



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-004937
First-tier Tribunal Nos: PA/54597/2021,
IA/15551/2021

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 17 August 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

**HSMA (IRAQ)
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Holmes, Counsel (instructed by Broudie Jackson Canter solicitors)

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

Heard at Manchester Civil Justice Centre on 20 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, and following the anonymity order made in the First-tier Tribunal, the Appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the Appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Background

1. This matter concerns an appeal against the Respondent's decision letter of 7 September 2021, refusing the Appellant's asylum and protection claim initially made on 7 February 2020.
2. The Appellant's claim was made on the basis of his political opinion, claiming to have been arrested and threatened in the Iraqi Kurdistan Region (IKR) due to his political posts on Facebook.
3. The Respondent refused the Appellant's claim due to his account being internally inconsistent and speculative such that it was not credible, and his credibility also being damaged due to his failure to claim asylum in France. The Respondent did not accept the Appellant held a genuine political opinion or had expressed such an opinion on Facebook or even if he did, he would not be liable to persecution in Iraq as his activity had only ever been low level, including sur place activity in the UK; the Appellant had a copy of his CSID and was in contact with his family such that he could obtain a replacement CSID if needed and return by flight to Sulaymaniyah or Erbil.
4. The Appellant appealed the refusal decision.
5. His appeal was heard by First-tier Tribunal Judge Lewis ("the Judge") at Manchester on 12 July 2022, who later dismissed the appeal in its entirety in a decision promulgated on 21 July 2022.
6. The Appellant applied for permission to appeal to this Tribunal on two grounds as follows:
 - (a) Ground 1 - Wrongly Treating the Respondent's Policy Position as Evidence

The Judge accepts at [36] of his decision that the Appellant is genuinely politically opposed to the government of IKR. As such, his appeal turned on an assessment of the background evidence and how he might act upon return and/or be treated by the Kurdish authorities.

The Judge acknowledges at [37], [38] and [39] the background evidence which tends to show that the Kurdish authorities take a hard line against, and target, those who express opposition or dissent. However, the Judge goes on to conclude at [46] and [47] that this presents no risk to the Appellant, in reliance on the policy summary at section 2 of the Respondent's "Country Policy Information Note: Iraq: Opposition to the government in the Kurdish Region of Iraq" dated June 2021.

The distinction between the policy elements of CPIN documents and the country background elements is well established. In his January 2018 report, the Chief Inspector of Immigration Notes in the foreword:

"As their title implies, Country Policy and Information Notes (CPINs) combine country information and "Policy". This is wrong in principle and, whatever the intention, the effect is to direct the user towards a predetermined outcome..."

In para 70 of LP (LTTE area - Tamils - Colombo - risk?) Sri Lanka CG [2007] UKAIT 00076 that such expressions of policy were “certainly nothing more than ... submissions and are the Respondent's view(s) on issues only”. In MD (Women) Ivory Coast CG [2010] UKUT 215 (IAC), the Tribunal confirmed at headnote 5 its view that ‘OGNs’ (the former title of the CPIN) are no more than statements of the Home Office's policy.

The Judge was wrong to i) treat the Respondent’s policy as though it were country information, ii) use it as a substitute for his own analysis, and iii) apparently treat it as a determinative summary of the background evidence. In the absence of any other reasoning as to why the country evidence does not assist the Appellant’s case, this approach discloses a material error.

(b) Ground 2 - Failing to Apply HJ (Iran) [2010] UKSC 31 / Give Adequate Reasons

Given that the Judge accepts that the Appellant is an individual with genuine political motivations, it was incumbent upon the Judge to consider (a) how the Appellant will act upon return, and (b) what will be the consequence of him acting in this way.

The closest that the Judge comes to such an assessment is [48] (f), where he says: “If the appellant were return (sic) to the KRI and to continue his opposition, it is not reasonably likely that he will be at risk of serious harm or persecution based upon his political opinion.”

No reasons are offered as to why this is so, in light of the evidence cited earlier by the Judge of arrests of “dozens of young men calling from (sic) protests in their social media posts” amongst other things. The Judge appears to engage in no analysis of the HJ (Iran) principles. The Judge’s conclusion that there is simply no risk to the Appellant is flawed for the reasons set out in ground 1, and alternatively, is flawed for a failure to adequately reason why he has arrived at this view in light of the background evidence tending to show that such a risk exists.

7. Permission to appeal was refused by First-tier Tribunal Judge Robinson on 21 September 2022. The Appellant to the Upper Tribunal for permission on substantively the same grounds.

8. Permission to appeal was granted by Upper Tribunal Judge Smith on 22 November 2022, stating:

“1. The Appellant appealed against the decision of the Respondent dated 7 September 2021 refusing his protection and human rights claims in the context of a decision to remove him to KRI.

2. The appeal was dismissed by First-Tier Tribunal Judge Lewis sitting in Manchester by a decision dated 21 July 2022 (“the Decision”). Permission to appeal was refused by First-tier Tribunal Judge F E Robinson in a decision dated 21 September 2022.

3. The grounds challenging the Decision relate only to the protection claim. Two grounds are raised. First, it is submitted that the Judge erred by treating as evidence what is a “policy” position of the Respondent as set out in the Country Policy Information Note (“CPIN”). Second, it is said that the Judge failed to consider how the Appellant would conduct himself on return to KRI and what would befall him if he continued his opposition there.

4. Taking the second ground first, it is arguable that, although the Judge considered whether the Appellant would be at risk on return based on his opposition to the KRI whilst in the UK, he has failed to consider the evidence about what would happen to the Appellant if he continued to criticise the authorities on return. It is arguable that the Judge has failed to consider and resolve the HJ (Iran) issue.

5. I am less persuaded by the first ground but since there is an overlap with the second, I do not limit the grant of permission. I simply observe at this stage that the mix of “policy” and evidence is a feature of background evidence whether that is contained in a CPIN or within a report from an organisation such as Human Rights Watch. I also observe that Appellant appears to have relied upon another section of the CPIN which might equally be described as the Respondent’s own view of the situation (see [39] of the Decision). However, it is arguable that the Judge has failed to explain in light of what is recorded at [37] to [39] considered as a whole why he finds that the Appellant would not be at risk on return if he continued his opposition in the KRI.”

The Hearing

9. The matter came before me for hearing on 20 July 2023.
10. It serves no purpose to recite the submissions in full here as they are a matter of record.
11. A preliminary discussion took place as to what I considered may be a ‘Robinson obvious’ point which had not been raised in the grounds, however having heard the parties’ submissions on the point, and given the parties were in agreement with each other, I am satisfied it need not be addressed and so shall not mention it further here.
12. As regards the grounds of appeal, Mr Holmes took me through these in detail.
13. Mr McVeety confirmed there was no rule 24 response and all grounds were opposed. He said, as regards the first ground, whilst the section of the CPIN referred to may be the Respondent’s opinion, it is based on background evidence, and the Judge also notes the background evidence at [37] and [38], including the Human Rights Watch report; the majority of that evidence referred to journalists being the ones targeted, there was little evidence about people ‘rousing the public to rise up’ (as said in the Appellant’s witness statement) and most protests were not about politics but matters such as salaries being paid to staff and teachers etc. He said the absence of such evidence clearly demonstrates there is not a risk to those operating at a low level and this ties in with ground 2; if the Appellant continues to act as he has done in UK, the objective evidence referred to would show he wouldn’t be at risk as whether he keeps quiet or not, he is not high profile. The judge was entitled to make the findings he did concerning the lack of comments and like etc against the Facebook posts.
14. I asked Mr Holmes whether the Judge, having considered the objective evidence, did not undertake a fact specific exercise in [48]? He said to an extent yes, but the objective evidence cited does not necessarily lead to a view that only those of high profile are at risk, but discusses that risk could arise from different activities and that risk could amount to persecution. For example, the CPIN in the background information section says detention conditions in Iraq are particularly poor so even 1 day in detention may amount to serious harm. He said the information is open to more than one interpretation but the Judge appears to have treated the Respondent’s opinion as determinative.

15. As regards ground 2, Mr Holmes emphasised how, having found the Appellant to have been genuine in his opposition activity on Facebook for many years, the Judge does not assess how the Appellant would act on return. He took me to objective evidence before the judge which included security forces using excessive forces to suppress protests. He conceded there was some force in Mr McVeety's point about the majority of the evidence discussing areas of Iraq outside the IKR but said this is not a complete answer on the issue and part of the CPIN does deal with the IKR at 11.3 (page 85 Appellant's bundle).
16. Both agreed that given the limited extent of fact finding required, if a material error is found on the grounds, the matter could be set aside and retained for remaking in the Upper Tribunal.

Discussion and Findings

17. I note a copy of the Country Policy and Information Note - Iraq: Opposition to the government in the Kurdistan Region of Iraq (June 2021) ("the CPIN"), was provided in the Appellant's bundle before the Judge such that he had access to the entire document.
18. Whilst [46] of the Judge's decision does set out a section of the CPIN which falls under the heading 'Assessment' as opposed to the later heading 'Country Information', I do not find this in itself indicates that the section cited is purely policy. Rather it appears to be a mixture of summary of the objective information and an assessment based on that summary. This can be seen by various parts of section 2.4 containing hyperlinks to sections contained under 'Country Information', such as 2.4.6 linking to 11.2 which contains details of the objective information which have given rise to the summary and policy in 2.4.6. I note that the comment cited to me in para 70 of LP (LTTE area - Tamils - Colombo - risk?) Sri Lanka CG [2007] UKAIT 00076 concerned the former Operational Guidance Notes (OGNs) and not CPINs in the form they are now, as did the other case cited to me of MD (Women) Ivory Coast CG [2010] UKUT 215 (IAC). The Chief Inspector's report cited also confirms CPINs are a mixture of policy and country information.
19. It is clear that the Judge considers the Appellant's case on its merits and does not use the 'assessment' section of the CPIN as the only basis for doing so. At [30] - [35] he analyses the Facebook evidence before reaching his conclusions on this at [36] i.e. that since 2013 the Appellant has used Facebook to criticise the regime in the IKR. Having done so, the Judge goes on in [37] - [39] to set out the submissions made to him about the objective evidence which included the Human Rights Watch report and the example of a protestor using Facebook being detained, restrained and beaten, as well as 11.1.12 of the said CPIN, which the Appellant himself relied on. At [40] - [45] the Judge analyses the Appellant's sur place activity and the attention his Facebook account has attracted. The Judge at [47] goes on to cite 2.4.6 of the CPIN including what it says about decision makers needing to consider each case on its merits. He then makes his overall findings at [48] which includes reference to comments made in the preceding paragraphs, such as 48(e) referring to the discussion at [44] and [45]. It is therefore wrong to say the Judge used the CPIN as a substitute for his own analysis, or that he treated it as a determinative summary of the background evidence. I find it is simply due to structure that there is any question of paragraph 2.4.6 of the CPIN appearing to be a primary or determining factor. It is not. It is one factor amongst others which happened to come immediately before the key findings in [48].

20. I therefore find that no error is disclosed in this regard and ground 1 is not made out.
21. I now address ground 2.
22. It is well established that the principles set out in HJ (Iran) v SSHD [2010] UKSC 31 are applicable to cases concerning how someone will behave on return for fear of a convention reason such as the political activity in this case. The questions that must be asked in such cases are found in para 82 of that decision and, paraphrased to concern the issues in this case, were as follows:
- (a) The tribunal must first ask itself whether it is satisfied on the evidence that the applicant holds a political opinion, or that he would be treated as holding it by potential persecutors in his country of nationality.
 - (b) If so, the tribunal must then ask itself whether it is satisfied on the available evidence that people with political opinion who expressed it openly would be liable to persecution in the applicant's country of nationality.
 - (c) If so, the tribunal must go on to consider what the individual applicant would do if he were returned to that country.
 - (d) If the applicant would in fact express it openly and thereby be exposed to a real risk of persecution, then he has a well-founded fear of persecution - even if he could avoid the risk by living "discreetly".
 - (e) If, on the other hand, the tribunal concludes that the applicant would in fact live discreetly and so avoid persecution, it must go on to ask itself why he would do so.
 - (f) If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures.... then his application should be rejected
23. I note that the Judge cites HJ (Iran) at [11] and says he has considered it, as well as two other cases (rightly) applicable to the question of risk due to political opinion.
24. At [36] the Judge finds that the Appellant has used, and continues to use, Facebook to voice opposition to the regime in the IKR. At [40] the Judge finds that the Appellant left Iraq using his own passport and had no difficulties with the authorities in doing so, but this did not mean he would be free to express his political opinions on return. The Judge makes a self-direction at [41] that he needs to assess whether the Appellant would face risk due to his political opinion on return to the IKR.
25. At [41] to [45] the Judge assesses the nature of the Appellant's activity both on Facebook and in attending three demonstrations in the UK. At [43] he discusses how the Appellant previously used a pseudonym and that anyone viewing the posts at the time would have thought it was someone other than the Appellant who made them. At [44] the Judge finds the Appellant's posts have not received widespread attention given the amount of likes and comments and there being no evidence of them being viewed by thousands of people.

26. At [48] the Judge makes his overall findings based on the evidence he has seen. These are that: the Appellant holds political opinion adverse to the regime in the IKR; he did not come to the attention of the authorities before he left Iraq; he is not 'high profile' whether by reason of profession or participation in demonstrations; his activities in the UK have not come to the attention of the authorities in the IKR; his Facebook activity has not brought him to prominence; if he returned and continued his opposition it is not reasonably likely he would be at risk.
27. The key finding is the last one at 48(f) "If the appellant were to return to the KRI and to continue his opposition, it is not reasonably likely that he will be at risk of serious harm or persecution base on his political opinion".
28. Overall, I find that the Judge has conducted an assessment sufficient for the purposes of HJ (Iran) and it is incorrect to say the Judge fails to give reasons for his finding in 48(f). This is because although the Judge does not explicitly state that the Appellant would or would not continue his opposition on return, he takes the Appellant's case at its highest by addressing what would happen if he did. He does so having already found that, even though the Appellant had a genuine political opinion which he had expressed in the IKR previously, he did not come to the adverse attention of the authorities by doing so. The Appellant has not challenged this finding. I cannot see that there was evidence indicating the Appellant would do anything further or differently on return to the activities already undertaken, either in the UK or the IKR. To the extent that he would attend demonstrations in the IKR, the Judge addresses that in his finding at 48(c) i.e. that any participation was not high profile.
29. If I am wrong about this, and the Judge did err in failing to undertake such an assessment, I find such an error is not material given all indications are that the Judge would have arrived at the same conclusion of dismissing the appeal. I cannot see that, having addressed the question of what would happen if the Appellant lived 'openly', it would have taken the matter any further to address what would happened if he did not live openly for whatever reason, as living openly would have carried the greatest risk.
30. As discussed at the hearing, and having reviewed the papers before the Judge in detail, there was also little evidence that someone in the Appellant's position undertaking similar activities would suffer treatment amount to persecution in any case; much of the evidence mentions journalists, protests about matters such as salaries of public servants (neither of which were analogous to the Appellant's situation), and the suppressive tactics used in parts of Iraq other than the IKR. Mr Holmes was candid in admitting this and the evidence that he could point to before me was exactly that cited to the Judge at the hearing and features in his decision at [37 - [39].
31. To conclude, I find the decision is not infected by any material errors of law. The decision therefore stands.

Notice of Decision

1. The appeal to the Upper Tribunal is dismissed. The decision of First-tier Tribunal Judge Lewis promulgated on 21 July 2022 is maintained.
2. An anonymity direction is made due to the nature of the issues underlying the appeal.

L.Shepherd
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
4 August 2023