



Case No: UI-2022-005928, UI-2022-005929

**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER**

**First-tier Tribunal No:
PA/50834/2022**

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 18 September 2023**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

**BMS
(ANONYMITY ORDER MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms Brakaj, instructed on behalf of the appellant

For the Respondent : Ms Z. Young, Senior Presenting Officer

Heard at (IAC) on 26 July 2023

DECISION AND REASONS

1. Both parties appeal, with permission of Upper Tribunal Judge Bruce against the determination of the First-tier Tribunal (Judge Monaghan) promulgated on 12 October 2022. By its decision, the Tribunal allowed the appellant's appeal on human rights grounds (Article 8) and on humanitarian protection (Article 15 (c)) grounds against the Secretary of State's decision dated 10 February 2022 to refuse his protection and human rights claim but dismissed his protection claim based on his political opinion.
2. The FtTJ did make an anonymity order and no grounds were submitted during the hearing for such an order to be discharged. Anonymity is granted because the facts of the appeal involve a protection claim.

3. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, 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 or any member of his family. Failure to comply with this order could amount to a contempt of court.

The background:

4. The factual background can be summarised as follows.
5. The appellant is a national of Iraq of Kurdish ethnicity. The appellant has been in the UK since December 2016 when he made a claim for asylum upon arrival. The basis of his asylum claim at that time was that he feared attacks or capture or torture or detention by ISIS in Iraq; that his father trying to kill him because he would not agree the marriage arranged his cousin; that he been in a relationship with a Yezidi woman whose family had threatened him and that he feared the Kurdish authorities as his father had been a member of the Baath party. He also feared the Shia militia as he was a Sunni Muslim.
6. The respondent considered his claim and refused it in a letter dated 30 December 2019. The respondent did not accept that he had established that he was at risk as claimed and the only acceptance was that he was a national of Iraq of Kurdish ethnicity and that in the recent past he had been abducted by ISIS.
7. The appellant appealed the decision, and the appeal was heard by FtTJ Clemes. In a decision promulgated on 20 February 2020 the FtTJ dismissed his appeal on all grounds. Whilst he had advanced a number of heads of claim of protection, having undertaken an evidential analysis of those claims, the FtTJ rejected them for the reasons set out between paragraphs 16 - 32 of his decision. In respect of the appellant's asylum claim, Judge Clemes made findings of fact whereby he rejected the appellant's account of being at risk in his home area. The judge rejected his account that he would be at risk from his father as he would not agree to marry his cousin (see paragraph 21), the judge rejected his claim that he would be at risk from the Kurdish authorities they would find out about his father's links to the Baath party (see paragraph 19), the judge rejected his claim that concerned his relationship with a Yezidi woman (see paragraph 20). In addition the judge found that his Sunni identity alone would not give rise to a real risk of serious harm and that other than his religion, there was nothing to heighten the risk from the Shia Militia in his home area. Finally the FtTJ did not find that he would be considered as a supporter of ISIS (see paragraph 24).
8. The FtTJ addressed Article 15(c) at paragraph 27 but having assessed the risk factors in the context of his home area and as a former contested area determined that he had not demonstrated that he established a real risk of being subjected to indiscriminate violence amounting to serious harm within the scope of Article 15 (c).
9. As to the issue of return this was based on his finding of fact that the appellant had family who were alive and present in his home area which included his father with whom there was no difficulty. It was also based on the finding that he left his CSID at home when he left Iraq (paragraph 22). Having applied the CG decision of SMO, the FtTJ found that as his CSID was in Iraq and he had the support of his family, his return was feasible. The FtTJ dismissed his appeal based on the Refugee Convention, humanitarian protection and Articles 2 and 3 of the ECHR. The FtTJ also dismissed his appeal on Article 8 grounds.

10. Following the dismissal of his appeal, the appellant was granted permission to appeal on 28 May 2020 however on 12 August 2020 the Upper Tribunal dismissed his appeal.
11. The appellant became “appeal rights exhausted” on 25 August 2020.
12. He submitted further submissions on 8 June 2021, which were refused in a decision by the respondent dated 10 February 2022.
13. The appellant appealed that decision, and it came before FtTJ Monaghan. At the hearing, the respondent was not represented. The FtTJ heard evidence from the appellant, his partner and her parents which related both to his claim on protection grounds and Article 3 claim which was based on his sur place political activities in the UK, and humanitarian protection and his Article 8 claim based on his relationship with his partner, and his family life.
14. The FtTJ set out the relevant issues at paragraph 23. The FtTJ referred to her starting point as the decision of Judge Clemes. As to the relationship with his partner, the FtTJ found that the appellant was not in a relationship with anyone when he came before Judge Clemes and was not at that time exercising family life in the United Kingdom (see paragraph 27). However having considered the documentary and oral evidence in relation to the relationship, the FtTJ found that this was a genuine and subsisting relationship (see paragraphs 27 - 37).
15. As to his political activities, the FtTJ referred to his social media evidence including Facebook posts and photographs showing regular involvement in demonstrations and posting anti-regime messages. Having considered the evidence, the FtTJ found that he did not hold any position in the group the identified and that he was just a member (paragraph 42) and found that he held no particular profile which might bring him to the attention of the authorities.
16. As regards the evidence in relation to 3 named individuals, the judge was not satisfied how the authorities would single out the appellant. The FtTJ took into account the objective material relating to the Penal Code in Iraq in respect of freedom of expression and that journalists were at risk if they engaged in social media and posts which were detrimental to the authorities.
17. In relation to his social media, the FtTJ concluded that he had not disclosed the information referred to in paragraph 7 of XX (PJAK) and had not provided any evidence that the authorities have the ability to monitor an individual’s Facebook account and therefore the timely closure of the account would neutralise any risk consequential on him having a critical Facebook account (see paragraphs 47 and 49). The FtTJ consider the demonstrations but that he was not a leader or organiser but a member of the crowd. She did not find he had any profile in Iraq which would trigger suspicion or further enquiry upon his return.
18. The FtTJ concluded that he had not established the core of his claim to be at risk on return to Iraq.
19. On the issue of documentation, the FtTJ set out that she had concerns about the credibility of his account given the different evidence as to his place of residence; and concluded that the appellant remained in contact with his family, and they could send his CSID, and he could travel to the home area safely.

20. When considering Article 15(c) the FtTJ found the appellant to be from a former contested area and taking into account the appellant's personal characteristics and the nature of the area to which he would be returning found that he would be at risk under Article 15 (c) and allowed the appeal on humanitarian protection grounds.
21. As to Article 8 of the ECHR, having found that they were in a genuine subsisting relationship, the FtTJ considered the issue of insurmountable obstacles of family life with his partner continuing outside of the United Kingdom in Iraq. For the reason set out at paragraph 63 the FtTJ found that there were insurmountable obstacles to family life or in the alternative that it would be unjustifiably harsh to expect her to travel and that she would not be allowed to board a plane presently given her pregnancy nor to be separated from her parents and siblings with whom she had strong emotional bonds at the time of her confinement. The judge found that as the appellant satisfied Immigration Rules it was determinative of the finding that it would not be in the public interest to remove him and that "the decision of the respondent to that effect would be disproportionate and unjustifiably harsh."
22. The FtTJ therefore dismissed the appeal on Refugee Convention grounds and Article 3 but allowed the appeal on Article 8 human rights grounds and on humanitarian protection grounds Article 15 (c).

The appeal:

23. Following the decision both parties sought permission to appeal. FtTJ Austin, on 4 December 2022 considered the challenges to the decision brought by the appellant and the respondent before the FTT. For the reasons set out in the decisions, Judge Austin refused permission to appeal to both parties.
24. An application was made for renewal of permission to appeal on behalf of both parties. This was considered by UTJ Bruce in a decision dated 20 January 2023 who granted permission to both parties.
25. Ms Young, Senior Presenting Officer appeared on behalf of the respondent and relied upon the written grounds of challenge and made oral submissions in response to the grounds advanced on behalf of the appellant. Similarly Ms Brakaj on behalf of the appellant relied upon the written grounds of challenge and provided oral submissions in response to the grounds issued by the respondent. The written grounds are a matter of record, and it is not necessary to set them out but will be referred to in the assessment of the decision of the FtTJ. Neither party provided a rule 24 response in answer to the challenges brought by the other party. I have heard oral submissions in that respect and intend to set them out in my consideration of whether the grounds of challenge advanced by either party or both parties are made out.

Article 8:

26. The respondent seeks to challenge the decision of the FtTJ to allow the appeal on Article 8 of the ECHR. Ms Young relies upon the written grounds of challenge where it is submitted that the FtTJ failed to apply the principles in Devaseelan and that contrary to the finding made at paragraph 27 that the appellant was not in a relationship with his partner when he came before Judge Clemes, is in error.

27. Ms Young sought to argue that there was evidence before the FtT that the appellant partner were in a relationship when the appellant's appeal came before Judge Clemes. The hearing was on 14 February 2020 and the appeal was dismissed on 20 February 20 and that if the relationship were genuine and subsisting, it would have been before judge Clemes in 2020 therefore the judge failed to treat the relationship with the "greatest circumspection".
28. In her oral submissions Ms Young referred to the date of the Islamic marriage certificate (P865; E6;p 170) which was dated 20 February 2020 which was 6 days after the decision was promulgated. She submits that the FtTJ failed to engage with the position before the previous judge and the evidence was not so straightforward.
29. The 2nd part of the grounds relied upon by the respondent is that the appellant has been in the UK without leave and therefore section 17B applies and little weight would be given to any private and family life established. Ms Young submitted that paragraph 64 was not an adequate assessment and linked this to the failure to apply Devaseelan.
30. Ms Brakaj on behalf of the appellant submitted that the FtTJ was not in error in allowing the appeal on Article 8 grounds. As to the previous finding, paragraph 27 was not contrary to the decision as the FtTJ noted that he was not exercising family life in the UK. At the date of the marriage they were living separately, and not living together and at best it could probably be seen as the beginning of a relationship it was not being said that they had established a family life at that stage. She further submits that whilst there was evidence that they had met in 2019, and the appellant was invited to his partner's parents' home on 9 November 2019, it was not until 20 February 2020 which was the defining point of the relationship and that postdated the previous hearing.
31. In any event she submits that the FtTJ assessed the evidence that was put before her and concluded that there was a wealth of evidence to support that this was a genuine and subsisting relationship, based on both the oral evidence given by the parties including the appellant's partner and her parents and also the documentary evidence in the bundle. Ms Brakaj took the tribunal through the various documents showing cohabitation and also evidence relating to the pregnancy. She submitted that there was evidence that the judge was fully aware of the evidence which the judge considered and that the evidence was overwhelming that this was a genuine and subsisting relationship.
32. Ms Brakaj submitted that s 117B was not alluded to because the question of whether there were insurmountable obstacles engaged with the question to look at the issue of immigration control. The FtTJ gave her reasons as to why the parties could not relocate to Iraq and those reasons are not challenged and were present on the facts of this appeal. In particular the appellant's partner was due to give birth and the FtTJ found on the evidence that it would be unduly harsh or unjustifiably harsh to expect her to leave the country with the appellant in those circumstances and where she would be separated. She therefore submitted there was no material error of law in the assessment of Article 8.
33. Having heard the submissions of the advocates and considering the decision of the FtTJ, there was no material error of law sufficient to set aside the decision made on Article 8 grounds.

34. Contrary to the submission made on behalf the respondent there is no material error in the FtTJ's findings or assessment at paragraph 27 where the FtTJ sets out that the appellant was not in a relationship with anyone when he came before Judge Clemes. The position before the previous judge was at the appellant did not pursue any family life claim. At paragraph 33 the previous judge referred to the Article 8 claim as "not being vigorously pursued at the hearing". The FtTJ referred to there being no family life claim in the context of the judge stating that that this was made clear in the asylum interview, which was before the hearing. The FtTJ's assessment proceeded on the basis of private life and whether there were very significant obstacles to integration (see paragraphs 34 - 37).
35. Whilst the evidence before the FtTJ from the appellant's partner's parents, as set out at pages 29 pages 113 of the bundle, was that the appellant had been invited to their home on 9 November 2019 and that the engagement did not take place until 20 February 20, the latter date postdated the hearing. I accept the submission made by Ms Brakaj on this issue that the appellant was not living with his partner at the time of the hearing. At best the relationship had begun in 2019 but it did not become an engagement or crystallised into something more than a fledgling relationship until 20 February 2020 which postdated the hearing.
36. I would accept that there was a short period between the date of the Islamic ceremony and the dismissal of the claim. However it is important to view the context and relevance of this. It is submitted on behalf of the respondent that it is relevant to the genuine and subsisting nature of the relationship. In this respect it is also necessary to set out the findings made on this issue and the FtTJ.
37. The FtTJ was not relying solely on the evidence of the appellant but analysed a large number of documents that had been provided and the FtTJ had the advantage of the oral evidence of the appellant's partner and her parents.
38. The FtTJ's findings on the evidence, both the documentary evidence and the oral evidence that they were in a relationship which is genuine, and subsisting was described by the FtTJ as "significant and substantial"(see paragraph 28). The FtTJ summarised the evidence at paragraph 29. It consisted not just the witness statements from the appellant and the parties but documentary evidence independent of the parties which the judge found to provide a "wealth of documentary evidence including bills, letters of different companies and authorities which all substantiated that they were living together in a relationship." Ms Brakaj went through that evidence at the hearing. There was documentary evidence of cohabitation (page 34 March 2021), evidence of council tax the same property page 39, NHS letters to the same addressed (page 43) and health questionnaire. The FtTJ also place weight on photographs that were provided in different settings and on different outings. Whilst the judge stated that she appreciated photographs could be staged, when taking into account the other evidence, the FtTJ reached the conclusion that the photographs were also capable of substantiating their relationship.
39. At paragraph 31 the FtTJ referred to the fact that the parties were expecting a baby with a due date of 16 November. Ms Brakaj pointed out the document at page 71 and page 109 which was a nuchal pad dating scan. The due date 16 November was at page 8 of 12.
40. Alongside the documentary evidence, the FtTJ considered the evidence from the appellant's partner and her parents. The judge considered that they all gave a consistent account of how they had all met one another and the relationship and

confirmed that “it was subsisting” (see paragraphs 30-33). It is of note that the respondent in the review stated that they wished to cross examine the witnesses but did not do so as they did not appear.

41. In light of the evidence and the assessment made by the FtTJ, the finding that there was little if any reason to doubt that this was a general and subsisting relationship was a finding that was reasonably open to the FtTJ to make. The respondent does not seek to challenge any of the documents referred to by the FtTJ and even if the FtTJ had not considered the timeline, in the light of the evidence taken as a whole which the judge described as “significant and substantial,” the FtTJ was entitled to make findings that she did.
42. It was not the case that the FtTJ ignored from the consideration the points raised by the respondent and the decision letter. They were addressed between paragraphs 35 – 37 of the decision, including the finding made that the evidence in the appellant’s partner was “credible”. There is no material error of law based on the 1st ground advanced by the respondent
43. The 2nd ground relates to section 117B and the little weight provisions. Again it is necessary to look at the FtTJ’s assessment. At paragraph 37 the FtTJ sets out the evidence concerning the appellant’s partner who was present and settled in the UK having been granted ILR as a refugee under a settlement scheme. Her family circumstances were also set out at paragraph 37.
44. The Article 8 assessment is set out between paragraphs 62 – 64 and the FtTJ set out her findings of fact that there were insurmountable obstacles to family life being established outside the UK. The respondent did not consider this issue because she did not consider the relationship had been evidenced as genuine and subsisting.
45. At paragraph 63 the FtTJ set out her assessment of the issue of insurmountable obstacles. The judge found on the evidence that there were insurmountable obstacles to family life, and they were based on the circumstances of the appellant’s partner. The judge found that neither she or her family had any documentation before leaving and entering the UK under the resettlement scheme. The judge found there was no evidence to support the finding that the appellant’s partner would be allowed to enter Iraq. The FtTJ went on to find that even if she were in error in that regard, taking into account the different backgrounds and ethnicities, it was reasonably likely in her view that the marriage would not be accepted or would be viewed with suspicion or hostility. In addition the FtTJ considered the circumstances as they were as at the date of the hearing which is consistent with a human rights assessment. The appellant’s partner was one month away from giving birth to her 1st child. The FtTJ found that even setting aside the other matters which amounted to insurmountable obstacles, she found it would be unjustifiably harsh to expect her to travel and that she may not be allowed to board a plane presently nor to be separated from her parents and siblings with whom she had strong emotional bond that time she was about to give birth. The FtTJ was alluding to the family circumstances set out at paragraph 37.
46. It is of note that the respondent does not challenge those findings of fact as to whether insurmountable obstacles existed. Realistically all the findings of fact made by the FtTJ went to the issue of whether there were insurmountable obstacles including the circumstances of giving birth and the strong relationship

between the appellant's partner and her parents given her particular circumstances.

47. The grounds also do not challenge paragraph 64 where the FtTJ found that the appellant satisfied the immigration rules and that as a result it was determinative the finding that it would not be in the public interest to remove him and that a decision to that effect would be disproportionate and unjustifiably harsh. The FtTJ therefore found that the appellant had met the rules given that there was a genuine subsisting relationship and that there were insurmountable obstacles to family life being established outside the United Kingdom for the reasons that she had given and in the circumstances the public interest did not apply.
48. Even if that were not correct in light of the acceptance and lack of challenge to the findings as to insurmountable obstacles to family life, even if the FtTJ applied the previous findings, the circumstances of the appellant were entirely different and even if little weight were given to the relationship it has not been demonstrated that in the light of those unchallenged findings of insurmountable obstacles that the FtTJ would have reached any other conclusion on the Article 8 assessment.
49. For those reasons, the respondent's grounds of challenge to the Article 8 assessment not made out. There is no material error of law sufficient to set aside the decision of the FtTJ insofar as it was allowed on Article 8 grounds. The decision to allow the appeal on Article 8 grounds shall stand.

The protection claim and humanitarian protection claim:

50. Both parties seek to challenge the FtTJ's of the appellant's claim that relates to his actual/imputed political opinion as a result of sur place activities carried out in the UK. As set out in the grounds of challenge, the central point made is that the appellant has demonstrated his political opinion in the UK via his social media posts and attendance at demonstrations. It is argued that if that is accepted, the FtTJ's assessment that he can be expected to delete his social media posts is inconsistent with holding those views. Ms Brakaj also submitted that the FtTJ's assessment that he has not established to the lower standard the core of his claim to have been engaged in sur place activities, the nature of which would place him at risk on return (see paragraph 51) is inconsistent with the FtTJ's assessment of Article 15 (1) (c) as set out at paragraph 60 where the FtTJ found that he was a person who will be regarded as an opponent or a critic of the majority of the actors in the area including local security forces given that he had been politically active. Thus she submits the finding at paragraph 60 refers to a risk of harm on return, but the protection /asylum part of the claim was dismissed.
51. Ms Brakaj began her oral submissions by stating that there had been no clear finding made as to whether the appellant's views were genuinely held but that it could be implied in the Article 15 (c) assessment at paragraph 60. However she also submitted that if the appellant had been found to be genuine in his political activities he should not be expected changes behaviour (the "HJ(Iran) " point). Therefore her submission is that if the FtTJ allowed the appeal on humanitarian protection grounds under Article 15 (c) then he must have demonstrated that he met the grounds under the Refugee Convention and his claim should have been allowed on that basis.

52. Ms Brakaj did also highlight that in rejecting his account to be at risk on return, the FtTJ had not carried out a risk assessment of how, if he were returned, he would continue his political activities. In her oral submissions, she submitted that the findings or assessment on the issues was confused, and the Article 15 (c) assessment read as someone opposed to the regime but that the finding that was wholly contrary to the finding in the asylum part of the claim where the FtTJ found that he could be expected to mitigate the risk by removing his Facebook posts. She submitted that if he held genuine political views he should be able to express them openly.
53. In the alternative she submitted that if the Article 15 (c) finding was not based on the holding of genuine political views then the matter should be heard afresh as to whether they were so held. The confusion in the findings of the FtTJ she submitted were because the Article 15 (c) assessment gave the appearance that she accepted that he held genuine political views but contrary to that had found the opposite in the earlier part of her decision and that he could be expected to take down or delete his Facebook posts. She also submitted that it was difficult to understand how the judge could have made a finding in Article 15 (c) as she did not find in his favour on the protection/asylum grounds.
54. Ms Young on behalf of the respondent responded to those submissions made by Ms Brakaj as they related to the political aspect of the appeal. She counteracts Ms Brakaj's submission based on paragraph 60 that the FtTJ found him to be genuine in his personal views and submitted that the FtTJ did not make such finding or any such clear primary finding. She accepted that between paragraphs 38 - 51 the FtTJ did not make any clear or explicit finding as to whether his political activity was a result of genuinely held views or not. She submitted that this was a material error and that if Ms Brakaj's submission that it was only implied at paragraph 60, the error was material because the FtTJ was required to make a primary finding as to his political activity and whether it was a result of holding genuine political views. This is not made clear in the findings and in ensuing assessment which are confusing and inconsistent with each other.
55. Miss Young submitted has no clear findings were made and the FtTJ was required to consider on return to Iraq. She accepted on that basis there was a material error of law in the decision dismissing the appeal.
56. In essence she submitted that there needed to be a primary finding as to the genuineness of the views held by the appellant before considering the asylum aspect of the claim and as to whether he should close the account. She was therefore prepared to accept the decision was flawed on that basis.
57. As to Article 15 (c) , she submitted that the finding made did not point to the appellant holding genuine political views as the finding made at paragraph 51 was that he would not be at risk on return.
58. The respondent also challenges the Article 15 (C) assessment for the reasons set out in the grounds between paragraphs 4 and 8.
59. The grounds of challenge are as follows. In allowing the appeal under Article 15 (c) at [61]the FtTJ has departed from the country guidance case of *SMO, KSP & IM (Article 15(c); identity documents) Iraq CG* [2019] UKUT 00400 (IAC) without good reason and again has failed to apply the principles contained in *Devaseelan*.

60. In 2020 Judge Clemes considered the appellant's appeal on the same facts as were before the FtTJ and from [24] - [31] dismissed his claim. Both undertook a fact sensitive "sliding scale" assessment taking into account the factors set out at paragraph 425 of SMO. The only new evidence is that of the appellant's sur place activities which at [51] the FtTJ dismisses as not placing him at risk on return.
61. It is submitted that no reasons are given for departing from Judge Clemes findings and the only new evidence of sur place activities has been dismissed. It is submitted that in allowing the appeal the FtTJ has also departed from SMO without good reason. At [261] of SMO conditions in Mosul are found to fall short of the Article 15(c) threshold. At [59] FTTJ Monaghan finds that as a Kurd the appellant would be in a minority. However, in SMO it is submitted that Mosul is described as an ethnically mixed area. Further, it is respectfully submitted that Judge Clemes dismisses the appeal on this basis at [27].
62. At [60], it is submitted that FtTJ errs when she finds that the appellant will be at enhanced risk from ISIL who maintain an active presence in his home region according to background country information. It is respectfully submitted that at [259]-[261] of SMO ISIL is considered in the appellant's home area and conditions are found to fall short of the Article 15(c) threshold.
63. Further, at [27] Judge Clemes applies SMO and finds the appellant cannot succeed on the basis of a fear of ISIS/ISIL generally. It is submitted that as stated in the refusal letter where ISIS does have a presence is the mountainous region of Salah Al-Din, north of Baiji, which is over 130 miles from Mosul.
64. At [60], it is respectfully submitted that the FtTJ errs when she finds that the appellant will be regarded as in opposition to or critical of many of the other actors in the area, including local security actors given that he has been politically active. It is submitted that this finding is in contradiction to her earlier finding at [42] that he holds no particular profile, that would bring him to the attention of the authorities and at [51] that he is not at risk on return due to his sur place activities.
65. In her oral submissions Ms Young submitted that the only factor which potentially differed from the factual evidence related to his political activity but that was dependent upon whether the FtTJ found that he was genuine in his views and would express them. If there was a material error as there is a lack of finding that he held such views which were genuine or that he would not be at risk of harm due to political views (either genuinely held or not) which were the findings in the asylum part of the claim, then the FtTJ's assessment made under Article 15 C would be directly affected by the legal error.

Discussion:

66. Both parties seek to challenge the assessment of the evidence as to the appellant's political activities and the issue of risk on return whilst initially for different reasons it became clear from their oral submissions that there was some overlap. Having heard the submissions and having considered them in the light of the decision, I am satisfied that the decision reached involves the making of an error on a point of law.

67. Dealing with the grounds advanced by the respondent which are directed towards the assessment under Article 15 (c), the FtTJ erred in law by failing to apply the principles of Devaseelan to the assessment. The starting point in the FtTJ's assessment was the previous decision of Judge Clemes but the FtTJ did not apply those findings in the assessment that she undertook thereafter. The appeal before Judge Clemes was considered on the same facts as those before the present FtTJ and in his decision Judge Clemes gave reasons for dismissing the claim between paragraphs 24 - 31. The only factual difference related to the appellant's political views as a relevant characteristic which is a matter to which I will return.
68. Looking at the assessment made by Judge Clemes, it was set out at paragraph 27 of his decision. Prior to this Judge Clemes set out the relevant part of the headnote of SMO (1) dealing with Article 15 (c). There is no dispute between the parties that this is now set out in section A of SMO (2).
69. In respect of the appellant's asylum claim, Judge Clemes made findings of fact whereby he rejected the appellant's account of being at risk in his home area. The judge rejected his account that he would be at risk from his father as he would not agree to marry his cousin (see paragraph 21), the judge rejected his claim that he would be at risk from the Kurdish authorities they would find out about his father's links to the Baath party (see paragraph 19), the judge rejected his claim that concerned his relationship with a Yezidi woman (see paragraph 20). In addition the judge found that his Sunni identity alone would not give rise to a real risk of serious harm and that other than his religion, there was nothing to heighten the risk from the Shia Militia in his home area. Finally the FtTJ did not find that he would be considered as a supporter of ISIS (see paragraph 24).
70. Judge Clemes set out his finding at paragraph 27. It is plain from reading the assessment that the previous judge observed that the appellant had not submitted background evidence to establish what risks he faced . Those findings of fact to the starting point for the present judge by applying the principles in Devaseelan. Ms Brakaj submits that the FtTJ acknowledged this at paragraph 24 of the decision and set out the principles in Devaseelan at paragraph 25. At paragraph 26 the FTT Jason stated that she would refer to those findings as relevant when dealing with the issues in the appeal.
71. The FtTJ's consideration of Article 15 C was between paragraphs 58 - 61.

"58.I have next considered the Appellant's claim under Article 15(c). Following the country guidance caselaw of SMO, KSP & IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC) given that the Appellant is from a formerly contested area, Salah Al Din, I have carried out a fact sensitive " sliding scale" assessment taking into account the factors set out.

59.The personal characteristics which I take into account therefore are that the Appellant is Kurdish and therefore a member of an ethnic group which is in the minority , or not in de facto control of the area.

60.He is a person who will be regarded as in opposition to or critical of many of the other actors in the area, including local security actors given that he has been politically active. It is reasonably likely that he will be regarded as Westernised as he has been living in the West. For similar reasons, as a person returned from the United Kingdom he may be perceived as being wealthy. He will be at enhanced risk from ISIL who maintain an active presence in his home region according to background country information.

61. Therefore taking into account the Appellant's personal characteristics and the nature of the area to which he would be returning, I find that he would be at Article 15(c) risk".

72. The first material error in the FtTJ's assessment of the "sliding scale" approach is that the FtTJ considered his claim by reference to the wrong governorate of Salah Al Din. The appellant's home area is not situated in that governorate but Mosul which is in the governorate of Nineveh. Ms Young accepted that neither parties written grounds raised this, however it is so obvious as to be an error of fact. As the FtTJ failed to set out any references to the background material relevant to the governorate, it cannot be realistically said that this was merely a slip or error.
73. In any event the respondent's grounds are made out when considering the other aspects of the assessment.
74. Paragraph 59 of the FtTJ's decision sets out the personal characteristics identified by the FtTJ which gave risk to the appellant. The 1st characteristic is that he is Kurdish and a member of an ethnic group in the minority and not in de facto control of the area. The FtTJ plainly stated that she took that factor into account as part of the personal characteristics at paragraph 59. However the FtTJ gave no reasons why she departed from the earlier finding made by Judge Clemes that this characteristic would not lead to him being at risk of harm. Nor did the FtTJ if she sought to depart from the early findings made, provide any reasoning or identify any objective material as to the circumstances of those of Kurdish ethnicity in Mosul or the governorate generally.
75. The tribunal in SMO considered this at paragraph 300 of its decision and made the observation that members of religion and minority ethnic groups were considered by the UNHCR to be likely in need of international refugee protection in areas where ISIL retained a presence. However the tribunal further observed, "there is some danger in applying too broad a brush in trying to describe this cohort" and went on to state "whenever it is submitted that an individual is at enhanced risk on this basis, therefore, it is necessary to evaluate the submission with particular care, with reference to the composition of the area in question, the local balance of power and the extent of ISIL activity in the area in question. " The tribunal considered that it was too simplistic to state that religious or ethnic minorities are likely to be at increased risk in areas in which ISIL retains a presence and that membership of an ethnic or religious minority may increase the risk to individual but a "contextual evaluation rather than a presumption is required."
76. On any reading of paragraph 59 there is no assessment of the factors and in accordance with the objective country material or any contextual evaluation.
77. Dealing with the risk identified at paragraph 60 (based on westernisation having been living in the UK and being perceived as wealthy), as Ms Young submits there is no reasoning in support of that finding and the assessment that purely as a returnee he would be perceived as wealthy is inconsistent with paragraph 309 of SMO who considered that it was unlikely on the evidence before them that a returnee would be perceived as wealthy purely on account of being in the UK. Whilst there was an acceptance that those perceived to be wealthy are more likely to be at risk and it was therefore a relevant characteristic, those factors has relied upon still require reasoning as to why this particular appellant will be perceived as "wealthy" and none are given. As to displaying westernised behaviour, the UT considered this at paragraph 311. Reference was made to

reports of those being targeted in Baghdad for un-Islamic dress. The UT also noted there was little recent evidence to support a claim that those displaying westernised behaviour would be at significant enhanced risk even in formerly contested areas. Whilst it is noted that in areas where ISIS retained a presence such behaviour might be a relevant characteristic the FtTJ undertook no evidential assessment of this aspect. Nothing was identified about the appellant's personal "westernisation" or how it would be perceived.

78. As to whether he would be at an enhanced risk from ISIL who maintain an active present are set out previously Judge Clemes on the same evidence found that the appellant could not succeed on this basis. Whilst the FtTJ referred to ISIL maintaining a presence in the area according to the background information she did not identify what background evidence she had taken into account and as she had identified the wrong governorate, it cannot be said with any certainty that the FtTJ was applying the correct evidence.
79. Ms Brakaj in her oral submissions in response referred to general evidence concerning the Nineveh governorate, but this related to the historical evidence in the past as it stood in 2014 - 2018. The UT in SMO set out evidence that Nineveh was the most ethnically diverse governorate and the whilst the threat from ISIS in the governorate is higher than in Kirkuk (see paragraph 259) the UT found that the ISIL presence in the governorate did not go unchecked and the Iraqi army was present in the governorate in large numbers (261).
80. In summary all the relevant potential personal characteristics were considered by Judge Clemes and the appellant was found not be at risk or to fall within an enhanced category therefore it was for the FtTJ to set out her reasoning as to why she had reached a different view from the previous judge who had considered the same evidence, applying the same country guidance decision and why she had reached a different conclusion. Whilst it is plain that the judge began by directing herself to the principles in Devaseelan, there was no engagement with those principles in the Article 15 (c) assessment. There was no reference to having considered any different objective material nor providing reasoning as to why the particular characteristics identified applied to this particular appellant.
81. The only characteristic which was different to the factual matrix before judge Clemes was that which related to his political opinion or profile. In this respect both parties rely on paragraph 60 as to demonstrate an error of law in the approach of the FtTJ. As set out Ms Brakaj submitted that the finding made in respect of his political opinions were confused and that the Article 15 (c) assessment read as if on return he will be known or regarded as someone in opposition and critical of the actors in that area and therefore would be at risk on return. This finding wholly contradicted the finding made between paragraph 48 - 51 that he would not be at risk as a result of his political activities.
82. Ms Young submits that in light of the finding made in the asylum part of his claim that he would not be at risk of harm on return the Article 15 (c) assessment must be in error.
83. However as relevant to those submissions both advocates have identified the issue of whether the FtTJ had in fact accepted or made a firm and primary finding as to whether his views were genuinely held or not. It is wholly unclear from the finding made at paragraph 49 where it was stated that he could delete his Facebook posts which appears to indicate that his political views were not

genuinely held that he could mitigate any risk by deleting posts which did not really believe.

84. Both advocates in their respective submissions have pointed to the inconsistent assessment of the evidence of risk on return. In my view the FtJ was required to make a primary finding as to whether his political beliefs or his activities were genuinely held before looking at the issue of whether the material could be deleted. The only purpose in deleting such material would be if the appellant did not hold genuine political views and therefore would not be at risk on return as he would not have any intention of expressing views which were not genuinely held.
85. As stated above both parties in essence agreed about this error and I do not consider that the genuineness or not of his views can be inferred from paragraph 60 as it is wholly inconsistent with the finding that he could delete his social media posts. As Ms Brakaj submitted if they were so genuinely held he would not be expected to delete the posts as found at paragraph 49.
86. The genuineness or not of his views were set out as an issue to be determined in the respondent's review and in this context expressly set out the reference made to the ability to delete social media posts.
87. The finding at paragraph 60 is also inconsistent with the general finding made at paragraph 47 that he did not provide sufficient online material consistent with the decision in XX (PJA) and that he could close the account neutralise the risk at paragraph 49. Paragraph 48 of the decision does not provide any assistance either. Whilst part of any risk assessment based on sur place activities will consider risk based on someone who commences activities and continues them in bad faith, the question of perception of risk still arises. However when looking at the assessment made of risk in this decision, the findings at paragraph 49 are inconsistent with the assessment made under paragraph 60.
88. As UTJ Bruce identified in granting permission, having a Facebook account is not a "human right" but it is still part of the overall assessment of risk and the primary finding as to whether those political activities are carried out genuinely has not been made or the findings that are made are inconsistent. Neither advocate referred me to paragraph 295 of SMO (1). At that paragraph the UT observed that the categories identified by the appellant are capable of engaging the Refugee Convention, mostly on the basis of actual or imputed political opinion or membership of the PSG. An individual who is to be considered under Article 15(C) would have been adjudged not to be deserving of protection under the Refugee Convention but that does not mean that the factors would necessarily cease to be of relevance when assessing eligibility for subsidiary protection. Therefore in a situation as this where it is considered that the appellant would not be at risk on return due to his political opinion, but would meet the eligibility for subsidiary protection, the need for clear reasoning is obvious.
89. In essence there needs to be a legally sound finding on this aspect of the decision before assessing the sliding scale approach under Article 15 (c). The inconsistency identified by both advocates in the findings is material to whether he held genuine views and also was relevant to what he would do on return to Iraq.

90. For those reasons I am satisfied that the FtTJ's decision on the protection part of his claim (the appellant's grounds) and the Article 15 (c) claim (the respondent's grounds) involve the making of an error on a point of law. I therefore set aside the decision of the FtTJ to dismiss the appeal on Refugee Convention grounds and on humanitarian protection grounds (Article 15 (c)).
91. Whilst the second part of the appellant's grounds relate to the assessment of contact with family, and in the light of the evidence of his partner's parents, it is not necessary to consider that further given my conclusion that the decision of the FtTJ involves the making of an error on a point of law. Issues of credibility should be considered holistically and in the circumstances I do not preserve any of the findings of fact given the inconsistency of the findings and the nature of them and that the general findings of credibility relating to the appellant are likely to be relevant to including the issue of documentation. I note that the assessment made by the FtTJ partially relied on the earlier findings made and also on evidence that she had heard, and that the assessment relied upon in part the appellant's general credibility. Part of that related to his change of evidence, as considered by the FtTJ, concerning his home area. Having considered the previous decision, the appellant had referred to having once lived in Raniya but had later moved to Mosul to join his father after the 1991 conflict (see paragraph 19). That does not appear to have factored into the assessment.
92. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal and have done so in light of the submissions of the parties. Ms Brakaj had submitted that of the errors were made substantially that the appeal should be remitted to the FtT. She submitted that the hearing was likely to be listed promptly and would be in the area close to the parties. I have considered the issues in the light of the practice statement recited and the recent decision of the Court of Appeal in AEB v SSHD[2022] EWCA Civ 1512 and the decision in Begum [2023] UKUT 46(IAC.) As to the remaking of the decision I am satisfied that in light of the error of law identified and the fact findings which will be necessary, the appeal falls within paragraphs 7.2 (a) and (b) of the practice statement. I therefore remit the appeal to the First-tier Tribunal for that hearing to take place. The FtT will be best placed to consider the issues arising. It will be for the First-tier tribunal to undertake a holistic assessment of risk and credibility in the light of the evidence as a whole, including the material relied upon by the appellant and the country materials and country guidance.
93. The decision made by the FtTJ to allow the appeal on Article 8 grounds shall stand for the reasons given.
94. The FtT shall therefore consider the Refugee Convention grounds, humanitarian protection and/or Article 3.

Notice of Decision:

95. The decision of the FtTJ dismissing the appeal on protection grounds and allowing the appeal on humanitarian protection grounds did involve the making of a material error of law and the decision of the FtT to dismiss the appeal on protection (asylum grounds) is set aside and the decision to allow the appeal on humanitarian protection grounds (Article 15 (c)) is also set aside. The appeal on those issues will be remitted to the FtT for a rehearing.

96. The decision to allow the appeal on Article 8 of the ECHR does not involve the making of a material error of law to set aside the decision and the decision to allow the appeal on Article 8 grounds shall stand.

Upper Tribunal Judge Reeds
Upper Tribunal Judge Reeds

11 September 2023