



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-003387
First-tier Tribunal No:
PA/55222/2021
IA/15775/2021

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On the 04 April 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BHH
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Singh, agent instructed by CB solicitors

For the Respondent: Mr Gazge, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 14 March 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant (and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified) 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 (and/or other person). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Dieu promulgated on 6 July 2022 in which he allowed the Appellant's appeal against a decision of the Secretary of State made 11 October 2021 refusing his protection claim.
2. Although it is the Secretary of State for the Home Department who is the Appellant in this appeal, I refer to the parties as they were before the First-tier Tribunal to avoid confusion i.e. the Secretary of State will be referred to as the Respondent.

The Appellant's Case

3. The Appellant is a Kurdish national of Iraq. He arrived in the UK on 15 March 2019 and claimed asylum on the basis of his political opinion. His claim was refused and his subsequent appeal dismissed. He later made further submissions asserting that he had been actively involved in political activity in the UK and feared being persecuted for it on return. The Respondent refused those submissions by letter dated 11 October 2021 ("the Refusal Letter"). The Appellant's appeal against that decision was heard by First-Tier Tribunal Judge Dieu ("the Judge") on 23 May 2022.
4. The Appellant asserted that he would be at risk on return to his home area, Tuz Khurmatu in Salah-al-Din in Iraq, on the basis of his political opinion as he had taken part in sur-place activity in the UK against the Kurdistan regime and Shia Militia in Iraq. He said he had no family who could support or help to re-document him; internal relocation would not be possible since he feared state actors.

The Respondent's case

5. The Respondent relied on the previous determination of First-Tier tribunal Judge Lloyd promulgated on 20 November 2019 which had found the Appellant not to be credible due mainly to a number of inconsistencies found in his account. Judge Lloyd also did not accept that the Appellant's ID had been destroyed.
6. Using this decision as a starting point pursuant to Devaseelan, the Respondent accepted that the Appellant had been demonstrating against the Iraq/Kurdish government and in support of the Kurdish community, but said that he was only a low level supporter with no history of organising protests and the objective evidence showed that, as such, he would not be at risk on return. As regards the Appellant's claim to be at risk in his home area due to ISIS control and attacks, there was no evidence to say he was associated with extremist groups and Judge Lloyd had found he could safely relocate to the KRI. Pursuant to SMO, a sliding scale assessment was undertaken and the Respondent concluded that the Appellant would not be at risk, having the support of his mother who remained in Iraq, being of Kurdish ethnicity with no known disabilities, not being at risk due to political activity and being able to relocate to the KRI. The Respondent did not accept that the Appellant had lost contact with his family in Iraq

such that he could gain assistance from them in redocumenting himself in order to return.

The First-tier Tribunal's decision

7. The Judge heard evidence from the Appellant via a Kurdish Sorani interpreter, together with submissions from his representative, Mr Madanhi, and the Respondent's representative, Ms Billen.
8. The Judge concluded that:-
 - (a) There was no reason to depart from Judge Lloyd's finding that the Appellant could redocument himself as the Appellant had produced no new evidence on the matter. He had not destroyed his documents and was in contact with his family in Iraq who could provide him with his documents for internal travel, or provide him with the necessary family and volume book number [31].
 - (b) The Appellant had engaged in posting politically sensitive material that could be seen as critical of the Iraqi Authorities and Shia Militia, and had attended a number of demonstrations in the UK; his timing in commencing this activity in the UK (in early 2020, having arrived in March 2019) did not go against him [32].
 - (c) The Appellant held a genuine political belief which he vocalised through his Facebook page and involvement in demonstrations. He had taken a more involved role organising timings and encouraging others to join in [33].
 - (d) No weight was attached to any risk posed by the Appellant having received threats from unknown people [34].
 - (e) The Appellant's postings were not known to the Iraqi or Shia Authorities [35].
 - (f) The Appellant would continue with his political activity on return [36]; he was someone likely to call out to others to protest and was likely therefore to encounter mistreatment from the authorities amounting to significant harm [37].
 - (g) The Appellant would not be at risk of indiscriminate violence such as would engage Article 15(c).
9. The Respondent sought permission to appeal to the Upper Tribunal on the grounds that the judge had erred as follows:-
 - (a) Ground 1: In his approach to the sur place evidence:

- (i) The Respondent had submitted that the negative credibility findings of Judge Lloyd applied across the appeal and clearly applied to the Appellant's claim to have a genuine political belief. The Judge misconstrued this point and failed to consider it, restricting the argument to simply an issue of timing. Whilst the Judge held that the timing of the sur place activity did not go against the Appellant, he failed to consider or comment upon the absence of any political activity prior to February 2020, it being noted that the Appellant had been in the UK since March 2019.
- (ii) In finding that the Appellant's Facebook evidence was persuasive and that he had a more involved role in encouraging others, the Judge failed to take into account the Respondent's submissions with reference to the guidance as set out in XX (P/IAK - sur place activities - Facebook) Iran CG [2022] UKUT 23 (IAC) (20 January 2022) when making such an assessment (headnotes 7 and 8 cited):
- (iii) It was unclear what weight was placed on the Facebook evidence and adequate reasons were not provided as to why the evidence showed he had a 'more involved role'.
- (iv) The Judge materially erred in both assessing the Appellant's claimed political beliefs and his profile in any activities undertaken.

(b) Ground 2: In his approach to risk on return:

- (i) Having found the Appellant had not shown that the authorities were aware of his activities or would be in a position to put him at risk on return, the Judge then considered the risk arising from political activity on return. The Judge materially erred by making an assessment of risk based upon the Appellant being in the KRI rather than in his home area of Tuz Khormatu or another area of government-controlled Iraq. The Judge provided no other reasons or basis to find that the Appellant would be at risk.

10. On 2 August 2022, First-tier Tribunal Judge Komorowski granted permission to appeal to the Upper Tribunal stating:

3. The respondent's decision of 11 October 2021 anticipated that the appellant might return to his "home area" or to the Kurdistan Region of Iraq (respondent's decision, para. 52). The judge notes that the appellant's home area is Tuz Khurmatu in Salah-al-Din (judge's decision, para. 2). But the judge, arguably, appears only to assess the risk on return of the appellant if he should return to the KRI. The judge quotes extensively from a respondent's Country Policy and Information Note on the KRI (judge's decision, para. 36), but appears to quote nothing, and say nothing, about the likely attitude of the authorities in Government Controlled

Iraq (GCI) and the risk to the appellant should he return to Tuz Khurmatu.

4. Accordingly, the respondent's complaint that the judge "materially erred by making an assessment of risk based upon the appellant being in the IKR rather than in his home area or another area of GCI" identifies an arguable error of law such as might lead to the decision being set aside.

5. I doubt whether the respondent's first ground criticising the judge's assessment of the sincerity of sur place activity has merit. The judge's omission to explicitly mention the absence of any political activity (on Facebook or in person) or the adverse credibility findings on other points (thus arguably affecting the appellant's general credibility on all matters) does not necessarily show that the judge failed to consider these matters. But, I grant permission on all grounds taking a "pragmatic view" (Joint Presidential Guidance 2019 No. 1: Permission to appeal to UTIAC, para. 48).."

- 11.** The Appellant submitted a rule 24 response on 26 August 2022 stating that:
- (a) The Judge had made proper findings concerning the Appellant's activities; it was wrong to say that the previous credibility findings should be used against a different aspect of the Appellant's case (i.e. his sur place activity) and the Judge was right to assess this separately. The Judge's findings that the Appellant was genuine and would be political active on return were open to him.
 - (b) The findings concerning risk on return were also open to the Judge, having found that the Appellant was at risk from the Shia or Iraqi government and that the Appellant would be active on return; the crucial issue was his genuine political belief and likelihood of activity and headnote 5 of SMO and KSP (Civil status documentation, article 15) (CG) [2022] UKUT 00110 held that such opposition would put him at risk.

The hearing

- 12.** The appeal came before me on 14 March 2023.
- 13.** It serves no purpose to recite the submissions here at length as they are set out in the record of proceedings. Essentially, Mr Gazge reiterated the grounds of appeal and asked that the matter be remitted back to the First-tier Tribunal.
- 14.** I asked him to take me to where it was shown that the case of XX was before the Judge. He could not do so but said that, as XX was a country guidance case, it was an error for the Judge not to have considered it.

Alternatively, even if he did not need to consider XX, the Judge did not consider all relevant factors concerning the Facebook evidence.

- 15.** Mr Singh said he relied on the rule 24 response. He admitted that the Judge's decision did not specifically discuss risk on return to the Appellant's home area of Tuz Khomatu, but said the Judge was discussing risk in the whole of Iraq, having made findings based on the Appellant's political activity, which were open to him.
- 16.** Mr Gazge made no reply.

Discussion and Findings

Ground 1

- 17.** At [32] of his decision, the Judge accepts that the Appellant has engaged in the posting of politically sensitive material that could be seen as critical of the Iraqi Authorities and Shia Militia, and accepts that that the Appellant has attended a number of demonstrations in the UK. This confirms the acceptance by the Respondent in the Refusal Letter. The question the Judge had to determine was whether that activity put the Appellant at risk on return, which meant assessing his profile in order to determine whether he was of, or would come to, the adverse attention of the authorities in Iraq. The evidence of profile that was before the Judge is set out at [17]-[22] of his decision and comprised of the Appellant's oral and witness statement evidence, Facebook posts and screenshots of messages sent to him.
- 18.** It is correct that, pursuant to Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka * [2002] UKIAT 00702, Judge Lloyd's decision was the starting-point and was the authoritative assessment of the Appellant's status at the time it was made. As above, Judge Lloyd found the Appellant not to be credible in his account of events in Iraq including that his identity documentation had been destroyed. He also found that the Appellant was still in contact with his family in Iraq. Judge Lloyd's decision was not challenged, or not successfully challenged.
- 19.** The claim of sur place activity was not before Judge Lloyd such that it fell to be assessed and determined for the first time by the Judge, albeit with the adverse credibility findings of Judge Lloyd's decision forming the background to the new claim. In this sense, the Appellant had somewhat of an uphill struggle in terms of proving his word was now credible. The Judge acknowledged the application of Devaseelan in [15] and found at [31] that there was no reason to depart from Judge Lloyd's finding that the Appellant's documents had not been destroyed and that he had been in contact with his mother, using this as a basis to find that the Appellant could redocument himself if needs be. The Judge therefore upheld the finding of a lack of credibility in this regard, and also found that the evidence before Judge Lloyd about the Appellant having contact with his mother in 2019 did not accord with the current evidence which stated that

the Appellant had had no contact with his family since arriving in the UK [31].

- 20.** Having acknowledged this, I cannot see that the Judge takes the adverse credibility findings of either Judge Lloyd or himself into account in assessing the sur place activity. Devaseelan is clear in saying that facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. It is a fact personal to the Appellant and relevant to the issue of return, that at the time of the hearing before Judge Lloyd in November 2019, there was no mention of any political activity either in Iraq or the UK.
- 21.** On the evidence before the Judge at [18], the Appellant's political activity commenced in February 2020, four months after Judge Lloyd's decision which, of course, dismissed the protection appeal. On the face of it, this timing calls the motives of the Appellant into question, even more so given that the basis for his new claim was entirely different from that he had previously made. I cannot see in [17]-[22], where the Judge describes the evidence before him, any mention of the Appellant seeking to maintain or even mention his previous account of events in Iraq, nor does he say he was ever politically active whilst in Iraq. I cannot see that the Appellant explained why he started his activities when he did. Having not having challenged Judge Lloyds' findings, and in the absence as to any explanation as to why he had entirely dropped his former claim, in my view, this further validates the adverse credibility findings and means the Appellant had even more of an uphill struggle in terms of proving credibility than he had prior to the new appeal. I can also see that this was raised in submissions before the Judge - see [23].
- 22.** I find the Judge did not give this background proper consideration. At [32] the Judge says only that:

"Given that the Appellant arrived in the UK in March 2019, I am not troubled by his timing of getting involved only a few months later in early 2020. When asked about this in evidence, the Appellant said that prior to that he did not have a Facebook account and was not familiar with how these things worked. There is no suggestion by the Respondent that he did have a Facebook profile before this. I find that the Appellant's timing does not go against him.
- 23.** As can be seen, the Judge describes how there is no evidence of the Appellant having a Facebook profile prior to early 2020, the Respondent having not adduced evidence on this and the Appellant admitting that he did not have an account. This means that both the Facebook activity and the demonstrations commenced a short time after Judge Lloyd's dismissal.
- 24.** The Judge's finding about timing ignores the fact that sur place activity was not raised before Judge Lloyd in November 2019, and does not properly explain why the Judge finds the Appellant credible in his

descriptions of his sur place activity against both his own and Judge Lloyd's findings. This is an error.

- 25.** As to the social media evidence, I do not find the Judge's failure to consider XX to be an error or if it is, it is not material. It is a country guidance case but the country concerned is Iran, not Iraq. The question is whether the Judge weighed the social media evidence before him appropriately and made findings that were open to him on that evidence.
- 26.** As to the Appellant's role in demonstrations and wider profile, in his witness statement, he says at para [2] that he was one of many who attend demonstrations, at para [3] that he had no particular role and was part of the crowd at the demonstration on 23 October 2020 and at para [9] that at a further 3-4 demonstrations he was only an 'ordinary participant'. So at the demonstrations themselves, he admits he had no particular role and was effectively a face in the crowd. I cannot see any evidence that he says he encouraged others to join in whilst at demonstrations.
- 27.** Para 12 of the Appellant's witness statement says:
- "I have been taking a more active role in terms of notifying people through my Facebook to attend and support the demonstrations. I also usually try and reach out to Kurdish journalists to be part of the demonstrations and I have reached out to larger groups encouraging them to attend demonstrations".
- 28.** The Appellant's oral evidence is cited in [19] of the Judge decision:
- "He has around 5,000 followers on Facebook and it was an open profile which bore his full name. He has been taking more of an active role in notifying people to attend demonstrations. He says he has reached out to Kurdish journalists and larger groups. He said in evidence before me that he would organise timings of demonstrations and help run a Facebook group. Around 200-350 would attend".
- 29.** It was raised by the Respondent in submissions that there was no specific evidence on the Appellant's claimed high profile save for the Facebook posts which were insufficient, nothing was known about the individual who had made threats, and there was no evidence that the Appellant could or had been identified amongst crowds of hundreds. Having reviewed the Facebook posts, I can see little which supports the Appellant's oral or witness statement evidence. The majority of posts concerning demonstrations show the Appellant having attended them rather than publicising dates or upcoming events. The Appellant's profile page was not disclosed and so it is impossible to tell which online groups he was part of or how many 'friends' he had. The number of attendees cannot be discerned from the photos. The posts have many comments and 'likes' but the authors and contents of these have not been disclosed. His witness statement does not explain when his Facebook account was set up.

- 30.** It appears the Judge has simply accepted the Appellant's word as to the number of followers and role in demonstrations. Whilst it was open to the Judge to do so, he has not explained why he has done so against a background of adverse credibility findings, in the absence of supportive documentary evidence and when the Appellant himself does not say he took any kind of role at the demonstrations themselves. I find this is an error.
- 31.** I find the errors referred to above are material, as the matters under discussion form the basis for the Judge's overall conclusion that there is a risk on return arising from the Appellant's sur place activity. Without this conclusion, the Judge may well not have allowed the appeal.

Ground 2

- 32.** The Judge's decision refers at [2] to part of the Appellant's case being that "He claims that he will be a risk on return to his home area Tuz Khurmatu in Salah-al-Din".
- 33.** As Mr Singh admitted at the hearing, there is no analysis in the Judge's decision of risk specific to the Appellant's home area.
- 34.** I do not find this to be an error in terms of the risk arising from the Appellant's political profile. It is correct to say that if the Appellant has sufficient profile to be of adverse attention to the authorities for his political opinion, then that risk would apply across the whole of Iraq, including the Appellant's home area. Having found the Appellant had such a profile, the finding that he would be at risk across Iraq was open to the Judge. The situation in the Appellant's home area would have been relevant and would have fallen to be assessed in its own right had the Judge found that the Appellant was not at risk due to his political profile, such that the question of risk from other factors in his home area would have come into play prior to any assessment of internal relocation.

Conclusion

- 35.** I am satisfied the decision of the First-tier Tribunal did involve the making of material errors of law and I set it aside, subject to the findings made by the Judge in [31] which I preserve as neither side has challenged them, there was no new evidence concerning them and they are on the discrete issue of redocumentation and family contact.
- 36.** Otherwise, given that the errors identified undermine the remaining findings, none of the facts found aside from those in [31] can be sustained. In the light of the need for extensive judicial fact-finding, I am satisfied that the appropriate course of action is to remit the appeal to the First-tier Tribunal to be heard afresh by a judge other than Judge Dieu.

Notice of decision

1. The decision of the First-tier Tribunal involved the making of errors of law and I set it aside subject to the preserved findings in [31] of the Judge's decision.
2. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues save for the Appellant having contact with his family and being redocumented.
3. An anonymity direction is made due to the appeal concerning a protection claim.

Signed: L. Shepherd

Date 28 March 2023

Judge of the Upper Tribunal
Immigration and Asylum Chamber