Upper Tribunal
(Immigration and Asylum Chamber)Appeal Number: PA/02510/2020 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated On 27 April 2021**
Remotely by Skype	
On 15 April 2021	

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

D M R
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Coyte of Fountain Solicitors
For the Respondent: Ms R Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Iraq who was born on 1 July 1990. The appellant is of Kurdish ethnicity and comes from Makhmour. Up to, and including, the hearing of the First-tier Tribunal appeal in this case, the appellant's home area was located by the parties as being within the Erbil governorate of the IKR. As will become clear, the appellant now disputes that and contends that his home area falls within the Ninewa governorate of Central Iraq under the control of the Iraqi authorities rather than the government of the IKR.

3. The appellant left Iraq sometime during October 2015 and, having travelled through various countries, lived in Finland for about one and a half years. There, he unsuccessfully claimed asylum. He then left Finland and travelled to the UK clandestinely where, on 17 March 2017, he claimed asylum. The basis of the appellant's claim was twofold as set out in his screening interview on 17 March 2017. First, he claimed that he was at risk from the Iraqi authorities as a result of a television interview he gave to a journalist in Iraq on 14 August 2014 in which he criticised the Iraqi authorities by stating that the defending military ran away when ISIS took control of the area. Secondly, he claimed that he had converted to Christianity in Finland in April 2016.

4. Following an asylum interview on 5 February 2020, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR in a decision dated 2 March 2020.

The Appeal to the First-tier Tribunal

5. The appellant appealed against that decision to the First-tier Tribunal. Before Judge Page, the appellant relied upon the TV interview which he claimed to have given and put him at risk from the Iraqi government. He relied upon two arrest warrants dated 20 January 2015 and 10 February 2015 which named him as a person wanted, and to be arrested, in relation to an offence under Art (197) of the Iraqi Criminal Law. Secondly, the appellant relied upon his conversion to Christianity in Finland and his attending a Christian church in Newport from around April 2019. In respect of that claim, he relied upon the evidence (given orally at the hearing) by two members of that church, including the minister.

6. Judge Page dismissed the appellant's appeal on all grounds. The judge made adverse credibility findings. First, he did not accept the appellant's claim that he had been interviewed as claimed by a journalist and had expressed anti-government views which would put him at risk on return to Iraq. The judge rejected the two arrest warrants describing their contents as "risible" and "gobbledygook". Secondly, the judge did not accept that the appellant had converted to Christianity in Finland or was practising as a Christian in the UK. Thirdly, the judge found that even if the appellant

were a genuine Christian, he was not satisfied that the appellant would be at risk in Iraq as a Christian convert or that he would pursue his Christianity there when he returned.

The Appeal to the Upper Tribunal

7. The appellant sought permission to appeal to the Upper Tribunal on three grounds. Permission was granted on all grounds by the First-tier Tribunal (Judge Grant) on 11 November 2020.

8. The appeal was listed for remote hearing at the Cardiff Civil Justice Centre on 15 April 2021 working remotely. Mr Coyte, who represented the appellant, and Ms Pettersen, who represented the Secretary of State, joined the hearing remotely by Skype.

The Appellant's Challenge

9. The appellant relied upon three grounds of appeal which Mr Coyte developed in his oral argument.

10. Ground 1 contends that the judge failed to apply the CG decision of SMO and Others (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC). The judge failed to assess whether, applying the sliding-scale risk factors set out in SMO and Others, following Elgafaji v Staatssecretaris van Justite [2009] Imm AR 477 (ECJ), whether the appellant would be at real risk of indiscriminate violence amounting to serious harm contrary to Art 15(c) of the Qualification Directive (Council Directive 2004/83/EC) because it had been a wrong premise throughout the appellant's asylum claim that his home area was within the Erbil governorate of the IKR when, in fact, it fell within the disputed area of the Ninewa province in Central Iraq.

11. Mr Coyte submitted that there were a number of risk factors which the judge should have considered under Art 15(c) such as that the appellant is Kurdish and that his home area is under the control of Shi'a militia, he is potentially westernised and also, subject to a challenge under grounds 2 and 3, that the appellant has a political background and has converted to Christianity.

12. Ground 2 contends that the judge failed to give adequate reasons for his adverse finding in relation to the appellant's claim based upon his interview and criticism of the Iraqi authorities.

13. First, the judge failed to give any reasons why the arrest warrants were "risible" or "imitated officialdom" or were "gobbledygook" such that he discounted them as emanating from an official source in Iraq. The grounds contend that there was no submission or background evidence to support that reasoning which could only have been based upon the judge's own perception of what an official Iraqi document would look like.

14. Secondly, the judge was wrong to doubt the authenticity of the arrest warrants on the basis that the appellant's claimed wrongdoing could not

fall within Art (197) of the Iraqi Criminal Law. As developed in his oral submissions, Mr Coyte submitted that this was not a matter directly raised by the respondent or explored at the hearing. That provision in the Iraqi Criminal Code could apply as it includes, as set out in the grounds, spoiling or obstructing means of communication with the intent to overthrow the constitutionally appointed regime or spread panic or anarchy during a time of civil unrest.

15. Thirdly, the judge was wrong to rely upon perceived discrepancies in the appellant's evidence in his asylum interview that he had both made a "five-minute speech" but had said in his oral evidence that he had only been asked a few questions which could not possibly have lasted for approximately five minutes.

16. Ground 3 contends that the judge was wrong to reach his adverse credibility finding in relation to the appellant's claimed conversion to Christianity.

17. First, it was not right for the judge to state that the appellant had not pursued his religious claim with "any vigour". Mr Coyte pointed out that the appellant had pursued the claim before the judge including calling two witnesses to give oral evidence. He had also raised it in his screening interview. Even though he had not raised it in his asylum interview, conducted three years after his screening interview, he had not been asked directly about any claim based upon his religion.

18. Secondly, it was not clear why the judge had, despite finding the appellant's claim to have converted not to be genuine, stated that he would accept that "as a possibility" should the appellant resume his attendance at his UK church which he had not done during the lockdown or between the time he arrived in 2017 and April 2019.

19. Thirdly, in his reply, Mr Coyte submitted that the judge had, in effect, failed to take into account the Home Office's own policy concerning the risk to Christian converts in Iraq when reaching his alternative finding that, even if the appellant was a genuine convert, he would not be at risk on return. Mr Coyte relied upon the *CPIN, "Iraq: Religious minorities"* (October 2019) at para 2.4.6 which stated that: "People who do convert from Islam to Christianity may be at risk of being killed depending on how overt the person is about their conversion and the attitudes of their community and family members towards conversion".

20. Mr Coyte submitted that that document was in the public domain and the judge should have been referred to it by the Presenting Officer and taken into account.

The Secretary of State's Submissions

21. On behalf of the Secretary of State, Ms Pettersen having heard Mr Coyte's submissions, accepted that Grounds 1 and 3 were made out.

22. As regards Ground 1, Ms Petterson accepted that the appellant's home area of Makhmour was in the Central Iraqi province of Ninewa which is a disputed area. That was the evidence of the recognised expert, Dr Fatah in SMO and Others at [60] which was not doubted by the UT in that appeal. The position was also confirmed, during the course of the hearing, by reference to material on the internet which both representatives accepted. Ms Pettersen accepted that, therefore, the judge had failed to consider Art 15(c) on a 'case by case basis' taking into account all the appellant's circumstances in his home area in the Ninewa governorate in Central Iraq.

23. In relation to Ground 3, Ms Pettersen, having taken me to the background material that was before the First-tier Judge, in particular the *US Department of State, 2019 Report on International Religious Freedom: Iraq,* (10 June 2020) (at pages 23–36 of the appellant's bundle), accepted that the judge should have been referred to the *CPIN*, in particular para 2.4.6 and also para 6.1.5 dealing with the difficulty of changing religion on identity cards. She accepted that his finding that the appellant would not be at risk on return even if he was a Christian convert was a finding that could not stand due to the judge's failure to engage with the Home Office's policy document on that very issue. She accepted that the issue of the appellant's religious conversion in general required a fresh decision to be made.

24. However, as regards Ground 2 Ms Pettersen did not concede the appellant's arguments although she accepted that the judge's reliance upon discrepancies in the appellant's evidence as to how long his interview took (at para 48) was not based upon evidence which was particularly discrepant as the appellant had said that the interview was "very short" and also that it was the questions and answers and not simply his speech which had taken approximately five minutes. Ms Pettersen accepted that there was no evidence before the judge about the terms of the Iraqi Criminal Law although, the appellant had been asked questions about the offence on the arrest warrants in cross-examination. Ms Petterson indicated that she left determination of Ground 2 to the Tribunal.

Discussion

25. In my judgment, Grounds 1 and 3 – as conceded by Ms Pettersen – are made out.

26. First, I accept, albeit through no fault of the judge, that he proceeded to determine the appeal on the basis that the appellant's home area was in the IKR. That is not the case. It was a mistake of fact relevant to the issues in the appeal. Although it is clear that the appellant's home area has, at times, been under the control of the IKR government and part of the Erbil governorate, it is plain that it is not so at present and was not so at the time of the judge's hearing. The IKR government does not control that area which is now under the control of the central government (with the presence of Shi'a militia) in the Ninewa governorate. That would have been plain if the judge had been referred to Dr Fatah's evidence at [60] of

SMO and Others. In those circumstances, the issue of whether the appellant would be at risk under Art 15(c) arose to be considered. I accept Mr Coyte's submission that the judge should, in those circumstances, have applied the sliding-scale set out in SMO and Others adopting the ECJ's decision in Elgafaji. That was, as Ms Pettersen conceded, a material error of law and a decision in relation to Art 15(c) needs to be made.

27. Secondly, I accept Ms Pettersen's concession that Ground 3 is made out. As regards the objective risk on return to a Christian convert, the *CPIN* – which is a public document emanating from the respondent – provides some support for a real risk of persecution, depending upon all the circumstances, to an individual who is a Christian convert in Iraq. The judge failed to take that into account. Indeed, it is not clear precisely what material the judge relied upon other than to cite the submission made by the Presenting Officer that "the Iraqi Constitution permits religious freedom" (at para 50) and then at para 52 to state that: "While I accept there may be instances of discrimination and violence against Christians in Iraq by those who object to conversion, it is not the case that Christians in Iraq are an at-risk group per se". That finding, not linked to any specific background evidence before the judge, failed to take into account background evidence in the Home Office's *CPIN* and that amounted to a material error of law in relation to that finding.

28. As regards the judge's adverse credibility finding in relation to the appellant's claimed Christian conversion, Ms Pettersen did not seek to sustain that finding. I accept Mr Coyte's submissions based upon Ground 3, that the judge erred in taking into account that the appellant had not pursued this limb of his claim "with any vigour". He clearly had done so since his screening interview and at the hearing. Whilst it is true that in his asylum interview he made no mention of a fear based upon his Christian conversion, he was also not directly asked about it even though he did not, when asked, identify any claimed fear other than arising from his interview critical of the Iraqi government.

29. The appellant's two witnesses gave clear and unequivocal supporting evidence as to his Christian conversion since April 2019. Despite this evidence, and despite not criticising the appellant for failing to attend church during the lockdown, the judge was critical of his failure to attend church given that he claimed to have done so in Finland when he did not speak Finnish because, he said, he did not speak English in order to attend church in the UK. However, that does not fully reflect the appellant's evidence which was not that he did not initially attend church in the UK because he could not speak English, but also because he did not know anyone in the UK whereas he knew Christian Iraqis in Finland.

30. Mr Coyte also relied upon the judge's reason set out in para 50 that he would, despite not believing the appellant to be a genuine Christian convert, accept that as a possibility if he was to resume his attendance at his church in Newport. I agree that that is a somewhat curious reason. It does not sit particularly well with the fact that the appellant's case was

that he had attended church in the UK for seventeen months since April 2019 (although, and he was not criticised for this, he did not take part during the lockdown) and explain why an added period of time would have led the judge to reach a different credibility finding. It has also to be noted that the judge did not accept that the appellant had attended church, and converted, as he claimed in Finland.

31. As I have said, Ms Pettersen does not seek to sustain the judge's adverse credibility finding in relation to the appellant's claimed Christian conversion and, in my judgment, his reasons are inadequate to support that finding.

32. As regards Ground 2, I am satisfied that the judge's consideration of the two "arrest warrants" relied upon by the appellant was, as a matter of law, inadequate. The judge had both arrest warrants in the appellant's bundle in translation. His reasons for discounting the documents as genuine are set out in para 46 as follows:

> "The central issue in this appeal is the credibility of the appellant's claim to be at risk in Iraq as someone who has communicated with the media. I have taken the two documents purporting to be arrest warrants from the Court of Appeal in Iraq as my starting point. Having viewed them in the round I find that I can safely reject them as having emanated from the judiciary in Iraq. Their contents are risible. Whoever drafted them has imitated officialdom and phrases like: 'whoever this memo falls in their hands, you are authorised in accordance with the law to arrest the accused whose name and address and description below and then hand them to our court as was required by (Makhmour) Police Station'. In the absence of evidence produced by the appellant or verified by the Home Office I am not prepared to accept that Article (197) of the Iraqi Criminal Law Code has any application of the appellant's claim to have made comments to a journalist with a video camera. The Iraqi Criminal Code translated into English is available online. I am surprised that the Home Office have not taken the trouble to read what Article 197 is applicable to. This primitive document purports to have been signed by 'the judge Yasser Ali Al Sawafi' and the document purports to be stamped by the court seal of the judiciary supreme council – Makhmour Court of Investigations. This is gobbledygook and I can safely discount any possibility that these documents have emanated from an official source in Iraq. Having made these findings about the two arrest warrants, I need not see the originals which the appellant has said are available. The original documents could add nothing to the appellant's case in my view".

33. It is plain from this paragraph that the judge doubted whether the appellant's conduct fell within Art (197) of the Iraqi Criminal Code. The judge does not explain why that was so and, equally, that issue does not appear to have been explored before the judge who appears to have looked at the Criminal Code in English online without reference to the parties who could make submissions upon it. Mr Coyte has summarised that provision in the grounds – and what is set out was not contested by Ms Pettersen – and there is no reason to conclude that this obviously could

not apply to the appellant's claimed conduct. In any event, the appellant's representative was entitled to deal with that issue which was not directly raised or relied upon before the judge.

34. Further, I accept Mr Coyte's submission that the judge gave no adequate reasons for dismissing the contents of the arrest warrants as "risible" or "gobbledygook". He was, of course, seeing the document in translation which could lead to language which might seem less official, from a UK or indeed other perspective, without being a false translation. But, more importantly, the judge referred to no evidence – and as far as I am aware no evidence was put before the judge – as to how an arrest warrant of this sort would look. It is not self-evident that the arrest warrants were outwith the form that could be used by the Iraqi authorities. The language may differ from what might be expected in the UK but, without supporting background evidence, the implausibility of their contents was not a matter which the judge could properly rely upon to doubt their authenticity (see HK v SSHD [2006] EWCA Civ 1037 and Y v SSHD [2006] EWCA Civ 1223).

35. Further, as Ms Pettersen frankly accepted, the judge's reliance upon discrepancies in the appellant's evidence as to how long his interview took (set out in para 48 of his determination) does not fully reflect the appellant's evidence. There the judge said this:

> "What the appellant claims to have said in the video recording was discrepant. It varied from a speech lasting five minutes to a couple of sentences – and he had no knowledge if it was ever broadcast. His evidence about what he had said changed from a five-minute speech in his asylum interview to a few words that could not possibly have taken five minutes. It was evident the appellant was inventing his evidence when he tried to embellish the encounter with the journalists last five minutes when he had next to nothing to say to them. I find that the appellant's account of having been interviewed by a journalist in Iraq is a complete fabrication to obtain an immigration status here – as he apparently attempted unsuccessfully in Finland".

36. As Ms Petersen accepted, the appellant's evidence was that the exchange had been very short and that he had not said that he had made a five minute speech but that it had taken approximately five minutes to ask questions and provide answers. In my judgment, the judge's reasoning in para 48 does not properly take into account the appellant's evidence. The reasoning is inadequate to sustain his adverse credibility finding in relation to the appellant's claim to have been interviewed and to be at risk as a result of making criticisms of the Iraqi government.

37. In my judgment, for these reasons, the judge also materially erred in reaching his adverse finding in relation to this aspect of the appellant's claim.

38. It follows that the judge's decision to dismiss the appellant's appeal involved the making of an error of law based upon Grounds 1, 2 and 3. His decision cannot stand and is set aside.

39. Both representatives accepted that, in those circumstances, the proper disposal of the appeal was to remit it to the First-tier Tribunal for a *de novo* rehearing.

Decision

40. The decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. That decision cannot stand and is set aside.

41. Having regard to the nature and extent of fact-finding required, and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Page.

Signed

Andrew Grubb
Judge of the Upper Tribunal
16 April 2021