Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08404/2016

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly
On the 14th February 2018

Decision & Reasons Promulgated
On the 26th February 2018

Before:

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between:

MR K. M. H.
(Anonymity Direction made)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Wilkins (Counsel)
For the Respondent: Mr McVeety (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Traynor promulgated on the 8th May 2017, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse to grant his protection and Human Rights claims.

2. The Appellant is a citizen of Iraq who was born on the [ ] 1982. It is the Appellant's case that he was born in Erbil in the Kurdistan region of Iraq, but had subsequently worked for the coalition forces from March 2010 until March 2011 having been recruited through the Sarwan

Company. He says that he had served in 2 camps belonging to those forces and that he subsequently worked for the Kurdish Ministry of Education in Accounting in 2014. The Appellant came to the UK thereafter, and at a time following his arrival in the UK his case is that the Sarwan Company was invaded by forces belonging to ISIS and that at the beginning of 2015 he received a call from friends in Iraq informing him that ISIS had raided the company where he had worked and had seized documents which showed that he had been employed by the coalition forces.

3. The Appellant's case was that in April 2015 he received a telephone call from his brother who had been listed as his emergency contact by the Sarwan Company and told that ISIS had threatened to kill the Appellant because of his past involvement with the coalition forces. The Appellant's case is that his brother had informed him that within a 2 week period the brother had received 2 telephone calls from ISIS threatening him and that the Appellant's brother had then left for Germany. He says that he has also received messages on his Facebook page informing him that he was a traitor and that he would be killed. The Appellant's case is that if returned to Iraq he would be killed either by forces loyal to ISIS or alternatively by the Kurdish government, on the basis that he was a supporter of the Gorran Party (Movement for Change).

4. Within his decision, First-tier Tribunal Judge Traynor found that the Appellant had received a genuine letter from a Captain Geoff Brown of the US Army which supported his claim that he had worked for the coalition forces as a cleaner. However, Judge Traynor did not accept that the Appellant would have worked in any capacity which would have raised his profile to the extent that he would have been at risk upon return or that the letter supported the Appellant's contention that there were significant records held of him which resulted in threats being made towards him by ISIS.

5. In respect of the Appellant's claim that as a supporter of the Movement for Change, he would be at risk from the authorities, Judge Traynor noted that at paragraph 11 of the Appellant's witness statement it was

said that his career had been affected because of his membership of the party but Judge Traynor found that that was not a convention reason, nor was there any evidence to suggest that the Appellant's career was being hampered simply because he was an opposition supporter. Judge Traynor found that he had worked for the government and the party in question had numerous members of Parliament and that the Appellant had never suggested that he had encountered any problems from the KRG authorities because of that support and there was no reason why if returned to Iraq and the Kurdistan region he would be viewed any differently.

6. Judge Traynor further found that he could please no weight upon a very recently received letter from the Appellant's brother regarding the threats which were said to have been made to the Appellant by ISIS on the basis that the document was not dated and the Appellant's brother was in Germany and there were no further details concerning the Appellant's brother's immigration circumstances in that country. He found that no credible or reasonable explanation had been given as to why the document was not forwarded to the Respondent on an earlier date or why the Appellant had not provided more information concerning his brother's circumstances. Although accepting the Appellant had likely been in contact with his brother, Judge Traynor was not satisfied that his brother had received any telephone call from ISIS in which the Appellant had been threatened on account of his past association ,working as a cleaner for an organisation which cleaned coalition bases. He further found that the Appellant's claim that ISIS had contacted him directly via Facebook was wholly unsubstantiated. Judge Traynor found that the Appellant had not provided a credible, plausible or likely claim that he had been threatened on account of his imputed and/or actual political opinion, and therefore rejected the Appellant's asylum claim.

7. The Appellant now seeks to appeal that decision for the grounds relied upon in the renewed Grounds of Appeal to the Upper Tribunal.

8. Within the Grounds of Appeal, it is argued that the Appellant had in fact provided printouts of 2 Facebook messages that he had received

making threats against him which corresponded to the timeline that he gave in interview which were accompanied by a certified translation contained at pages 7 to 13 of the Appellant's bundle and that the Judge had misunderstood the Appellant's evidence when stating that the Appellant had said that he did not have any evidence to show those threats as he had closed his Facebook page and then finding at [47] that the Appellant's claim that ISIS had contacted him directly via Facebook was wholly unsubstantiated. It is argued within the Grounds of Appeal that what the Appellant had in fact stated was that he did not have evidence of comments that he had made on pro-ISIS postings which criticised the political stance by the terrorists, as the pro-ISIS webpages have been shut down, not that his own Facebook account to which the threats had been sent via Facebook Messenger had been shut down, were still available and in respect of which he had actually provided documentary evidence within the appeal bundle. It is argued that the Judge misunderstood the evidence given regarding Facebook, and had ignored material evidence in respect of the Facebook threats.

9. In the second ground of appeal it is said that the Judge mistook the extent of the Appellant's role for the coalition forces and that the Appellant was a supervisor for the contractor, rather than simply a cleaner and therefore had more than a minor role but that in any event, ISIS in the Mosul area would indiscriminately attack any civilian who was not supportive of ISIS.

10. In the third ground of appeal it is argued that the Judge had failed to take account of evidence and to give adequate reasons for rejecting the letter from the brother regarding the threats made to the Appellant via his brother and that people offered and received advice as to what evidence to obtain in the run up to a hearing and that the letter had to be sent from Germany via the brother and then translated which it is argued explained why the letter was received late and the Judge did not give a sustainable reason as to why no weight should be attached to it.

11. In the fourth ground of appeal it is argued that the Judge when considering the risk posed to the Appellant because of his affiliation to

the Gorran Party, which is said to be a separate risk on the basis that the Appellant will not receive state protection from ISIS, found that there was no evidence the Appellant's career was hampered. It was said however that the Appellant had given evidence about that in his witness statement and at the hearing and that his wife had also given evidence about it in her witness statement.

12. In respect of ground 5 of the Grounds of Appeal it is argued that the Judge made findings based upon no evidence regarding the wife's knowledge of threats made to the Appellant and that the Judge placed significant weight on the Appellant's statement that had not mentioned any awareness of the husband being threatened by ISIS via Facebook. It is argued that neither the Respondent nor the Court asked the Appellant's wife what she knew about this in the hearing and it was unfair to make an adverse finding that the threats did not get made in the absence of evidence on the point.

13. In respect of the refusal of permission to appeal originally by First-tier Tribunal Judge Hodgkinson, it is argued that the Judge's assessment that irrespective of the merits of any Grounds of Appeal the Judge was entitled to conclude as he appeared to have done that the Appellant's home area of Erbil was safe but that it missed the point that Erbil is unsafe to the Appellant because ISIS are specifically pursuing him and have the capacity to pursue him even within Erbil.

14. Permission to appeal has been granted by Upper Tribunal Judge Copieczek who found that it was arguable that the adverse credibility assessment made by the First-tier Tribunal Judge was flawed, for example on account of a failure to take into account which arguably demonstrated the Appellant did receive threats from ISIS on Facebook. Judge Copieczek further found that it was accepted by the First-tier Tribunal Judge that the Appellant did work for coalition forces, but his role was considered by the First-tier Tribunal Judge to be one that would not give rise to any real risk of harm and that that arguably amounted to an error of law in terms of the assessment of risk to the Appellant.

15. Within the Respondent's Rule 24 Reply dated the 15th November 2017, prepared by Mr McVeety himself it is argued that the Judge directed himself appropriately. However it is stated that Mr McVeety did not have access to the Home Office file in respect to what documents were provided with the bundle, when preparing the Rule 24 reply, but that even if the Judge did not note the alleged postings on Facebook the grounds overlook the fact that the lack of evidence was not the only reason why the Judge found against the Appellant in respect of the threats he received.

16. It is argued that at paragraph [47] the Judge found that the Appellant's claim that he and his brother were tracked down and threatened by ISIS was utterly inconsistent with the failure by them to track down and threaten his family who remain in Iraq, seemingly with no problems. It was argued that there was nothing in the objective evidence to show that being a cleaning supervisor rather than a cleaner raises the Appellant's profile to someone with a level of significance to ISIS and that regarding the letter from the Appellant's brother that is a matter for the Judge to attach such weight to the letter as he considered fit. It is further argued that it was open to the Judge to find that the Appellant would not be persecuted due to his political beliefs, when he had previously been employed by the state.

17. It was on that basis the case came before me in the Upper Tribunal. In the Upper Tribunal I listened carefully to the oral submissions of both Miss Wilkins on behalf of the Appellant and Mr McVeety on behalf of the Respondent, which are recorded within the Record of Proceedings.

18. At the appeal hearing before me, Mr McVeety on behalf of the Respondent conceded that it appeared that the First-tier Tribunal Judge had got confused regarding the Facebook evidence and seemingly had not taken account of the fact that there were said to be threats received by the Appellant on his Facebook page contained within the Appellant's bundle. He conceded that the First-tier Tribunal Judge was in error in stating that the Appellant's case was that he had not been able to provide the threats which were posted to him, on account of his webpage having been closed, as opposed to the evidence actually

given that the postings that he made on the account of ISIS supporters not being available, their Facebook pages having had been closed. He conceded that the Judge concluded that there was no evidence of any threats being made against the Appellant, whereas clearly the threats were referenced on the Facebook pages with their English translations contained within the Appellant's bundle.

19. However, Mr McVeety argued that such error not sufficient to justify setting aside the whole of the decision, and that the Judge would have reached the same conclusion in any event, even if that error had not been made. He argued that the real issue in the case was materiality, and that as the Judge had found other reasons for not finding the Appellant to be credible in respect of his claim that he had been threatened by ISIS so he would be at risk upon return, that even if the Judge had taken the Facebook postings into account, he would have reached the same conclusion. Mr McVeety argued that when one looked at the Facebook threats, they were exactly the same wording with even the same punctuation, although said to be made by different people on different dates and that little weight would have been attached to those postings by the Judge.

20. Miss Wilkins on that point argued specifically that the evidence should have been looked at holistically and in the round by the First-tier Tribunal Judge, and that if he has failed to take account of relevant evidence, that in itself is a material error of law and that the Appellant should be entitled to give evidence regarding the reason why the threats were in identical wording, and to comment upon their genuineness, but the fact that the Judge had failed to take that evidence into account and deprived the Appellant of the opportunity of commenting upon the genuineness of the documentation.

My Findings on Error of Law and Materiality

21. I do find, having carefully considered the decision of First-tier Tribunal Judge Traynor, that as conceded by Mr McVeety, Judge Traynor has sadly become confused in his consideration of the Facebook threats and the evidence given by the Appellant in respect thereof, when finding that the Appellant's own testimony was that he did not have

any evidence to show that the threats had been made as his own Facebook page had closed at [24] of his decision and thereafter at [47] that "*Moreover, I find the Appellant's claim that ISIS had contacted him directly via Facebook, is wholly unsubstantiated. I agree entirely with the Respondent's representative that no credible reason has been advanced why this evidence is not available*". The parties agree that the testimony given by the Appellant at the First-tier Tribunal was that he had not been able to produce the comments that he had made on other people's Facebook pages who were members of ISIS, criticising their actions, which had led to the retaliatory threats being made back to the Appellant's own Facebook Messenger page and that whereas the other people's Facebook pages had been closed down as they were supporting ISIS, in fact as he stated in his statement the Appellant had received messages from 2 different named accounts criticising him for making adverse comments about the Islamic State on Facebook and saying that they knew that he had previously worked for the Americans. The parties further agreed that within the Appellant's own bundle and exhibited to his statement between pages 8 and 13 were the 2 separate threats that had been made to the Appellant on Facebook, together with the translations of those threats, and that the Judge has not taken into account I find, in reaching his conclusion that the Appellant has not been threatened by ISIS.

22. Although Mr McVeety criticised the threats which were said to have come from different people on different dates in circumstances where the wording of the threats were identical, even to the grammar and punctuation used, and argued that the Judge would have placed little weight upon those threats in such circumstances, the Appellant clearly was not given the opportunity of answering any such concerns and was not asked such questions in cross-examination by the representative of the Home Office, nor were any such concerns regarding the wording of the threats put to him, so that he could deal with the same in evidence.

23. In circumstances where the Judge accepted that the Appellant had worked for the coalition forces in Iraq, the Judge has then, in finding that the Appellant had not been threatened by ISIS, ignored the actual evidence contained with the Appellant's bundle regarding the threats

that were made on Facebook to him on the Appellant's own Facebook account, which were contained within the Appellant's bundle. The Judge has thereby failed to take account of relevant evidence in that regard.

24. I cannot say that the Judge would have placed no weight upon such evidence, when the Appellant's explanation for the wording of those threats had not been sought, in circumstances where it was agreed that the Appellant had worked for the coalition forces and therefore may have been seen as a perceived collaborator with the coalition forces. I am therefore not in a position to say that the decision of the Judge would necessarily have been the same, had that error not been made. I therefore do find that that does amount to a material error of law, such that the decision of First-tier Tribunal Judge Traynor should be set aside, on the basis that he has failed to take account of relevant evidence in reaching his decision. Although Mr McVeety seeks to argue that that was not the only ground upon which the Appellant's credibility was rejected, given that the Judge had to consider the evidence in the round, and holistically, when reaching his decision, the fact that he has failed to take account of relevant evidence regarding the actual threats which were said to have been made to the Appellant and considered that there was no evidence of such threats, clearly undermines the holistic assessment made by him.

25. Further, in finding that the Appellant did work for the coalition forces, but only in the limited capacity of cleaning, although I do not accept Miss Wilkin's submission that he worked not just as a cleaner but as a supervisor and that that in itself would have necessarily made a difference regarding the threat level that he faced, I do consider that Judge Traynor has not adequately explained why there would have to be significant records of the Appellant held by the company for which he worked in order for threats to be made against him by ISIS, if those records show that she had worked for the coalition forces, even as a cleaner, and therefore could potentially be said to have been supporting the coalition forces rather than ISIS.

26. Further, the letter said to be from the Appellant's brother, is in effect a witness statement referring to the phone calls that he says that he received threatening the Appellant because of the Appellant's job with the Americans from members of ISIS, and seemingly, having considered the same, was prepared for use at the Appellant's appeal hearing. In such circumstances, even though it is said that the Appellant's brother was in Germany and that the letter was received late in the day, having only been translated into English on the 23rd February 2017, the decision of First-tier Tribunal Judge Traynor does not adequately explain, why no weight should be attached to that evidence. The First-tier Tribunal Judge appears to accept that the Appellant had been in contact with his brother, but has not adequately explained why it is that no weight should be attached to what appears to be a statement in letter form, supporting the Appellant's case for the appeal hearing. It is after all, a letter supporting the appeal, rather than a contemporaneous record. There is therefore a failure to adequately explain that finding, such as to enable the losing party, in this case the Appellant, to know why he has lost on that issue and as to why no weight was attached to his brother's evidence. This also amounts to a material error of law. I cannot say that the decision of the First-tier Tribunal Judge would necessarily have been the same, had that evidence been taken account of and some weight, even if limited weight, had been placed upon it.

27. The fourth ground of appeal however, lack merit. In respect of the fourth ground of appeal regarding the suggestion that the Judge ignored the fact that the Appellant had given evidence in his witness statement, as had his wife, regarding the Appellant's career having been hampered, whereas the Judge said that there was no evidence that his career had been hampered, it is clear that in fact what the Judge is referring to at [45] was the fact that this was not a Convention reason and there was not any objective evidence that the Appellant's career had been hampered simply on the basis that he was an opposition supporter. The implication in the grounds of appeal that the Judge had failed to take account of the fact that the Appellant's own statement had referred to that fact is misconceived, as Judge Traynor at [45] states specifically that "Paragraph 11 of the Appellant's witness

statement claims that his career was affected because of his members of that party" the Judge therefore had clearly taken account of the Appellant's own evidence on that issue, but was making the point that there was no other objective evidence and that that was not a convention reason, in any event. Those were findings open to the Judge on the evidence.

28. Further, in respect of the fifth ground of appeal, it was open to the Judge to find that the Appellant' wife's statement was devoid of any reference to her being aware that her husband had been threatened by ISIS through that medium, namely Facebook. Although it is argued that that should have been put to the Appellant or his wife, if the Appellant had genuinely been threatened in that manner, it was open to the Judge to find that the failure of the wife to suggest that she knew that to be the case in her statement, was a factor that he could rely upon in making his findings in that regard, and that had she known, she would have mentioned it in her statement.

29. However, for the reasons set out above, I do find that the decision of First-tier Tribunal Judge Traynor does contain material errors of law and that I cannot say that the decision would necessarily have been the same, if those errors had not been made. . It is therefore appropriate to set aside the decision of First-tier Tribunal Judge Traynor in its entirety, and for the matter to be remitted back to the First-tier Tribunal for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Traynor. It is not appropriate in the circumstances, given that credibility has to be considered in the round, for there to be any retained findings of fact.

Notice of Decision

The decision of First-tier Tribunal Judge Traynor does contain material errors of law and is set aside in its entirety;

I remit the case back to the First-tier Tribunal Judge for rehearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Traynor;

The First-tier Tribunal Judge ordered for there to be anonymity in this case. In the circumstances of the asylum claim, I too consider that an anonymity direction is appropriate. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction can lead to contempt of court proceedings.

Signed

Deputy Upper Tribunal Judge McGinty Dated 16th February 2018