



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-005113

First-tier Tribunal No: PA/65823/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 6th of February 2025

Before

UPPER TRIBUNAL JUDGE P LODATO
DEPUTY UPPER TRIBUNAL JUDGE R FRANTZIS

Between

QKM
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Dingley (Counsel instructed by Legal Justice Solicitors)
For the Respondent: Mr M Diwnycz (Senior Home Office Presenting Officer)

Heard at Phoenix House (Bradford) 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. We have decided to maintain the anonymity order originally made in these proceedings by the First-tier Tribunal because the underlying claim involves international protection issues in that the Appellant claims to fear persecution or serious harm on return to Iraq. In reaching this decision, we are mindful of the fundamental principle of open justice, but we are satisfied, taking the Appellant's case at its highest for these purposes, that the potential grave risks outweigh the rights of the public to know of his identity.
2. The Appellant appeals with permission against the decision, dated 20th August 2024 ("the Decision"), of First-tier Tribunal Judge Saffer ('the Judge') to dismiss his appeal on international protection and human rights grounds.

Background

3. The broad factual background to the appeal is not in dispute between the Parties. In brief summary, the Appellant's case is that he is at risk because as part of his work as a border guard he drew the adverse attention of the Failak Al Badr militia, one part of the wider Hashd Al Shaabi militia, or Popular Mobilisation Forces ('PMF').

Appeal to the First-tier Tribunal

4. The Appellant appealed against the refusal of the claim. The Respondent was not represented at the appeal hearing. In the Decision the Judge stated that "*I am not bound only by the Respondent's concerns and am entitled to look at the whole matter irrespective of whether the Respondent has raised an issue*" [9].
5. In dismissing the appeal, the Judge made the following findings:
 - a. It is reasonably likely that the Appellant worked as a border guard and had problems with smugglers [24]
 - b. Failak Al Badr had links to the PMF in 2015 [29]
 - c. It is accepted that as part of his work as a border guard, the Appellant detained two members of Failak Al Badr, which led to death threats made against the Appellant in 2015 [33]
 - d. Having left the Iraqi border guard the Appellant would be at risk of punishment as a result, but this punishment would not be persecutory [34]
 - e. There is no cogent evidence that, after 9 years, the PMF would have an ongoing interest in the Appellant [35]
 - f. It has not been made out that the Appellant could not redocument himself. [36]

Appeal to the Upper Tribunal

6. The Appellant's grounds for permission to appeal contend that the Judge has erred in law in the following ways:
 - a. Through failing to apply the 'Surendran guidelines';
 - b. Through failing to apply paragraph 339K of the Immigration Rules;
 - c. Through failing to give adequate reasons for findings.

7. In a decision dated 3rd November 2024, First-tier Tribunal Judge Mills granted permission for all grounds to be argued.
8. At the error of law hearing, Mr Diwnycz for the Respondent conceded that the Decision involved an error of law for the reasons set out in Ground 1. It was common ground between the Parties that Grounds 2 and 3 need not trouble the Upper Tribunal in light of that concession and that the appropriate disposal was for the decision in the appeal to be re-made in the Upper Tribunal and that the appeal should be allowed.

Discussion

9. The Upper Tribunal is not bound by the Respondent's concession that the Decision involved a material error of law. However, the fact that there is no dispute between the Parties necessarily functions as an important factor in our assessment. For the reasons that we set out below, we are satisfied that the concession was properly made.
10. There is no dispute between the Parties that the sole reason raised by the Respondent in the refusal letter for refusal was that: *"Since your claim is not deemed to be credible and you have failed to demonstrate that you are at risk, and your return to Iraq is feasible."* At no point in the refusal letter does the Respondent suggest that there would not be an ongoing risk of harm to the Appellant if he were credible. No alternative case was pleaded. The Respondent's Review confirms this position, summarising the Respondent's case at [13] as: *"As it is not accepted that the Appellant has been credible in the core of his claim for asylum it is not accepted that he would be at risk on return to Iraq."*
11. The Respondent was not represented before the Judge who, having found the Appellant's factual account to be a credible one, at paragraph 35 of the Decision finds:

"There is no cogent evidence to suggest that some 9 years after he fled, the PMF would still have an adverse interest in him even if they knew he had returned as there is no up to date evidence of their 2024 modus operandi."
12. It was common ground before us that the assertion and conclusion, that the Appellant's narrative might be accepted, but the appeal should fail for want of current risk, was raised for the first time in the Judge's Decision and had never formed part of the Respondent's case. It was also common ground that this was the sole reason given by the Judge for dismissing the Appellant's appeal.
13. We find that the Judge, as contended for by Mr Dingley when we explored this with him, mis-directed himself at paragraph 9 of his Decision in saying *"I am not bound only by the Respondent's concerns and am entitled to look at the whole matter irrespective of whether the Respondent has raised an issue"*. That self-direction, as set out, mis-states the legal position as set out in STARRED MNM (Surendran guidelines for Adjudicators) (Kenya) [2000] UKIAT 00005 [6], particularly because the Judge fails to direct himself that *"It is not the function of the special adjudicator to expand upon that document, nor is it his function to raise matters which are not raised in it, unless these are matters which are apparent to him from a reading of the papers, in which case these matters should be drawn to the attention of the appellant's representative who should then be invited to make submissions or call evidence in relation thereto"*. Such a self-

direction, and the facts that we set out at paragraphs 10-12 above, drive us to accept the Respondent's concession that the Decision involved the making of an error of law.

Disposal

14. It was agreed that were we to find Ground 1 made out, we need not go on to consider Grounds 2 and 3. It was also agreed that the appropriate course was to allow the appeal, set aside the Decision of the Judge, and re-make the decision allowing the appeal.
15. Given that the live issues in this appeal have been settled in the Appellant's favour by the First-tier Tribunal and are not challenged, we adopt those findings and agree that the Appellant's appeal should be allowed.

Notice of Decision

The Decision of the Judge involved a material error of law. We allow the appeal and set aside the Decision. We re-make the Decision and allow the appeal on asylum grounds.

Roxanne Frantzis
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

31st January 2025