IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000036
First-tier Tribunal No: HU/58036/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 29 May 2024

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M A A
(ANONYMITY ORDER CONTINUED)

Respondent

Representation:
For the Appellant: Mr Thompson, Senior Presenting Officer
For the Respondent: Ms Chaudhry, instructed on behalf of the respondent

Heard at Phoenix House (Bradford) on 15 May 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal(Judge Joshi) (hereinafter referred to as the "FtTJ") who allowed the appeal against the decision made to refuse his protection and human rights claim made in the context of his deportation in a decision promulgated on 20 November 2023.

2. The FtTJ did make an anonymity order and no grounds were submitted during the hearing for such an order to be discharged. Anonymity is granted because the facts of the appeal involve a protection claim.

3. 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.

4. Although the appellant in these proceedings is the Secretary of State, for convenience I will refer to the Secretary of State for the Home Department as the respondent and to the appellant before the FtT as "the appellant," thus reflecting their positions before the First-tier Tribunal.

The background:

5. The background to the appeal is set out in the evidence and in the decision of the FtTJ. The FtTJ recited the appellant's immigration history which had not been in dispute as follows:

6. On 1 September 2003, the appellant claimed that he entered the United Kingdom illegally.

7. On 24 January 2005, he was encountered working illegally and he was interviewed under caution. On this same date he was served with a notice notifying him that he was an illegal entrant who was liable to be detained and he then claimed asylum. On 25 January 2005, he was detained at HMP Woodhill. On 8 April 2005, he was sentenced to nine months imprisonment for using a false instrument and obtaining pecuniary advantage by deception. On 9 June 2005, he was released from prison on condition that he reported weekly.

8. On 6 July 2005, his asylum claim was refused with a right of appeal. He was also served with a form notifying him that he was to be removed to Iraq. On 20 July 2005, he stopped complying with reporting restrictions.

9. On 18 July 2007, new representatives made contact. On 23 July 2007, he was notified that he had to comply with reporting every two weeks. On 30 May 2007, he failed to comply with reporting restrictions. On 23 July 2007, he was notified that he had to comply with reporting every two weeks. On 7 December 2008, he was encountered at his home address and found with a counterfeit French passport, he was remanded in custody but on 6 March 2009, these charges were dropped, and he was released from custody on reporting restrictions. On 10 March 2009, he failed to comply with reporting restrictions. On 12 March 2009, letters were returned by Royal Mail saying that he did not live at the address he provided. On 24 April 2009, he started complying with reporting restrictions.

10. On 5 June 2009, further representations were submitted. On 30 June 2009, a letter was sent to him advising him that his case would be considered by the Case Resolution Directorate.

11. On 11 October 2010 and 15 September 2011, further representations were submitted.

12. On 28 February 2012, these were both rejected without a right of appeal.

13. On 10 April 2012, he signed a declaration of voluntary return to Iraq. On 3 May 2012, he applied for the Facilitated Return Scheme and ticked a box stating that there was no reason why he should not be deported and he wished to leave the UK as soon as possible. In late 2013, he left the United Kingdom on an unconfirmed date.

14. On 20 May 2014, he returned to the United Kingdom using a false identity on a ferry from Holland. He claimed asylum again. His application was voided and instead on 20 May 2014 further submissions were raised.

15. On 17 August 2015, these were rejected without a right of appeal. On 29 June 2016, he made further submissions, and these were refused on 2 July 2016 without a right of appeal.

16. On 7 February 2017, he made further submissions, and these were refused on 9 February 2017 without a right of appeal.

17. On 4 April 2019, he submitted further submissions, and these were refused on 4 July 2019, without a right of appeal.

18. On 22 May 2020, further representations were submitted.

19. On 25 September 2020 at the Crown Court, he was sentenced to ten months imprisonment for possession and use of a false instrument. On 30 December 2020, he completed his custodial sentence and were granted Secretary of State bail.

20. On 8 October 2020 and notified you that “because of your criminal convictions in the UK the Secretary of State had decided to make a deportation order against you under section 5(1) of the Immigration Act 1971 pursuant to section 3(5) of the Immigration Act 1971.”

21. On 18 October 2022, the respondent considered the representations made which were those provided on his behalf dated 22 May 2020 and refused his claims in a decision to refuse his protection and human rights claim. This was the decision under appeal before the FtTJ.

22. The FtTJ heard the appeal on 12 October 2023. In a decision promulgated on 20 November 2023 the FtTJ allowed the appeal on asylum grounds.

23. The FtTJ set out what appear to have been the issues raised at the hearing at paragraph 11 as follows:

> “At the outset of the hearing Mr Alani submitted that the Appellant is arguing his claim under the Refugee Convention because of his sexuality. He initially submitted that there is no separate argument under Article 3 based on his CSID / INID card but then after having taken instructions on it confirmed that it is being argued. He submitted that the Appellant is not pursuing any other risk-based claim. He submitted that the Appellant is arguing Article 8. Both representatives agreed that the Appellant has not resided in the United Kingdom for a continuous period of 20 years and that there has been no previous determination of the Tribunal”.

24. The FtTJ went on to consider the evidence submitted on the appellant’s behalf and whilst making reference to some of the credibility concerns regarding his claim the FtTJ stated : “However, in respect of his claim to be homosexual, when considering all the evidence in the round and at the lower standard of proof I do find that he is” . The FtTJ’s reasoning was that he attached weight to the two supporting letters provided alongside evidence given by the appellant. The FtTJ considered the decision of the respondent refusing his claim dated the 28th of February 2012 and his voluntary return and found that the appellant was gay and that if he were returned to Iraq, he would hide his sexuality in order to avoid persecution and he would not be able to seek state protection or internally relocate (applying the CPIN (Iraq: Sexual orientation and gender identity and expression Version 2.0 September 2021) paragraphs 2.4.21-2.5.2-3 and 2.6.3).

25. FtTJ Joshi therefore allowed the appeal on asylum grounds.

The appeal before the Upper Tribunal:

26. The respondent sought permission to appeal and permission to appeal was granted by UTJ Owens on 31 January 2024 for the following reasons:

> "The appellant, an Iraqi national, has a complex immigration history. He originally entered the UK in 2003 and claimed asylum on the basis of a fear of serious harm because of his Arab ethnicity. The claim was refused, and he did not appeal. He then lodged further submissions asserting that there was a risk to him because of his sexuality. These were rejected with no right of appeal. The respondent did not accept the appellant's claim to be a gay man. The appellant then left the UK in 2013 and re-entered illegally in 2014. He made further submissions, this time on Article 3 ECHR grounds in relation to the difficulties he would face in Iraq because of the ongoing conflict and his inability to redocument himself. Three sets of submissions were put forward on this basis. There was no mention of his sexuality. In 2020 the respondent decided to deport the appellant because of various convictions for the use of false documents. The respondent took a decision on 18 October 2022 to refuse the appellant's protection and human rights claim. The decision did not deal with the issue of sexuality.
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> 2. This issue was raised in the ASA and amended grounds of appeal which were uploaded in accordance with an extended timeframe. In the meantime, due to some confusion in case management directions, the respondent's review had already taken place. The respondent did not review the ASA prior to the hearing. The respondent appears not have raised the issue of whether the asylum claim on the basis of sexuality before the judge was a "new matter" and this was not considered by the judge.
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> 3. The judge allowed the appeal on asylum grounds. It is arguable that the appellant's claim to fear serious harm as a gay man was a "new matter" because this issue had not been raised by the appellant or considered by the respondent after the appellant re-entered the UK in 2014. It is also arguable that the grounds of appeal challenged the decision to refuse the protection claim on the basis of Article 3 ECHR only because the further submissions post 2014 relied on Article 3 ECHR and did not assert that the appellant had a well-founded fear of persecution for a Convention reason. "

27. The written grounds advanced on behalf of the respondent state as follows:

28. Ground one: Making a material misdirection of law.

29. The Respondent submits s85 of the NIIA 2002: Nationality, Immigration and Asylum Act 2002 (legislation.gov.uk) states:

> (5)But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.
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> (6)A matter is a "new matter" if—
>
> (a)it constitutes a ground of appeal of a kind listed in section 84, and
>
> (b)the Secretary of State has not previously considered the matter in the context of— (i)the decision mentioned in section 82(1), or (ii)a statement made by the appellant under section 120.

30. The FtTJ has proceeded to consider the appellant's protection claim that he would be at risk on return to Iraq as a homosexual man. However, it is submitted

the appellant has only appealed on Human Rights grounds and FtTJ has incorrectly allowed consideration of a new matter without seeking consent from the attending HO Presenting Officer and has therefore rendered themself the primary decision maker on this key issue.

31. In anticipation that it may be viewed that implied consent was given, the respondent will highlight Mahmud (S. 85 NIAA 2002 – 'new matters') [2017] UKUT 488 at [36] which states: "…Thirdly, in any event, it would be contrary to the clear language in section 85(5) requiring the Secretary of State to have given consent, to find that by means of procedural rules, deemed consent can be inferred by inaction. Section 85(5) of the 2002 Act requires actual consent by the Respondent which cannot be deemed or implied."

32. Further reliance is placed on headnote 1 of this same appeal: "Whether something is or is not a 'new matter' goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue."

33. It is submitted consent for the Tribunal to consider a new matter should be expressly given and the FtTJ has made a material misdirection of law in in proceeding to consider an asylum appeal that was not before them.

34. It is submitted that the FtTJ erred materially in law in allowing the Appellant's appeal. The FtTJ's decision should be set aside, and the appeal referred to a different FtTJ.

35. The appeal came before the Upper Tribunal. The respondent was represented by Mr Thompson, Senior Presenting Officer and the appellant by Ms Chaudhry of Counsel. Ms Chaudhry confirmed that she did not require any further time to consider the respondent's grounds and was able to proceed.

36. Mr Thompson relied upon the written grounds of challenge as set out above. In addition it was submitted that it was clear from the decision under challenge of 18 October 2022 that the basis of his claim was due to a fear of ISIS and not a result of his sexuality. He submitted that as set out in the country guidance case of SMO, the sliding scale enhanced protection factors included that of the LGBTQ community as a risk category but there were no representations made in that respect to this appellant.

37. He referred the tribunal to paragraph 16 of the FtTJ's decision and that whilst the presenting officer was aware of the historic claim based on his sexuality an awareness of the claim was not an indication of consent being granted as set out in the headnote of the decision in Mahmud. He submitted that whether something was a "new matter" went to the jurisdiction of the FtT in the appeal and it is a matter that the FtTJ must determine himself.

38. Mr Thompson further submitted that by relying upon this new factual matrix the appellant's representatives deprived the Secretary of State of the opportunity to be the primary decision maker. He further submitted that the appellant's representatives erred in highlighting or failing to obtain consent for this to form part of the appeal and that the FtTJ should have explored whether consent ought be given. It was not possible to rely upon references in historic submissions made in 2009 – 2010 given the length of time.

39. By reference to the timeline of the proceedings before the FtT, the respondent had focused the case on the grounds raised in the further submissions and to that

which had resulted in the decision letter. The respondent's review was filed before the ASA and that it was for the appellant's representatives if they were changing their grounds to seek consent for the "new matter" and that did not occur. The FtTJ should have invited the parties to engage with the issue of consent. He therefore invited the tribunal to set aside the decision and to remit to the FtT given the lack of jurisdiction

40. The appellant's solicitors filed a skeleton argument which set out the following:

41. The FtT judge considering the application of the respondent for permission refused to grant the permission. The Solicitors acting for the appellant enquired from the UT as to any further applications and was advised that they would be advised of any new development. The Solicitors heard nothing from the UT or the respondent. On 17/4/2024, the appellant, and not his solicitors who were still on record, received a letter advising him of a hearing before the UT listed for 15/5/2024.It transpired that the UT had, on 2/2/2024, granted the Respondent permission to appeal which was not served on the appellant or his solicitors.

42. It is submitted that the UT judge erred in fact and law. The FtT judge who heard the appeal concluded that the ground of homosexuality was raised before, and the respondent was aware of it. The judge erred in concluding that it was a new ground.

43. During the hearing before the FtT judge the respondent accepted that the ground of homosexuality has existed all along. The respondent had the opportunity to challenge it there and then. The FtT judge hears the evidence in any appeal before him and is entitled to make his decision accordingly. It is not open for the UT judge, on paper, to conclude otherwise. There has not been an error of law in the decision of the FtT judge and the UT judge failed to identify any such error of law.

44. It is submitted that the UT judge failed to give reasons for his judgment. Simply saying that the respondent submission is arguable is not according to the authorities demanding a decision to be properly reasoned.

45. The UT and the respondent both erred in law in having failed to serve the application, or the decision to grant permission, on the appellant denying him his right to prepare a proper response.

46. It is submitted that the decision of the FtT is right and should be accepted by the UT.

47. Ms Chaudhry submitted that there was no material error of law and by reference to the chronology an application for grounds to be filed was made on the 3 November 2022 although it appears on 14 November 2022 was refused. However the documents and evidence relied upon including the skeleton argument were available to the respondent who had sight of them even if this were after the review had taken place. Thus she submits, the respondent was aware that this would be an issue. It was not raised before the FtTJ that this was a "new matter".

48. Ms Chaudhry further submits that the respondent was aware of the previous reliance upon his sexual orientation and therefore it was not a new matter because it had been previously considered. There was clear evidence before the FtTJ that the appellant had referred to his sexual orientation back in 2009 and 2010. The new evidence contained in 2 letters dated June 2023 were exhibited in

the bundle and the FtTJ made reference to those documents. Thus she submitted there was sufficient evidence before the respondent and therefore applying the decision in Mahmud, this was not a “new matter” and historically had been raised previously.

49. Ms Chaudhry further submitted that this factual claim was always at the forefront by those who represented him and therefore it was not a new matter. Therefore the judge was entitled to consider the evidence on this issue, and he was entitled to allow the appeal. Therefore the decision should be upheld.

50. By way of reply Mr Thompson submitted that the matter at issue was not whether the FtTJ gave adequate reasons for his decision, but it was whether he had jurisdiction to consider that evidence. The Secretary of State maintained that the further representations which gave rise the appeal were not pursued on grounds of sexuality. The review and the decision letter set out the documents provided in support, and it did not include the letters.

Decision on error of law:

51. The relevant legal framework is set out as follows:

52. Section 82 (Right of Appeal to the Tribunal) of the Nationality, Immigration and Asylum Act 2002 creates rights of appeal against, respectively, a decision to refuse a protection claim, and a decision to refuse a human rights claim:-

" **82. Right of appeal to the Tribunal**

(1) A person ("P") may appeal to the Tribunal where-”

(a) the Secretary of State has decided to refuse a protection claim made by P,

(b) the Secretary of State has decided to refuse a human rights claim made by P, or

(c) the Secretary of State has decided to revoke P's protection status.

(2) For the purposes of this Part-”

(a) a "protection claim," is a claim made by a person ("P") that removal of P from the United Kingdom-”

(i) would breach the United Kingdom's obligations under the Refugee Convention, or

(ii) would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(b) P's protection claim is refused if the Secretary of State makes one or more of the following decisions-”

(i) that removal of P from the United Kingdom would not breach the United Kingdom's obligations under the Refugee Convention;

(ii) that removal of P from the United Kingdom would not breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(c) a person has "protection status" if the person has been granted leave to enter or remain in the United Kingdom as a refugee or as a person eligible for a grant of humanitarian protection;

(d) "humanitarian protection" is to be construed in accordance with the immigration rules;

(e) "refugee" has the same meaning as in the Refugee Convention.

(3) The right of appeal under subsection (1) is subject to the exceptions and limitations specified in this Part.]"

53. Section 84 (Grounds of Appeal), so far as relevant, provides:-

" **84. Grounds of appeal**

(1) An appeal under section 82(1)(a) (refusal of protection claim) must be brought on one or more of the following grounds-”

(a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;

(b) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

(c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

(2) An appeal under section 82(1)(b) (refusal of human rights claim) must be brought on the ground that the decision is unlawful under section 6 of the Human Rights Act 1998."

54. Section 85 (Matters to be considered) provides, so far as relevant:-

" (4) On an appeal under section 82(1) ... against a decision [the Tribunal] may consider ... any matter which [it] thinks relevant to the substance of the decision, including ... a matter arising after the date of the decision.

(5) But the Tribunal must not consider a new matter unless must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.

(6) A matter is a new matter if-”

(a) it constitutes a ground of appeal of a kind listed in section 84, and

(b) the Secretary of State has not previously considered the matter in the context of-”

(i) the decision mentioned in section 82(1), or

(ii) a statement made by the appellant under section 120.]"

55. Section 82 and 85 were considered by the Vice President and Upper Tribunal Judge Jackson in Mahmud (S. 85 NIAA 2002 - 'new matters') [2017] UKUT 488 (IAC). The judicial head-note reads:

> "1. Whether something is or is not a 'new matter' goes to the jurisdiction of the First-tier Tribunal in the appeal and the First-tier Tribunal must therefore determine for itself the issue.
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> 2. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal.
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> 3. In practice, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive."

56. Paras 29-31 of Mahmud sets out:

> "29. A matter is the factual substance of a claim. A ground of appeal is the legal basis on which the facts in any given matter could form the basis of a challenge to the decision under appeal. For example, medical evidence of a serious health condition could be a matter which constitutes a ground of appeal on human rights grounds based on Article 3 of the European Convention on Human Rights which if breached, would mean that removal would be contrary to section 6 of the Human Rights Act, a ground of appeal in section 84(2) of the 2002 Act. Similarly, evidence of a relationship with a partner in the United Kingdom could be a matter which constitutes a ground of appeal based on Article 8 and for the same reasons could fall within section 84(2) of the 2002 Act as if made out, removal would be contrary to section 6 of the Human Rights Act.
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> 30. A 'new matter' is a matter which constitutes a ground of appeal of a kind listed in section 84, as required by section 85(6)(a) of the 2002 Act. Constituting a ground of appeal means that it must contain a matter which could raise or establish a listed ground of appeal. In the absence of this restriction, section 85(5) of the 2002 Act could potentially allow the Respondent to give the Tribunal jurisdiction to consider something which is not a ground of appeal by consent, thereby undermining sections 82 and 84 of the 2002 Act;
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> 31. Practically, a new matter is a factual matrix which has not previously been considered by the Secretary of State in the context of the decision in section 82(1) or a statement made by the appellant under section 120. This requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The assessment will always be fact sensitive. By way of example, evidence that a couple had married since

> the decision is likely to be new evidence but not a new matter where the relationship had previously been relied upon and considered by the Secretary of State. Conversely, evidence that a couple had had a child since the decision is likely to be a new matter as it adds an additional distinct new family relationship (with consequential requirements to consider the best interests of the child under section 55 of the Borders, Citizenship and Immigration Act 2009) which itself could separately raise or establish a ground of appeal under Article 8 that removal would be contrary to section 6 of the Human Rights Act."

57. The sole ground of challenge on behalf of the respondent is that the FtTJ erred in law by considering the appellant's protection claim based on his sexual orientation when the appellant had only appealed on Human Rights grounds and thus FtTJ has incorrectly allowed consideration of a new matter without seeking consent from the attending HO Presenting Officer and has therefore rendered himself the primary decision maker on this key issue.

58. It is further submitted that consent for the Tribunal to consider a new matter should be expressly given and the FtTJ has made a material misdirection of law in in proceeding to consider an asylum appeal that was not before him which went to the issue of jurisdiction.

59. Having had the opportunity to read the material evidence and for the material to be viewed in light of the submissions made by each of the advocates, I am satisfied that the FtTJ erred in law in the way set out in the respondent's grounds and that he fell into error by considering the applicant's claim based on his sexuality which fell within the definition of a "new matter" in accordance with section 85 the Nationality, Immigration and Asylum Act 2022. Accordingly, there was no jurisdiction him to consider the appeal on that basis without the consent of the respondent which had not been given. The reasoning for that conclusion is given as follows.

60. The appellant has a long and complicated immigration history. He claims to have first entered the United Kingdom illegally in September 2003 although he did not make a claim for asylum until he was encountered working illegally in January 2005. The basis of his claim was that he feared revenge from others in Iraq and that he was at risk as a result of his ethnicity having lived in a Kurdish area (see SEF 7/2/05 and statement of additional grounds at B2). The respondent refused his claim for asylum in a decision taken on 6 July 2005. Whilst the applicant claimed in further submissions filed on his behalf that the decision was appealed and dismissed by a judge (see further submissions at F1 dated 5/6/2009), there is no evidence of appeal being heard or that the appellant had engaged with the appeal. It was not until 4 years later in 2009 the appellant made further submissions (see F1 letter dated 5/6/2009). The content of those further submissions made on 5 June 2009, 11 October 2010 and 15 September 2011, was that he had been in a gay relationship in Syria in 1998 but that he had not mentioned it before in his claim and relied upon this in the further submissions. The respondent refused those further submissions in a decision taken on 28 February 2012 (see J12) taking into account the nature of the late claim made for asylum originally in 2005 and that it was made after arrest and that the claimed factual basis of his sexuality was not raised in 2005, that he provide no supporting evidence as to his sexual orientation from any sources including any reference to it in the 13 letters of support people who knew him. The applicant did not seek to challenge the decision- a route which was available to him by way of judicial review but in April 2012 signed a declaration of voluntary return to Iraq and applied under the facilitated return scheme. It is recorded that he ticked the

box to say there was no reason why he should not be deported and wished to leave the UK. He left the UK in late 2013 on a date that is unconfirmed.

61. On 20th of May 2014 the appellant returned to the UK using a false identity and made a further claim for asylum. The application appears to have been voided and instead on 20 May 2014 he made further submissions (see M2). Those submissions stated that he did not appeal the decision because he did not receive it (see p94RB) which was different to the earlier claim made in 2009. The basis of the claim made after his return to the UK was based on the instability in Iraq and expressly relied on the reasons he gave for fleeing Iraq in 1992. In those submissions reference was made to Article 15 (c) and the enhanced risk categories however the only risk factor identified as pertaining to this appellant related to his ethnicity. As Mr Thompson observed, if the appellant were relying upon his claimed sexuality that would have been a risk category which would have been identified in the same context. The submissions were refused by the Secretary of State with no right of appeal.

62. The decision was followed 2 years later by further submissions made to the respondent on 29 June 2016 based on the fear of ISIS in his home area (see N7), which were again refused without a right of appeal and a further set of submissions made on 3 February 2017 (set out at O3) which referred to risk from ISIS and the enhanced risk categories based on his ethnicity. The grounds referred to a claim made on Articles 2 and 3. The respondent refused those further submissions in a decision taken on 9 February 2017.

63. None of those further submissions advanced on the applicant's behalf following his voluntary removal from the UK and re-entry to the UK in 2014 was based on his sexuality even when it was asserted that he fell within the enhanced risk categories for a claim of humanitarian protection under Article 15(c) which would necessarily also include the issue of his sexuality. Furthermore none of the decisions generated by those further submissions had been subject to any challenge available to him by way of judicial review.

64. Nothing further was heard from the appellant until the 15 March 2019 when new solicitors issued further submissions of fresh claim on his behalf (see R1). They were made by the solicitors who continue to represent him for the present proceedings. The basis of the claim was that he feared he would be killed by ISIS, that he had last visited Iraq 15 years ago and had lost all ties and Article 15 (c) was relied on based on the regions volatility. The further submissions stated that the applicant had a viable Article 2 or 3 claim for protection and an Article 8 claim. Those further submissions were refused without a right of appeal in a decision taken on 4 July 2019 (see S 1).

65. The last set of submissions that are relevant are dated 22 May 2020. Those submissions repeated the same claim made in 2019 that he was in fear of return to Iraq due to ISIS. In line with the content of the further submissions made on his behalf since he returned to the UK in 2014, none of the further submissions made referred to a fear based on his sexual orientation, or any evidence advanced in support of the claim even in the context of Article 15 (c) and the enhanced risk categories which only raised the issue of his ethnicity

66. Following this, the accepted chronology of events is that he was arrested and convicted of criminal offences (possession and use of a false instrument) and was sentenced to 10 months imprisonment.

67. On 8 October 2020, the appellant was notified that because of his criminal convictions the respondent decided to make a deportation order against him under section 5 (1) of the Immigration Act 1971 pursuant to section 3 (5) of the Immigration Act 1971. The letter informed the appellant that he could provide further information and also explained the effect of the section 120 notice which was included with that decision.

68. As set out in the decision under appeal (dated 18/10/22) which led to the proceedings before the FtT, the appellant did not reply to the letter of 8 October 2020 and did not provide any further information or evidence as requested in the section 120 notice.

69. The decision challenged dated 18 October 2022 was a "Decision to refuse a protection and human rights claim" taking into account the matters raised on the applicant's behalf in the only outstanding submissions dated 22 May 2020. All of the grounds relied upon in those submissions were addressed in the decision letter. As can be seen none of them related to any risk based on his sexuality and no evidence had been made in support of such a claim. The further submissions since those provided in 2011 had been silent on that issue.

70. The decision letter expressly considered the appellant's claim to fall within the enhanced categories and thus a breach of Article 15 (c) as set out in SMO (the relevant country guidance decision) but reached the conclusion that there was no evidence that he fell within the criteria based on the factual claim that he had made (see paragraphs 19 and 20). The decision letter also considered other issues relevant to the issue of deportation.

71. Thus in summary, as submitted on behalf of the respondent there had been no further submissions or reference made to the appellant's sexual orientation relied upon as a Refugee Convention ground from any of the submissions made from 2014 – 2020. Nor had there been any response to the section 120 notice setting out any additional risk factors or evidence relied upon.

72. The next relevant material relates to the challenge of the decision. Both advocates were able to view the material on the First-tier Tribunal's case management system known as the "CCD" at the hearing. It demonstrated that following the decision reached on 18 October 2022, an appeal was submitted on his behalf on 31 October 2022. In respect of the grounds relied upon its stated "the decision is unlawful under Section 6 of the HRA 1998". No reference was made to the Refugee Convention which is a separate ground of appeal. Whilst reference was made "grounds to follow" it appears that an application was made for the grounds to be submitted but was refused by a tribunal caseworker (see entry 3 November 2022) although it is right to observe that there was a brief reference to the applicant's sexuality for the first time. Following this the appellant's skeleton argument (the "ASA") was not uploaded to the CCD in accordance with the case management directions . The respondent therefore uploaded his review on 7 June 2023. The focus of the review was to engage with the basis of the claim advanced by the appellant and the further submissions and as addressed in the decision letter.

73. Following the respondent's review, the appellant's bundle was uploaded on 10 July 2023 which included a document entitled "grounds for appeal" which the parties have referred to as amended grounds and a skeleton argument setting out the applicant's factual claim which was predominately based on his sexuality.

74. For reasons that are unclear to me, despite the ASA being filed out of sequence and after the respondent's review and the appearance of what were amended grounds of appeal, no further case management took place before the FtT hearing.

75. Having set out the background at some length it is plain that the issue of the appellant's sexual orientation as a Refugee Convention ground was not raised in the context of the decision that was made by the Secretary of State which was a decision to deport the applicant in the context of a decision to refuse the protection of human rights claim. The only submissions which were outstanding with those of 20 May 2020 and following the notice of deportation issued on 8 October 2020 no further grounds were submitted or reasons given by a new additional grounds or by reference to the section 120 notice served.

76. Whilst Ms Chaudhry submits that the matter of the applicant's sexuality was not a "new matter" because the Secretary of State was aware of this claim made in 2009 and 2011, and which she submitted was acknowledged by the judge at paragraph 16, that is not an answer to the issue of whether this was a "new matter". The respondent was entitled to address and consider as the decision maker the appellant's current circumstances in the context of the decision made to deport him and on the basis of the factual issues raised by him in that context. There had been no factual claim made based on his claimed sexuality for a period of over 12 years and after he had voluntarily left the UK. The claim advanced before the FtTJ under the Refugee Convention was a separate ground of appeal and separate to the appeal grounds which had been advanced on behalf the applicant which referred to the decision being unlawful under Section 6 of the HRA 1998.

77. When addressing whether this was a "new matter" applying the decision in Mahmud the matter is the factual substance of the claim and in practice which is not been previously considered in the context of the decision in section 82 (1). As demonstrated by the submissions which were considered and upon which the decision on 18 October 2022 was made, no claim was made of a Refugee Convention ground based on his sexuality or risk in that context. Nor was there any claim made in the section 120 notice. This had been served on the appellant with the decision of 8 October 2020.

78. Section 120 (5) requires the applicant in those circumstances to "provide a supplementary statement to the Secretary of State or immigration officer setting out the new circumstances or the additional reasons or grounds". One of the purposes of Section 120 is to provide the Secretary of State with notice of any new claim or reasons so that a positive response can be given. It is also in line with public policy reasons that Parliament did not intend the tribunal to be the primary decision maker. The grounds of appeal do not constitute the statement. If so, the statutory provisions would have said so (see the distinction drawn between section 85 (2) between a "matter raised in the statement" and ground of appeal of a kind listed in section 84 against the decision appealed against).

79. Turning to the factual substance of the claim made before the FtT, this was not one relied upon in the submissions made to the Secretary of State and as such is factually different. A significant period had elapsed since 2011 with no evidence being provided in support or reference to any claim being made under the Refugee Convention. The respondent was entitled to address the current evidence in the context of new proceedings which related to a decision to deport the appellant.

80. The argument advanced by Ms Chaudhury that the FtTJ went on to consider the claim and evidence which had been available in the bundle from July 2023 does not assist in determining whether the factual claim was a “new matter” as it is a matter of jurisdiction. The FtTJ was not assisted by the presenting officer who ought to have been aware that the Refugee Convention ground of a Particular Social Group based on the applicant’s sexuality was potentially a “new matter” and one, which if considered to be a “new matter” would require the consent of the respondent.

81. I accept the submission made by Mr Thompson that the observation or acknowledgement made by the FtTJ at paragraph 16 was not a consideration of whether this was a “new matter”. Whilst the presenting officer was aware of the historic claim made in 2009, awareness is not an indication of consent having been granted.

82. Furthermore any submission made that presenting officer’s inaction meant that such consent could be inferred, fails to take into account that this is an issue of jurisdiction and whether something is or is not a new matter goes to the jurisdiction of the FtT in the appeal and that the FtTJ must determine for itself that issue. Section 85(5) of the 2002 Act requires actual consent by the respondent which cannot be deemed or implied (see paragraph 36 of Mahmud).

83. As stated above, the difficulty which is arisen may relate to the lack of case management and that no party considered the issue of whether the Refugee Convention ground relied upon fell within a “new matter” as defined by the statute and by reference to the material provided. The fact that there appears to have been amended grounds should have been an indication that consent should been sought. I accept the submission made by Mr Thompson that even if that had not been done, the FtTJ should have considered this on his own volition as it went to the issue of jurisdiction.

84. Consequently for the reasons given above, the issue of the Refugee Convention ground based on the appellant’s sexual orientation was a “new matter” and one which was factually different from the context of the claim made to the Secretary of State and the decision made in response to it. That being the case and in the absence of consent from the Secretary of State there was no jurisdiction to consider the appeal on that factual basis and to allow the appeal on Refugee Convention grounds. In those circumstances there was an error of law because there was no jurisdiction to make that decision and that he took into account matters which should not have taken into account because of the constraints of his statutory powers imposed by section 85 of the 2022 Act.

85. Conversely the FtTJ did not address the other grounds relied upon by the appellant as identified in the further submissions of May 2020 and the decision letter therefore there is no reasoning available to consider any alternative basis of claim.

86. I therefore set aside the decision for error of law. Both advocates agree that if there is no jurisdiction for the judge to have considered the Refugee basis of the claim, this constitutes a procedural irregularity or unfairness and that the appeal should be remitted to the FtT. As there has been a procedural irregularity relevant to the issue of jurisdiction the appellant cannot retain a decision so affected and in accordance with the practice direction, the matter should be remitted to the First-tier under section 12 (2) (b) (i) of the TCE 2007 and paragraph 7.2 (a) of the Presidential Practice Statement (*Begum (remaking or remittal) Bangladesh*[2023]UKUT 0046 (IAC) considered) with no findings preserved.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law; the decision is set aside. The appeal is remitted to the FtT for a fresh hearing.

Upper Tribunal Judge Reeds

Upper Tribunal Judge Reeds
20 May 2024

20/5/24