



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal number: UI-2021-001595
(PA/50741/2021)
IA/01633/2021

THE IMMIGRATION ACTS

Heard at: Field House
On 1 June 2022

Decision & Reasons Promulgated
On 25 July 2022

Before

Upper Tribunal Judge Gill

Between

Hiwa Hamza Sabir
(ANONYMITY ORDER NOT MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:

For the appellant:

Ms A Ahmed, Senior Home Office Presenting Officer.

For the respondent:

Mr. R Spurling, of Counsel, instructed by Barnes Harrild & Dyer Solicitors.

DECISION AND DIRECTIONS

1. The Secretary of State has been granted permission to appeal the decision of Judge of the First-tier Tribunal C J T Lester (hereafter the “judge”) who, in a decision promulgated on 8 December 2021 following a hearing on 25 October 2021, allowed the appeal of Mr Hiwa Hamza Sabir (hereafter the “claimant”), a national of Iraq born on 18 March 1990, on asylum grounds against a decision of the respondent of 3 February 2021 to refuse his further submissions of 12 March 2019 with a right of appeal. The claimant was born in Kirkuk and had lived in Kirkuk.

2. At the hearing before me, Mr Spurling and Ms Ahmed accepted that the judge had incorrectly stated on page 1 of his decision that the decision appealed against was a decision dated 29 January 2021 and that the decision appealed against was in fact the decision dated 3 February 2021 (hereafter the “refusal letter”).
3. I granted an extension of time for the claimant's reply under Rule 24 dated 24 May 2022 (hereafter the “Rule 24 Reply”) to be relied upon. Ms Ahmed confirmed that she did not object.
4. The claimant claimed to have arrived in the United Kingdom on 1 August 2006 and first claimed asylum on 2 August 2006. This was refused on 28 September 2006 and his appeal dismissed on 30 November 2006. He exhausted his appeal rights on 22 March 2007. He lodged further submissions on four occasions beginning 9 June 2010 and ending with the further submissions of 12 March 2019, the first three of which were refused with no right of appeal.

The judge's decision

5. Unfortunately, the paragraphs of the judge's decision are not numbered. In quoting from the judge's decision, I have used letters of the alphabet to number the paragraphs I have quoted, for convenience.
6. According to the first paragraph on page 5, the judge was not provided with a copy of the decision of the Tribunal of 30 November 2006. However, the refusal letter set out extracts of the previous Tribunal decision which, according to the second paragraph on page 5 of the judge's decision, was accepted by Counsel for the claimant.
7. In addition, according to the last paragraph on 6 of the judge's decision, he was not provided with a print-out of the claimant's previous convictions from the police national computer (“PNC”). However, the judge was told details about the previous convictions which he (the judge) described at the top of page 7 as follows: A conviction for possessing class B cannabis with intent to supply for which he received a sentence of five months imprisonment which was suspended for two years. During the period of suspension further offending took place: driving with excess alcohol and driving with no insurance and no licence. He received a sentence of one month's imprisonment for the offence of driving with excess alcohol, and three months of the suspended sentence was activated. On 12th November 2020 a conditional discharge was imposed for an offence of using threatening words or behaviour.
8. Having quoted extracts from the previous Tribunal decision as set out in the refusal letter, the judge said that he concluded “*from all of this*” that the judge who had decided the claimant's previous appeal found that the claimant was not credible. He then reminded himself of the guidance in Devaseelan * [2002] UKIAT 000702 and the decisions of the Court of Appeal in Djebbar [2004] EWCA Civ 804 and AM (Belarus) v SSHD [2014] EWCA Civ 1506.
9. The judge then set out the basis of the claimant's asylum claim at pages 7-8 which I now quote insofar as relevant to the grounds of appeal:
 - [a] The [claimant] states that he arrived in the UK in 2006 without documentation and arrived in a clandestine manner. He states that he is therefore unable to obtain

identification documents from Iraq or from the Iraqi embassy. He states he is from Kirkuk and is Kurdish. He states that due to the current situation there that he would face a real risk of ill treatment or death if he were returned due to being Kurdish and also that he is a Sunni Muslim.

- [b] He says he is unable to evidence his identity and that he does not know his family book number and as a result cannot obtain Iraqi documents. He says he cannot remember such details and no longer remembers what Iraqi currency looks like.
- [c] He states he attended the Iraqi embassy in London on 23 March 2020 and 12 August 2021 in an attempt to obtain new documents. However, he states he was informed that as he did not have his original documentation he could not be helped. He was provided with a generic letter from the embassy (p10 of bundle, and letter dated 23/03/20). The letter was headed "To whom it may concern". The letter was not addressed to him and did not deal with the specifics of his case.
- [d] He states that he was homeless for some years in Bristol which did not help his ability to keep in contact with his family back in Iraq. He stated he had only been in contact with his family perhaps once a month or once every two months. He states he has lost contact with his family in Iraq and therefore is no longer able to obtain the details of his family book. He says that therefore he cannot obtain documents. In his evidence he stated that it is some years since he last had any contact with his family. He stated that he had only been able to contact them via a friend who had a landline telephone, and that he had not heard from this person for some years and suspected the person was dead. He did not recall when he had last had contact with his family other than it was "years ago". His last contact with this friend had been 2008/10. He said a lot of people had died since 2016. He stated that as a result of all this he was unaware of his families [sic] whereabouts and that his attempts to trace them by social media had failed. He had also tried asking about them within the Kurdish community in Bristol but without success. He stated that due to the internal conflict involving ISIS he did not know whether his family were displaced or dead.
- [e] He stated that feared persecution if returned due to what he regarded add [sic] as anti Kurdish government posts on his Facebook account."

10. Having referred to the country guidance case of SMO, KSP & IM (Article 15(c): identity documents) Iraq CG [2019] UKUT 400 (IAC) and quoted from paras 358 and 390 of that decision, the judge then made the following finding:

Objective Finding – passage of time

- [f] On an objective appraisal of the facts I find that the [claimant] has been gone from Iraq for 15 years now as he first claimed asylum in 2006. He is now a middle aged adult man who has spent a lengthy period of time away from his country of origin."

11. Having then directed himself on certain principles in relation to an assessment of credibility, the judge began his assessment at page 9 onwards which I now quote:

Credibility findings

- [g] The previous Immigration Tribunal found against the [claimant] in 2006, and as part of that found adversely in respect of his credibility. While that is not my starting point it is also true that this case is not an appeal of that decision.

Sur place activities

[h] The evidence of the [claimant] about participating in demonstrations and his Facebook activities was unconvincing. He stated he had attended a couple of demonstrations, with the last one having been five or six months earlier but he did not know the dates or when he had first attended a demonstration. He believed the demonstrations had been against both the Iraqi government and the Kurdish government. He provided no other details. He provided no explanation of what the protests were about, why he was there, or why these matters were significant to him. He believed the Kurdish authorities would have seen his Facebook account but he did not know how or why. When asked if he had undertaken these activities (participating in demonstrations and Facebook posts) to assist his asylum claim he responded that he did not know. He also stated that his memory was poor. His evidence around this topic was unconvincing and not credible.

Risk on return

[i] Very little evidence was advanced on this point other than the assertion. However, objectively he has been out of Iraq since 2006 when he claimed asylum in the UK. The intervening 15 years until now is a significant passage of time. This must be carefully weighed even with the limited testimony which the [claimant] was able to provide about what he perceived as potential risks to his return. It can be properly said that he has been gone from Iraq 15 years, that he is from Kirkuk (accepted by the Respondent) and that he could be looked upon as a male of fighting age. Given the well known violence and people displacement in that area it is possible that he could be looked upon with suspicion by people due these factors. Further and or alternatively, as a returning failed asylum seeker that could add a further layer of suspicion due to a perception of his having become westernised. I find that due to the passage of time and other factors I have set out above there is a potential for risk on return.

Loss of contact with family

[j] The evidence of the [claimant] was in many respects sparse on detail. However, this must be set against a backdrop of where he has been homeless for some time and on his evidence had only a tenuous ability to link to his family even without homelessness aggravating his situation.

[k] In summary the [claimant] said he did not know his family book number, and had no way of finding out as he had lost all contact with his family. In support of this contention is that he has been homeless for a period, and the sheer passage of time since he left Iraq plus the potential internal displacement of people in his former home area due to violence. Against this contention is that it is purely evidence from the [claimant] without any support.

[l] His evidence of his lack of contact with his friends and family in Iraq was unconvincing. However there are also relevant facts. Namely his homelessness, the passage of time and the potential for internal displacement of his family due to both passage of time and documented violence in the area are all matters that in my view can be accepted objectively.

[m] Having considered the evidence in the round and the lower standard of proof which applies in such cases I do find that it is plausible that the [claimant] has no contact with his family now, and therefore no way of acquiring the required details of his family book in order to obtain documentation.

Internal relocation

[n] Due to my findings in respect of loss of contact with family above these same facts (and findings) impact upon the potential for internal relocation and they render it not feasible.

Asylum claim

[o] Having considered the whole of the evidence in the round I have concluded that the [claimant] has discharged the burden of proof of having a well founded fear of persecution for a convention reason and that the removal of the [claimant] would cause the UK to be in breach of its obligations under the 1951 convention.

Article 8 ECHR

[p] The [claimant] has met the requirements of the immigration rules. That in itself is positively determinative of proportionality. As such the decision of the respondent is an unlawful interference with the private life of the [claimant] as it constitutes a disproportionate interference with the rights of the [claimant] under Article 8.

The grounds

12. Using the numbering in the Rule 24 Reply, the grounds are as follows:
 - (i) Ground 1: The judge erred in law by failing to identify a Refugee Convention reason for the claimed risk of persecution.
 - (ii) Ground 2: Further, and in the alternative, the judge erred by relying upon a non-Refugee Convention reason.
 - (iii) Ground 3: The judge erred by inadequately reasoning the claimant's Article 8 claim.
13. In relation to grounds 1 and 2, the Secretary of State's grounds draw attention to the fact that the judge had found the claimant's evidence regarding his *sur place* activities was unconvincing and not credible and that the judge had not considered the claimant's claim of being at risk on return for religious and ethnic reasons. The judge instead allowed the asylum claim because the claimant had been away from Iraq since 2006 and, having claimed asylum in the UK, that he might be perceived as westernised, a male of fighting age and could possibly be looked upon with suspicion by people due these factors. The grounds contend that there is no reason why the authorities would be aware that the claimant had claimed asylum and that being absent from Iraq for several years and being regarded with suspicion do not constitute a Refugee Convention reason.
14. Without objection by either party, I raised two additional matters, as follows:

- (i) whether the judge had erred by failing to apply the country guidance in SMO; and
- (ii) whether his assessment of the claimant's evidence and findings regarding the loss of contact by the claimant with his family was internally inconsistent.

Assessment

15. I heard submissions from Mr Spurling and Ms Ahmed for which I am grateful and which I have considered together with the Rule 24 Reply in reaching my decision. I shall refer to the submissions to the extent that I consider necessary.
16. I shall first consider whether the judge's assessment of the claimant's evidence concerning his loss of contact with his family was internally inconsistent before turning to grounds 1 and 2.
17. Mr Spurling submitted that the judge's assessment of the claimant's evidence concerning his loss of contact with his family was not internally inconsistent. In his submission, the judge said that the claimant's evidence as to the reasons why he had lost contact with his family was unconvincing but then went on to identify the facts. In contrast, in relation to the claimant's evidence about his *sur place* activities, the judge had said that the evidence was unconvincing and he had then gone on explain why the evidence was unconvincing.
18. In reaching my conclusion on this issue, I have borne in mind the need to ensure that the claimant is not lightly deprived of a finding of fact in his favour. Indeed, this is at the forefront of my mind.
19. An assessment of credibility must be made on the evidence as a whole, taking into account any evidence that has a bearing on the matter in question. In this particular case, the facts claimed by the claimant in explaining why he had lost contact with his family were his homelessness, the passage of time and the possibility that his family were internally displaced. The judge did not consider the credibility of the claimant's evidence on these asserted facts. Had he done so and had he then made a finding as to whether or not the claimant's evidence concerning his lack of contact with his friends and family in Iraq was credible, there could have been no legitimate criticism.
20. The question is whether the second and third sentences of para [I] of the judge's decision can be read in that way, that is, that the judge was considering the credibility of the claimant's evidence as to the reasons he gave for losing contact with his family. The difficulty is that one is then immediately confronted by the fact that the "*relevant facts*" that the judge considered were established and that he relied upon – that is, the claimant's homeless, the passage of time and the potential for internal displacement of the claimant's family – were precisely the reasons given by the claimant for losing contact with his family, evidence which the judge had just described as being "*unconvincing*".
21. I have therefore concluded that the first sentence of para [I] is plainly inconsistent with the remainder of that paragraph. The judge's description of the matters he set out in the third sentence of para [I] as "*relevant facts*" means he accepted these facts as established and yet he had just described the claimant's evidence of the same

reasons for losing contact as “*unconvincing*”. I do not accept Mr Spurling’s submission that the judge’s reasoning was not internally inconsistent.

22. It is not possible to resolve the inconsistency in the judge’s reasoning by reference to anything else said by the judge in his decision.
23. The judge’s finding that the claimant had no contact with his family now was directly linked by him (see [m]) to his finding that the claimant has no way of acquiring the required details of his family book in order to obtain documentation.
24. It follows that the inconsistency in the judge’s reasoning at para [l] means that he erred in law by failing to give adequate reasons for his finding at [m] that the claimant has no way of acquiring the required details of his family book in order to obtain documentation. Given the guidance in SMO concerning the importance of an individual’s ability to document himself, the error was material.
25. On this basis alone, the judge’s decision must be set aside. I shall nevertheless proceed to consider grounds 1 and 2. The issue described at para 14(i) above is linked to ground 1 and/or ground 2.

Grounds 1 and 2

26. Mr Spurling asked me to note that the judge had said, on page 4 (not quoted above), that he had considered the oral evidence, submissions, and all of the documentary evidence.
27. Mr Spurling accepted that the judge’s decision was short and that it was therefore necessary to draw some inferences from his decision. He submitted that the decision was nevertheless sustainable. He submitted that judges do not have to give their reasons in exhaustive detail. Their decisions should not be read as one would read a piece of legislation or a contract.
28. Mr Spurling took me through the guidance in SMO, including paras 311, 27, 252, 254 to 257. Kirkuk was an area where ISIL remains a presence.
29. The judge had specifically mentioned SMO and quoted from it. Everyone knows the guidance that was given in SMO.
30. Taking into account the guidance in SMO, it was clear, in Mr Spurling’s submission, that the Refugee Convention reason that the judge decided applied in the instant case was as follows: imputed political opinion by reason of the claimant’s ethnicity and religion. This was clearly the Refugee Convention reason given that the country guidance cases make it clear that it is important for returnees to be able to document themselves because checks are carried out at checkpoints and in neighbourhoods. A person who is not documented will have imputed to them by the authorities at the checkpoints an ethnicity or a political opinion that is adverse to them.
31. In my judgement, whilst it is correct that judges are not obliged to give their reasons in exhaustive detail and whilst it is correct that the judge referred to SMO and even quoted from paras 358 and 390 of SMO, the fact is that he failed to engage with any aspect of the guidance. In effect, Mr Spurling’s approach in oral submissions and in his Rule 24 Reply (see, for example, paras 11-14 of the Rule 24 Reply) was to refer

to passages in SMO that *he* considered were relevant and to provide the reasoning that was missing from the judge's decision. It is clear from SMO that any assessment of the risk facing an individual upon return to their home area is fact-specific. An approach whereby Counsel draws from the country guidance case the relevant passages and the reasoning that supports a judge's finding when no such reasoning is apparent in the judge's decision means that there has been a failure by the judge either to apply the country guidance or to give adequate reasons for his finding on the risk on return. The respondent is entitled to know how the country guidance was applied in this case to reach the finding that the claimant was at risk on return. On any legitimate reading of the judge's decision, it is not possible for the reader to know how the country guidance in SMO was applied in the claimant's case.

32. The difficulty with Mr Spurling submission, that the applicable Refugee Convention reason found by the judge to apply was imputed political opinion by reason of the claimant's ethnicity and religion, is that the judge simply did not mention the claimant's ethnicity or religion in his assessment of the risk on return. In effect, Mr Spurling's submission was an attempt to write into the judge's reasoning a Refugee Convention reason that it is not possible to infer or discern on any reasonable view.
33. Ground 1 is therefore established, in my judgment.
34. It is therefore unnecessary for me to consider ground 2.
35. In summary, the judge erred in law as follows:
 - (i) His assessment of the claimant's evidence concerning his loss of contact with his family was internally inconsistent.
 - (ii) He failed to identify a Refugee Convention reason.
 - (iii) He failed to apply the country guidance in SMO.
36. I am satisfied that each of these errors are fatal, in that, each is material to his decision to allow the appeal on asylum grounds.

Ground 3

37. In relation to ground 3, Mr Spurling submitted that it is clear that the judge considered that it was not necessary for him to conduct an assessment of the claimant's Article 8 claim because he had decided to allow the appeal on asylum grounds. I agree.
38. Accordingly, given that I have concluded that the judge had materially erred in law in reaching his decision to allow the appeal on asylum grounds, his decision on the claimant's Article 8 claim cannot stand.
39. For all of the above reasons, I set aside the decision of Judge Lester to allow the appeal in its entirety.
40. In the majority of cases, the Upper Tribunal when setting aside the decision will re-make the relevant decision itself. However, para 7.2 of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper

Tribunal (the “Practice Statements”) recognises that it may not be possible for the Upper Tribunal to proceed to re-make the decision when it is satisfied that:

- “(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.”

41. In my judgment, given the extent of the fact-finding that will be necessary, I am satisfied that this case falls within para 7.2 (b). In addition, given that the claimant won his appeal before the First-tier Tribunal and having regard to the Court of Appeal’s judgment in JD (Congo) & Others [2012] EWCA Civ 327, I am of the view that a remittal to the First-tier Tribunal is the right course of action.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on points of law such that the decision is set aside in its entirety. This appeal is remitted to the First-tier Tribunal for a fresh hearing on the merits on all issues by a judge other than Judge of the First-tier Tribunal Lester.

Signed: D. Gill Date: 5 June 2022

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal’s decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.
3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.
5. A “working day” means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.
6. The date when the decision is “sent” is that appearing on the covering letter or covering email