of this Appeal is the Appellant, [SJS]. He is an Iraqi national of Kurdish ethnicity. His date of birth is 01 January 1984. He appealed against the decision of the SSHD dated 20 July 2022 refusing his claim for protection made on 25 November 2019. His appeal against the refusal was dismissed by FTTJ Anthony on 9 October 2023.
>
> 3. The Appellant is seeking permission to Appeal the decision made by the FTT Judge Anthony.
>
> GROUNDS OF APPLICATION
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> 4. The Appellant submits:
>
> (a) That the decision of the FTTJ is flawed in law;
> (b) That the Appellant's claim has not been properly/adequately assessed;
> (c) That the relevant weight has not been given to the evidence;
> (d) That the FTT failed to ascribe appropriate weight to the circumstances of the case.
>
> 5. The Applicant submits that there was inadequate/insufficient consideration of his asylum/humanitarian protection claim. It is submitted that the FTT Judge failed to give reasons or any adequate reasons for findings on material matters.
>
> DOCUMENTATIONS (CSID)
> 6. From paragraphs 22 to 25 the FTTJ considers the issue of documentation as a side issue for the sake of completeness.
>
> 7. It is submitted that the FTTJ finding in relation to documentation is flawed. The tribunal is aware that the Appellant requires either a CSID card or INID card, to return to the IKR to avoid a breach of Article 3 ECHR.

8. It is arguable that the FTTJ has failed sufficiently to engage with the process the appellant would have to follow in order to obtain a CSID document,

9. Neither has the FTTJ given any reasons for finding in paragraph 25 that the appellant can contact his family and request that his family forward to him the CSID despite the fact the FTTJ knew the Appellant left his CSID card with the agent in his home country before crossing the border to Turkey. The Appellant in cross-examination clearly informed the Tribunal that the agent had never returned his CSID card to his family. It is thus arguable that the FTTJ has not made clear findings first as to whether the appellant was in contact with his family in Iraq, and second as to whether his family in fact in possession of the Appellant's CSID card. The FTTJ simply rejected the appellant's account without finding any inconsistencies or credibility issues in his case. The FTTJ simply rejected a credible account without applying a proper standard.

10. It is arguable that the FTTJ has not expressly considered whether the appellant's family in Iraq would be able to send his CSID card to him in the UK or meet him with it upon his arrival in Iraq. The FTTJ has failed to provide adequate reasons for her rejection of the appellant's account.

11. The appellant arrived in the UK in 2005 as an undocumented individual and was not in possession of a CSID card. The appellant has been living in the UK for 18 years and a half, the passage of time itself is sufficient to find it difficult to re-document himself. The FTTJ has failed to assess the delay in the appellant's case. The historical injustice done by the Home Office against the appellant, after 18 years and 6 months, this was the appellant's first appearance before the tribunal. The appellant has never been given the opportunity by the Home Office (as he has never been given the right to appeal previous Home Office decisions or benefited from Home Office policies of legacy cases) to testify his account of events before an independent tribunal.

12. It is submitted the FTTJ is required to undertake an adequate assessment as to whether the Appellant is in possession of his CSID card and if not whether and how he is able to redocument himself. No such assessment has been made in line with the existing country guidance case of SMO, KSP & IM (Article 15(c); identity documents) CG Iraq [2019] UKUT 400 (IAC) (20 December 2019) [SMO (1)] and SMO and KSP (Civil status documentation, article 15) (CG)) Iraq [2022] UKUT 110 (IAC) (16 March 2022) [SMO (2)]

13. In omitting to follow country guidance or apply the respondent's own CPIN, the FTTJ falls into material error and further omits to undertake an adequate assessment of the risk arising to the appellant under Article 3. Consequently, the FTTJ's findings on the risk of return and internal relocation are flawed.

SUR PLACE ACTIVITIES
14. It is submitted that the FTTJ findings on the appellant's social media activity were not reasonable and that she had erred in her approach to the Facebook evidence. It is arguable that the FTTJ had not given regard to all relevant factors in relation to the risk to

the appellant on return, the judge was properly not entitled to conclude as she did.

15. It is submitted that the judge was wrong to find at 21 that the appellant is not at risk of serious harm on account of his sur place activities. The FTTJ has failed to take into consideration that the appellant is an activist and failed to assess the risk associated to activists. The objective evidence provided in support of his appeal confirmed that he was a credible human rights and political activist. The FTTJ has failed to give enough weight to. the supporting letters from high-profile political figures in Iraq, such as a former speaker of the Iraqi Kurdistan (IKR) Parliament, a Member of the Iraqi Parliament, and members of the IKR Parliament. The high-profile figures all confirmed that the appellant is a political human rights activist.

16. The nature of the appellant's political and human rights activities in the UK gives him a profile that would lead him to be of interest to the authorities so as to put him at risk on return. When considering the appellant's sur place activities and social media postings including his organisations and participation in demonstrations, the appellant could not be considered as a person of a low profile.

17. The appellant had provided supporting letters which not only corroborate his contention that he is an activist but also support his contention that he is an active organiser and participant in demonstrations against the authorities in Iraq, the statements are material evidence as to his high profile at demonstrations. It is submitted that not only has the FTTJ not given any weight to this evidence, but she, has also erred in law by failing to make clear findings or give reasons in relation to this element of the appellant's claim, which could have made a difference to the outcome of the appeal.

CONCLUSION

18. It is therefore submitted that the FTTJ decision was not based upon a full and careful consideration of all the evidence in the context of the background country information and in relation to the sur place activities it was not supported by clear and cogent reasoning.

19. For the above reasons it is respectfully submitted that the determination is flawed. The grounds in support of leave are arguable and disclose material errors of law such that this Appeal has a real prospect of success."

5. Permission to appeal was granted by First-tier Tribunal Judge Boyes in the following terms:

"1. The application is in time
2. The grounds assert that the Judge erred in proceeding as follows;

3. (a)That the decision of the FTT is flawed in law;
(b)That the Appellant's claim has not been properly/adequately assessed;
(c)That the relevant weight has not been given to the evidence;

> (d)That the FTT failed to ascribe appropriate weight to the circumstances of the case
>
> 4. All of the grounds are arguable. It is difficult to see where the Judge has examined and critically assessed the evidence before reaching a conclusion which falls within the complaint that the claim has not been properly assessed.
>
> 5. Having considered the judgment overall, the grounds are clearly arguable for the reasons given therein."

6. The respondent did not file a Rule 24 response.

7. That is the basis on which this appeal came before the Upper Tribunal.

Documents

8. I had before me a composite bundle containing all necessary documents. This also included the bundles relied upon by the parties in the First-tier Tribunal.

Hearing and Submissions

9. The hearing was conducted with myself sitting at Field House, whilst the representatives attended via Cloud Video Platform. Both representatives made submissions which I have taken into account and these are set out in the Record of Proceedings and need not be repeated here.

Discussion and Analysis

Grounds a, b, c & d

10. I shall deal with the all the grounds together as they are interlinked.

11. The Judge stated at [8] of her decision under the heading 'Honour Killing'

> "..I began by considering the evidence presented as part of the appellant's previous asylum claims. I will then consider any new evidence and whether there is anything to suggest that the previous decisions should be overturned".

12. The Judge then at [10], [11], and [12] stated that;

> "10. I have considered whether the appellant has provided any new evidence which is different to the materials previously considered. I find the appellant has not produced any new documentary evidence which would overturn the findings made by the respondent in his first asylum claim and in the further submissions made in 2009. Mr Islam argues that the previous decisions have never been appealed and that I can come to a different decision on this issue.
>
> 11. I agree that I can arrive at a different decision but only if the appellant has produced new evidence which enables another Tribunal to reach a different conclusion. As stated above, I find the appellant has produced no new documentary evidence in respect of his fear of persecution based on his claim to be a victim of an honour crime. In the absence of any new materials, I conclude that the previous findings of fact made by the respondent must stand. I find the fact the appellant

> had chosen not to challenge the previous refusals is not a reason to say that this Tribunal can now depart from those findings in the absence of any new evidence. I find it is immaterial whether the appellant was given a right of appeal. Even if those previous decisions did not carry a right of appeal, and if the appellant considered that he should have been given a right of appeal, it would have been open to him to bring a challenge by way of judicial review.
>
> 12. The appellant continues to maintain in his latest witness statement that he has been charged with rape and assault which was at the instigation of his previous partner's family. However, apart from the arrest warrant produced in 2009 which was rejected as not credible by the respondent, the appellant has produced no up to date evidence or new arrest warrants to demonstrate he continues to be at risk on return. I conclude the appellant has not shown that he would be at risk of persecution owing to an honour killing or blood feud if returned to Iraq." [**My emphasis**].

13. Both parties confirmed, and it was not in dispute, that the appellant has not previously been through the appeal process with any of the previous refusals to his asylum and human rights applications, and the subsequent submissions he made. It was agreed and confirmed that this was his first appeal before the First-tier Tribunal in response to the right of appeal afforded to him following the refusal of the submissions he made on 25 November 2019. The Judge appears to have noted this, yet she has restricted herself to only new evidence and rejects the appellant's claim on the basis of there being no such new evidence. Though the Judge does not refer to the authority in **Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702,** she appears to have nonetheless approached the appeal on this basis requiring the appellant to have provided new evidence to support his claim in '**Devaseelan'** terms. The absence of which led her to conclude that the appellant was not at risk on return for the reasons he had claimed.

14. I therefore find that the Judge's approach to the evidence was legally flawed as she was not confined to considering only new evidence. What was required was consideration of all of the evidence presented to the First-tier Tribunal, and for her to make findings and to reach her own conclusions on this independent of any conclusions that might have been reached by the respondent when considering the appellant's claims/submissions in 2005, 2009 and then in 2019. What the Judge has done in substance is to approach the respondent's previous refusal decisions as though they were appeal decisions where she then applies '**Devaseelan'** principles to those decisions confining herself to only new evidence, finding ultimately against the appellant for not producing what she decided in her view did not amount to new evidence.

15. Further, even if **Devaseelan** did have applicability in this appeal, its application is not so constricted that it allows only for new evidence in a new appeal. I need not set this out as '**Devaseelan'** principles are trite (see also **Djebbar v SSHD [2004] EWCA Civ 804; [2004] INLR 466**, **Mubu and others (immigration appeals – res judicata) [2012] UKUT 00398** and **BK (Afghanistan) [2019] EWCA Civ 1358**). Therefore, the Judge confining herself to only new evidence in this context would also, in all likelihood, have resulted in a material error of law.

16. I therefore find that the grounds, as pleaded, are made out as the Judge should not have restricted herself to only considering new evidence in the way that she

did. Consequently, her failure to consider the totality of the evidence, as a whole and in the round, was a material error of law. I find that this infected the remainder of her decision under the other headings rendering the entire decision unsafe.

17. I will, nonetheless, in short, for completeness, deal with the other elements of the grounds on the Judge's approach to considering the appellant's surplace claim, and on returnability in assessing the claim against **SMO and KSP (Civil status documentation, article 15) (CG)) Iraq [2022] UKUT 110 (IAC) (16 March 2022** and **SA (Removal destination; Iraq; undertakings) Iraq [2022] UKUT 37 (IAC)**.

18. Firstly, on the surplace claim, the Judge appears not to have followed the guidance in **XX (PJAK - surplace activities - Facebook) Iran CG [2022] UKUT 23 (IAC)**. Ms Rushforth submitted that this had limited applicability as the appellant in **XX Pjak** was Iranian, whereas the appellant in this matter is an Iraqi Kurd. However, **XX PJAK** contains general guidance on FaceBook and Social Media activities in the context of surplace claims. It was therefore applicable to this extent hence the Judge should have followed it. However, it is not at all clear from what she states at [18]-[20] regarding the appellant's FaceBook activities, whether she either followed or had it in her mind in terms of her consideration of the issues placed before her on this particular issue. It is also of concern, if I am correct in the way I have read the decision, that the Judge appears to have herself gone into the appellant's FaceBook profile, as this is what she seems to suggest by her comments at [18] in particular, when she says;

> "I am unable to locate any Facebook posts that are set to a public setting. I find that all of the appellant's posts are set to "Friends Only" as demonstrated by the two person icon next to each post."

19. In any event, further difficulties arise in the Judge's findings at [15] and [20] where she assesses the reliability of documents adduced by the appellant based on her finding that the appellant's account was not credible. This is a further material error of law as the approach required was as per the trite decision of the Court of Appeal in **Mibanga [2005] EWCA Civ 367**, as cited by the Court of Appeal in the later decision of **AM (Afghanistan) v Secretary of State for the Home Department [2017] EWCA Civ 1123**. The principle being that there is a requirement for a judge to consider all the evidence in the round before arriving at their own conclusions, and that if a judge rejects an asylum claim on adverse credibility grounds before considering the evidence, that will be an error of approach. Accordingly, the Judge fell into such error as it appears that her approach to the evidence adduced was, at the very least, tainted by the negative view she had already formed about the appellant's credibility. The Judge's comments at [17] highlight the difficulty where she says;

> 'As the provenance of this letter has not been proven, I find the reliability of the documents would depend on the credibility of the appellant's account',

20. The assessment here needed to be other way round where findings on credibility and the claim as a whole should only have been formed after consideration of all of the evidence. This appears not to have happened as there is nothing underpinning her adverse credibility findings against the appellant. This includes her failure to consider when assessing that which the appellant

had presented as to what she might have deemed as being ‘old’ or evidence that was not ‘new’.

21. On the Judge’s finding on returnability and redocumentation at [25], this was erroneous as she fails to explain or to give reasons on why she says the appellant could simply contact family members to provide him with a CSID to enable him to then obtain an INID. I accept, as averred, that the Judge’s assessment failed to properly consider **SMO 2** or indeed **SA Iraq**, both of which were arguably applicable in the Judge’s assessment in considering returnability, given that the appellant claimed he had travelled/left Iraq without a CSID with the assistance of an agent, and that he had lost all contact with family and friends in Iraq. This was argued in the skeleton argument placed before the Judge (at paragraph 30(a) of the undated skeleton argument submitted as part of the appellant’s First-tier Tribunal appeal), where extensive submissions were made, inter alia, also on **SMO2**. The appellant had also claimed at paragraph 27 of his witness statement that was also placed before the Judge, that he was not in contact with any friends or family Iraq. The Judge makes no findings on this aspect of the evidence and/or any findings as to why she might have rejected the appellant’s claims in this regard, hence what she stated was essentially based on unreasoned speculation that the appellant could simply approach family in Iraq to assist with his redocumentation.

22. Accordingly, the Upper Tribunal interferes only with caution in the findings of fact by a First-tier Tribunal which has heard and seen the parties give their evidence and made proper findings of fact. This has been stated numerously by the higher courts, for example recently in **Volpi & Anor v Volpi [2022] EWCA Civ 464.** Unfortunately, that is not the position here. The First-tier Tribunal Judge’s decision was vitiated by significant errors in the way that she approached the evidence and the facts in the appellant’s case. These amounted to material errors of law

23. I therefore set aside the decision of the Judge.

24. Applying **AEB [2022] EWCA Civ 1512** and **Begum (Remaking or remittal) Bangladesh [2023] UKUT 46 (IAC)**, I have considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statement. I consider, however, that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process.

Notice of Decision

25. The appellant’s appeal is allowed.

26. The decision of the First-tier Tribunal dismissing the appellant’s appeal, sent to the parties on 09 October 2023, involved the making of material errors of law. It is set aside in its entirety.

27. The appeal is remitted back to the First-tier Tribunal at Birmingham to be heard by any judge other than First-tier Tribunal Judge Anthony.

Anonymity

28. The Anonymity Order made by the First-tier Tribunal is maintained.

S Meah
Judge of the Upper Tribunal
Immigration and Asylum Chamber

09 October 2024