IN THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-005007

First-tier Tribunal No:
PA/53196/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 30th of January 2025

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

DEPUTY UPPER TRIBUNAL JUDGE HILLS

Between

SH

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr D Bazini, Counsel, instructed by Barnes Harrild & Dyer

For the respondent: Mr A Tan, Senior Presenting Officer

Heard at Field House on 20 January 2025

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 Hawden-Beal ("the judge"), promulgated on 15 August 2024 following a remote hearing on 31 July 2024. By that decision, the judge dismissed the appellant's appeal against the respondent's refusal of his protection and human rights claims. Those claims were made on or about 12 December 2019.

2. The appellant is a national of Iraq and is of Kurdish ethnicity. He originates from the IKR, having been born in Erbil and then moving to Sulaymaniyah. The essence of his protection claim was as follows. He claimed to have engaged in an adulterous relationship with L, the married daughter of an influential man with connections to the

authorities. Intimate photographs of the appellant and L were disclosed to the latter's family by a friend of the appellant. As a result, he feared retribution from L's father. In addition, the appellant's father had been shown photographs of him drinking alcohol with a friend and this too created a risk.

The judge's decision

3. The judge produced a lengthy and conscientious decision which we recognise involved a good deal of work. We only summarise the central findings here in order to achieve a degree of conciseness and to prevent repetition when it comes to our analysis and conclusions.

4. In summary, between [31] and [50], the judge found that:

   (a) the appellant did have an intimate relationship with L: [31]-[41];

   (b) on the appellant's account, he could be considered a member of a particular social group, namely a potential victim of an honour crime as result of having an extra-marital affair: [42]-[46];

   (c) the intimate photographs were not divulged to L's family or that of the appellant: [47]-[48] and [50];

   (d) the photographs were not posted on social media: [49].

5. At [50], the judge purportedly went on to take the appellant's case "at its highest" and consider the consequences of the intimate photographs having been shown to L's family. The judge concluded that if they had been seen, the appellant "would be persecuted" as a result: [51]-[52].

However, the judge subsequently found that L's father was not influential such that he could, or would want to, find the appellant on return and do him harm: [57]-[60]. As a result, the judge concluded that there was no risk on return: [63].

6. In assessing what the judge described as the question of whether a return to Iraq was "feasible", he referred to a number of "documents", including a passport, which remained in Iraq and which might seemingly be available to the appellant on or after return to either Duhok or Erbil airport (those being the points of return proposed by the respondent in her decision letter): [64]-[65]. The Refugee Convention claim was rejected and the judge then dealt briefly with humanitarian protection and Article 8, dismissing the appeal on those grounds as well.

The grounds of appeal

7. Two grounds of appeal have been put forward. We observe that they were not perhaps drafted with the precision and/or structure that one might ideally hope for. The first ground asserts that the judge had failed to apply the country guidance decision in SMO (Civil status documentation: Article 15) Iraq CG [2022] UKUT 00110 (IAC) ("SMO(2)") when considering the question of documentation and return.

8. The second ground of appeal asserted that the judge erred in a number of respects when assessing the credibility of the appellant's account. More specifically, it is said that the judge failed to apply anxious scrutiny, made mistakes of fact, engaged in speculation and/or impermissible assessment of plausibility, and, made adverse findings.

9. Permission was refused by the First-tier Tribunal but granted by the Upper Tribunal on both grounds.

Rule 24

10. The respondent did not provide a rule 24 response.

The hearing

11. We were assisted by helpful submissions from Mr Bazini and Mr Tan. We intend no disrespect to either by only summarising their respective arguments here.

12. Mr Bazini relied on the grounds, but refined each and supplemented the credibility challenge with particular references to the underlying evidence before the judge. Whilst he maintained that the judge had erred in relation to the question of documentation and return, he acknowledged the difficulty in demonstrating that this was a material error, given that the appellant would be returned directly to the IKR. In respect of the second ground, Mr Bazini submitted that the judge had materially erred in his assessment of whether the intimate photographs had been disclosed to L's father, with reference to [47]-[49]. As regards the alternative assessment beginning at [50], the judge did not in fact take the appellant's case at its highest and, in any event, erred when rejecting certain aspects of the account.

13. Mr Tan submitted that the appellant's challenge was effectively based on irrationality and amounted to nothing more than a disagreement with the judge's findings. The judge had provided a detailed decision and had not engaged in impermissible speculation. There had been a self-direction to the case of HK v SSHD [2006] EWCA Civ 1037 and the importance of applying caution when assessing plausibility. The judge had been entitled to find that the appellant had added detail to his account over time which could have been provided earlier. Importantly, the judge had been entitled to find that L's family

had not had significant influence, as evidenced by the fact that the appellant had not been found when hiding.

14. Mr Bazini briefly responded to Mr Tan's submissions and provided additional references to the evidence.

15. At the end of the hearing we reserved our decision.

Discussion and conclusions

16. Over the course of many years, the higher courts have emphasised the importance of the application of appropriate judicial restraint before interfering with a first-instance decision. Examples include: SSHD v AH (Sudan) [2007] UKHL; [2008] 3 WLR 832, at [30]; Fage UK Ltd. v Chobani UK Ltd. [2014] EWCA Civ 5, at [114] and [115]; MA (Somalia) v SSHD [2020] UKSC, at [45]; Volpi v Volpi [2022] EWCA Civ 464, at [2]; HA (Iraq) v SSHD [2022] UKSC 22, at [72]; Yalcin v SSHD [2024] EWCA Civ 74, at [50] and [51]; and most recently Gadinala v SSHD [2024] EWCA Civ 1410, at [46] and [47].

17. We have exercised that restraint. We have considered the judge's decision holistically and our focus has been on matters which were of real significance to the claim with which he was concerned.

Ground 1

18. Whilst the judge cited SMO and Others (Article 15(c); identity documents) CG Iraq [2019] UKUT 00400 (IAC), it is unfortunate that the judge did not refer to, or apply, the country guidance set out in SMO(2) when considering the issue of documentation and return. It appears as though he was not assisted by the appellant's previous representatives; there is no reference to SMO(2) in the skeleton argument and it may well

be that nothing was said about it at the hearing. Having said that, extant country guidance must be applied (or cogent reasons provided for not doing so).

19. It is not altogether clear what the judge was making findings on at [64]. He used the term “feasible” when posing the question of whether the appellant could return to Iraq. In the context of SMO(2), that term has a particular meaning and is more limited than the wider issue of documentation and any potential risk arising from the lack thereof once an individual is in the country. The context of what is said in [64] as a whole indicates that the judge was concerned with post-return documentation. In this regard, there is merit to the criticisms made at [40]-[41] of the grounds (pleaded under the second ground, but clearly relevant to the first). The judge may have misapprehended the appellant’s evidence as to who held his passport in Iraq and whether that document, or others, could have been obtained.

20. However, Mr Bazini was right to acknowledge the difficulties in the appellant establishing the materiality of any error. We are satisfied that the judge’s failure to have engaged with SMO(2) and a lack of clarity on the question of documents do not disclose a material error of law. The respondent proposed to return the appellant directly to either Dohuk or Ebril, both of which are in the IKR. The appellant was previously a resident of the IKR. There was no question of the appellant having to travel from Baghdad to that region. Given the presence of family members in the IKR (specifically his sister and brother-in-law), there was no proper basis on which any Article 3 or other humanitarian protection risk could have arisen.

21. For the sake of completeness, the appellant could not have succeeded in his appeal solely on the basis that a return to Iraq was not

currently feasible, as that term was used in SMO: [9] of the judicial headnote.

Ground 2

22. As recognised by Mr Bazini, the appellant must in the first instance demonstrate that the judge erred in respect of his finding that the intimate photographs had not been disclosed to L's family. If he cannot, the challenge to the judge's alternative assessment beginning at [50] falls away.

23. At the outset we acknowledge that the judge directed himself to HK v SSHD and the question of plausibility in protection claims. Indeed, Mr Tan was right to point out that whilst he found aspects of the appellant's case to be implausible, that same credibility assessment indicator had in other respects been applied in the appellant's favour.

24. At [47] the judge provided three reasons for holding significant concerns as to how the appellant's friend could have accessed the intimate photographs and then sent them to L's family: *first*, the appellant's mobile telephone was protected by a password and facial recognition; *second*, there would have been a record on that telephone if photographs had been sent to another device; *third*, the appellant would not have kept the comprising photographs on his telephone and then lend it to the friend.

25. We are satisfied that the judge erred in respect of at least two of the three reasons given.

26. In respect of the first reason provided, the judge stated that:

> "The problem with that is that the appellant today not only said that the telephone was protected by a password, which I accept can easily be discovered or handed over but also by face identity which means that in order to unlock the telephone, the friend would have had to ask the appellant to look at the telephone."

27. The judge therefore accepted that the password could have been known to the friend. That was in line with the appellant's consistent evidence that he regularly lent his telephone to this individual, which must presumably have involved providing the password (as a matter of common sense, there would have been no utility in lending the telephone to the friend if facial recognition had been required). The flaw in the judge's reasoning is that he appears to have assumed that there was a 'double lock' on the device, requiring *both* the password *and* facial recognition in order to access it. Whilst there was no expert technical evidence before the judge, the appellant's evidence did not suggest that such protection applied to his device (or even that it existed at all). We are able to take judicial notice that the use of a password is an alternative to facial recognition in order to access a mobile telephone. If we were wrong about that, the judge in any event either misunderstood the appellant's evidence (believing it to include an assertion that both forms of protection had to be used), or failed to provide adequate reasons as to why the appellant's evidence was so inherently implausible as to be untruthful/unreliable.

28. The judge was "quite sure" that there would have been a record if the intimate photographs had been sent to another device. It is unclear on what basis this strongly-phrased finding was reached. The appellant's evidence was that he did not know precisely how the photographs had been transferred. There was no expert technical evidence before the judge to indicate that a record of transfer would inevitably have existed. There can be no question that the judge was able to take judicial

knowledge of such a record because there are a variety of ways in which photographs can be sent from one device to another and not all would in fact leave a record: for example, the airdrop facility. We are satisfied that there was no proper basis, or no adequate reasoning provided, for the judge's rejection of any plausible explanation for how the intimate photographs could have been transferred without leaving a record.

29. We do have a concern that at [47] the judge did not answer, by way of a clear finding, the question he stated was left begging by the appellant's actions. When that is viewed in isolation, we would not be inclined to find an error because the judge was in reality raising a legitimate plausibility issue. That being so, it does not remedy the other errors contained within [47].

30. At [48], the judge clearly applied a plausibility assessment to the appellant's evidence. It did "not make sense" that the appellant's friend (and possibly other associates connected with the PUK) "suddenly" became interested in the appellant's father four years after he ceased to be an MP. In the judge's view, it "would have made more sense" if attempts to obtain information on the father had taken place earlier. This aspect of the appellant's account was not "credible or plausible".

31. We accept Mr Bazini's submission that the judge engaged in speculation based on a flawed premise and this approach led the judge to fall foul of the dangers of relying on plausibility highlighted by HK v SSHD. The appellant could not of course have known the mind of the friend and/or the PUK and in any event, as far as we can tell, he was never asked about this issue at the hearing. The judge was therefore speculating as to why interest in the father had only "suddenly" emerged in 2018. That is problematic in itself, although such speculation might not have amounted to an error if there was evidence that the friend had

access to incriminating evidence from the appellant which could have been used earlier, but was not. However, that was not the case; the intimate photographs were only transferred by the friend in 2018. On the appellant's evidence, that was the basis of the attempted blackmail in order to obtain information evidence about the father. That exercise could not have occurred earlier because the photographs did not exist between 2014 and 2018. In short, the judge was comparing different scenarios (one in which the photographs existed, the other in which they did not) and he erroneously based his plausibility concerns on these.

32. The latter part of [48] relates to the judge's concern that there was an inconsistency in the appellant's evidence as to whether his own family received the intimate photographs. The difficulty here is that the appellant had not stated that those photographs had been sent to his own family; his family had only received photographs of him drinking alcohol with his friend. We are satisfied that the judge either misunderstood the evidence or failed to explain why there was a credibility concern. On either basis, there is an error.

33. At [49] the judge roundly rejected a submission made by the appellant's previous representative which had asserted that the intimate photographs were posted on social media. The judge rightly pointed out that the appellant had never stated this in his evidence. We recognise that there can be a difference between the rejection of a submission and the rejection of evidence, with the former not necessarily having an adverse impact on the individual's credibility. However, we are concerned that in this case the judge did allow the former to adversely affect the latter. Within [49], the judge found that: "I am satisfied that this claim is an embellishment and an attempt to explain how it is that his friend was able to blackmail him." It may be that the "claim" referred to the representative's submission, but use of the word "his" indicates that the appellant's own evidence was being called into question. If the

judge believed that the appellant was seeking to embellish his claim, this was presumably relevant to the overall assessment of credibility. We find that the judge erred, whilst at the same time recognising that it is not a significant difficulty with his decision as a whole.

34. Bringing all of the above together, we are satisfied that the judge committed errors of law relating to the assessment of credibility, in particular the question of whether L's family were ever provided with the intimate photographs. Given that the judge was satisfied the appellant would have been at risk if those photographs had been disclosed (see [51] and [60]), the errors are clearly material.

35. We now turn to the second aspect of the judge's decision in which he purported to take the appellant's case "at its highest". We can deal with this relatively briefly.

36. Whilst not expressed in the clearest of terms, the second ground of appeal permitted Mr Bazini to make the overarching submission that the judge had in fact failed to take the appellant's case at its highest and had instead made adverse credibility findings. Mr Tan's submissions in response were perfectly reasonable, but we are satisfied that Mr Bazini is correct.

37. Taking a case at its highest must mean what it says. All relevant aspects of the evidence should be taken as read and then factored into the risk assessment. Having been referred to the underlying evidence, we are satisfied that the appellant's evidence included the following assertions as to past events:

(a) the intimate photographs had been disclosed to L's family;

(b) L's father was a wealthy and influential man belonging to a powerful tribe and had connections to an important industrial conglomerate and the PUK;

(c) L's family had looked for the appellant and, together with security forces, raided his family's home in order to detain him;

(d) the appellant had been hiding at his sister's house for a short period before arrangements were made for him to leave the country;

(e) the appellant's father had disowned him due in part to the photographs showing the appellant drinking alcohol with friends and would do him harm on return;

(f) the appellant had been told that there was an arrest warrant against him;

38. In addition, the expert report from Professor Bluth stated in clear terms that if L's father was indeed influential as claimed, there would be no state protection and the appellant could not internally relocate.

39. If the judge had proceeded on the assumption that all of this evidence was reliable, it appears as though he would have allowed the appeal because he had accepted that disclosure of the intimate photographs would have led to the appellant being at risk: [51] and [60]. We consider that what is said at [60] amounts to a composite conclusion,

namely that the appellant would be at risk and there would be an absence of both state protection and internal relocation.

40. Yet the judge did not in fact take the appellant's evidence at its highest. Instead, he found that L's father did not hold the influence claimed: [57]-[60]. Mr Tan focused on the fact that the appellant had not been found by L's family before leaving Iraq, with reference to [59]. Whilst a fair point to raise, it was not the sole, or even the primary, basis on which the judge rejected the claimed risk on return. The failure to have accepted the status of L's father was at the very least a material consideration in the judge's assessment, including the question of how the appellant evaded detection before he left Iraq.

41. For the reasons set out above, it is clear that the judge's alternative risk assessment is fundamentally flawed and cannot stand. We therefore need not address the specific challenges to the judge's adverse findings contained within [57]-[60].

42. The judge's decision must be set aside.

Disposal

43. We invited submissions on the method of disposal should we conclude that the judge's decision had to be set aside. Mr Bazini asked us to preserve the finding that the appellant had conducted an affair with L and that we might be inclined to retain this appeal in the Upper Tribunal. Having said that, he acknowledged that there was a fair amount of fact-finding to be undertaken and that, if remittal were to occur, a preserved finding could cause difficulties for the First-tier Tribunal when it came to considering all of the evidence in the round.

44. We have carefully considered whether to retain or remit this appeal, having regard to paragraph 7.2 of the Practice Statements and AEB v SSHD [2022] EWCA Civ 1512. We have decided that it is appropriate to remit the appeal. In light of our conclusions, there will need to be a re-assessment of a number of contested factual matters which in turn concern the appellant's credibility. The nature of the fact-finding exercise will be relatively extensive.

45. We have considered whether any of the judge's findings should be preserved. There is a well-reasoned finding in the appellant's favour as to his intimate relationship with L: [36]-[41]. This has not been challenged by the respondent through a rule 24 response. In principle, there is no reason to overturn it. We bear in mind the guidance provided by AB (preserved FtT findings; Wisniewski principles) Iraq [2020] 00268 (IAC) and the potential difficulties in "drawing a bright line" around particular findings of fact reached by the First-tier Tribunal. However, in the present case we are satisfied that such difficulties need not arise. The finding on the relationship is clear. Preserving that finding will not of course mean that all other aspects of the appellant's account should necessarily be accepted; a point illustrated by the judge's assessment. Just as an individual might be untruthful about one element of a claim and truthful on others, the converse applies equally. The next judge to consider the case will have regard to the evidence as a whole, but with one aspect of that evidence now having been established as credible. We preserve the finding that the appellant had an intimate relationship with L.

46. The judge also found that if the appellant had indeed engaged in an affair with L, he would have come within a particular social group within the definition of the Refugee Convention, namely the potential victim of an honour crime: [42]-[46]. That was a mixed question of fact and law. Again, the respondent did not challenge it. We see nothing wrong with its reasoning. Preserving this aspect of the judge's decision

would not cause difficulties for the First-tier Tribunal on remittal because membership of that particular social group would only in fact arise if the appellant makes out all relevant elements of his claim. We therefore preserve the judge's finding that, in principle, the appellant's claim falls within the Refugee Convention.

Anonymity

47. It is appropriate to maintain the anonymity direction in this appeal because it concerns protection issues. This consideration outweighs the public interest in open justice.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

We exercise our discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal to the extent set out in this error of law decision.

We remit the appeal to the First-tier Tribunal.

Directions to the First-tier Tribunal

1. **The appeal is remitted to the First-tier Tribunal (Manchester hearing centre);**

2. **The remitted appeal shall not be conducted by First-tier Tribunal Judge Hawden-Beal;**

3. **The remitted appeal shall be conducted in line with this error of law decision;**

4. **The anonymity direction is maintained.**

H Norton-Taylor

Judge of the Upper Tribunal

Immigration and Asylum Chamber

Dated: 27 January 2025