IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002507

First-tier Tribunal No: PA/01779/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 17th of October 2024

Before

UPPER TRIBUNAL JUDGE HOFFMAN

Between

AA
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr K Wood of Counsel, instructed by Immigration Advice Service
For the Respondent: Ms C Newton, Senior Home Office Presenting Officer

Heard remotely at Field House on 15 October 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

Introduction

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge C J Williams promulgated on 8 April 2024 dismissing his appeal against the respondent's decision dated 4 November 2023 to refuse his protection claim.

Background

2. The appellant is a citizen of Iraq of Kurdish ethnicity. He claimed asylum in Norway in 2008. That claim was refused in 2011 and the appellant claims to have returned to Iraq in 2016. He arrived in the UK clandestinely on 6 November 2017 and claimed asylum the same day. According to the appellant, he had been a police officer in Iraq and his life was at risk because he had disobeyed an order to kill someone. The appellant's asylum claim was refused on 3 June 2020. The appellant exercised his right of appeal but this was dismissed by First-tier Tribunal Judge Birrell on 21 September 2021. The appellant was granted permission to appeal, but in a decision promulgated on 15 June 2023 the Upper Tribunal upheld Judge Birrell's determination.

3. On 15 September 2023, the appellant lodged further submissions with the Home Office. The appellant maintained his claim that he could not return to Iraq because he had refused an order to kill someone, but he also claimed that he was at risk because, since arriving in the UK, he had taken part in demonstrations against the Kurdish authorities in Iraq. The appellant's further submissions were refused in the decision dated 4 November 2023 and he was granted a new right of appeal. His appeal was heard on 15 March 2024 and dismissed by First-tier Tribunal Judge C J Williams ("the judge") on 8 April 2024.

The grounds of appeal

4. On 14 August 2024, the appellant was granted permission to appeal to the Upper Tribunal on the following grounds:

   (1) The judge acted unfairly by finding that the appellant's political beliefs were not genuine in circumstances where this had not been raised as an issue by the respondent and the appellant had not been cross-examined on this point.

   (2) The judge misdirected himself in law by finding that there was an absence of evidence to suggest that the Kurdistan Regional Government in Iraq ("KRGI") monitored demonstrators outside the Iraqi Embassy in the UK.

   (3) The judge misdirected himself in law by relying on criticisms of the appellant's case raised by Judge Birrell and not deciding the case for himself based on all the evidence before him.

Findings – Error of Law

Ground 1: Unfairness

5. At [24] of his decision, the judge made the following findings:

> "…Having considered the overall evidential landscape, I do not accept the appellant's [sur place] activities are expressions of genuinely held political beliefs. The appellant only began posting on Facebook a month before the hearing before me. His first attendance at a demonstration was around a

> month before he lodged his further submissions. It is telling that despite being in the United Kingdom since 2017, his political appetite is only whetted following the dismissal of his appeal by Judge Birrell, and close to the decision under appeal."

And at [25]:

> "It follows that the appellant could delete his Facebook profile before return to Iraq to obviate any risk which would stem from it being seen by the Kurdish authorities. The appellant has not shown, even to the lower standard, that he would be at risk upon return to Iraq because of his *sur place* activities."

6. However, as the appellant correctly points out, in refusing his further submissions, the respondent had not sought to question the genuineness of the appellant's political beliefs. Instead, the respondent asserted that the appellant's political profile was not significant enough that he was likely to have come to the attention of the Iraqi authorities: see para 53 of the decision letter.

7. Mr Wood, on behalf of the appellant, submitted that the judge therefore acted unfairly in making a finding against the appellant on a point that had not been set out in the decision letter and which the appellant had not been cross-examined on. Mr Wood also submitted that this error of law was material because it meant the judge did not consider the appellant's political beliefs in the context of HJ (Iran) v Secretary of State for the Home Department [2010] UKSC 31 and whether the appellant would be forced to hide them on return to Iraq.

8. In reply, Ms Newton, on behalf of the respondent, argued that while the decision letter did not question the genuineness of the appellant's political beliefs, it had noted that he commenced his sur place activities a month before he lodged his further submissions and, in the circumstances, the judge was entitled to make the finding that he did.

9. On consideration, I am satisfied that the judge's finding is tainted by procedural unfairness. The respondent had not questioned the genuineness of the appellant's beliefs in the decision letter and, consequently, the appellant had rightly prepared for and attended the hearing without expecting that matter to be in issue. Moreover, the appellant had not had the opportunity to have the genuineness of his political beliefs tested in oral evidence. While there is no challenge to the judge's findings that the appellant did not have a significant political profile in the UK, I am satisfied that by finding that the appellant's political beliefs were not genuine, the judge made a material error of law by not considering his case against the principles set out in the case of HJ (Iran). I cannot therefore say that the judge's conclusions on risk on return would have been the same but for that error.

Ground 2: Misdirection in law regarding the monitoring of demonstrations

10. The appellant argues that the judge misdirected himself in law at [22] and [24] by requiring express evidence that the KRGI monitored sur place activities outside Iraq's embassy and consulates which, he asserts is contrary to the position set out at para 18 of the judgment in YB (Eritrea) v Secretary of State for the Home Department [2008] EWCA Civ 360 (per Sedley LJ):

> "…In my judgment, and without disrespect to what is a specialist tribunal, this is a finding which risks losing contact with reality. Where, as here, the tribunal has objective evidence which "paints a bleak picture of the suppression of political opponents" by a named government, it requires little or no evidence or speculation to arrive at a strong possibility — and perhaps more — that its foreign legations not only film or photograph their nationals who demonstrate in public against the regime but have informers among expatriate oppositionist organisations who can name the people who are filmed or photographed. Similarly it does not require affirmative evidence to establish a probability that the intelligence services of such states monitor the internet for information about oppositionist groups. The real question in most cases will be what follows for the individual claimant. If, for example, any information reaching the embassy is likely to be that the claimant identified in a photograph is a hanger-on with no real commitment to the oppositionist cause, that will go directly to the issue flagged up by art 4(3)(d) of the Directive." [Underlining added]

11. I am not satisfied that this ground identifies a material error of law. While it is correct that at [22] the judge did note that there was no objective evidence "indicating that those inside the embassy would be recording the crowd", the judge's subsequent finding that "the appellant's attendance at these demonstrations would not cause him to have come to the attention of the Iraqi authorities" must be considered in the light of his findings at [21] that, while present at demonstrations, there was "no indication the appellant was anything other than a face in the crowd". The judge's findings at [21] are unchallenged. Again, while at [24] the judge refers to the absence of any suggestion in the CPIN "Opposition to the Government in the Kurdistan region of Iraq (KRI) (July 2023)" to the Kurdish authorities monitoring political activities outside of their region, the judge also makes reference to there being no evidence in the CPIN to "suggest someone of the appellant's very limited profile would be the target of the authorities". I am therefore satisfied that the judge's findings that there was no evidence that the authorities monitored demonstrators in the UK were immaterial in the light of his unchallenged findings that the appellant did not play a prominent role in those demonstrations and was therefore unlikely to be of interest to the authorities in any event.

Ground 3: Misdirection in law as regards the treatment of evidence post-dating the appellant's first appeal

12. While the appellant does not dispute that the correct starting point for the judge was the decision of Judge Birrell (in accordance with the case of Devaseelan (Second Appeals – ECHR – Extra-Territorial Effect) Sri Lanka* [2002] UKAIT 00702), the appellant argues that the judge erred in law by failing to have regard to the case of Secretary of State for the Home Department v BK (Afghanistan) [2019] EWCA Civ 1358 at para 44:

> "I do not accept that in addressing the question of whether the finding of fact should be carried forward in that way, the tribunal is only entitled to look at material which either post-dates the earlier tribunal's decision or which was not relevant to the earlier tribunal's determination. To restrict the second tribunal in that way would be inconsistent with the recognition in the case law that every tribunal must conscientiously decide the case in front of them…"

13. Specifically, the appellant challenges the judge's approach to two letters written by former colleagues of his in Iraq. The judge acknowledged at [14] these letters were not before Judge Birrell and at [16] the judge summarised their contents. At [17], the judge said the following:

> "I note that both of these letters are accompanied by ID cards indicating the authors do work for the Police as claimed. It was accepted by Judge Birrell that the appellant was a Policeman. I find I can rely on the letters which were presented by the appellant. There are further letters presented by the same individuals at pp.29-41 (AB), which provide further detail on AR and his activities. I make the following observations about these letters; first, none of the authors have any direct knowledge of the task the appellant was allegedly asked to carry out, nor do they provide any indication AR was involved with ordering extrajudicial killings, at their highest, these letters confirm AR was an official who visited and would spend time with the appellant." [Underlining added]

14. I am satisfied that the judge properly took into account the evidence post-dating the appeal before Judge Birrell and that he gave rational reasons as to why he found them to be of limited evidential value. This ground therefore identifies no material error of law in the judge's approach.

Remaking

15. As the error of law identified in Ground 1 has deprived the appellant of a fair hearing, applying paragraph 7.2 of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, I am satisfied that remittal for a de novo hearing is the appropriate course of action.

Notice of Decision

The decision of the First-tier Tribunal involved the making of a material error on a point of law.

The decision of the First-tier Tribunal is set aside with no findings preserved.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal at Manchester, to be remade afresh and heard by any judge other than Judge C J Williams.

M R Hoffman

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16th October 2024