IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-001742
First-tier Tribunal No: PA/51188/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 29 February 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

HJM
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr McGarvey, Counsel
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 18 January 2024

DECISION AND REASONS

Order Regarding Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

Anonymity was granted by the First-tier Tribunal. I have not been asked to rescind that order. I have considered the principles of open justice. I am of the view that it is in the interests of justice that order continues. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent.

Introduction

1. The Appellant is a national of Iraq of Kurdish ethnicity. He claimed asylum in the UK on the grounds that he had a well-founded fear of persecution in on the basis of being a victim of a blood feud. His appeal

against the Respondent's decision dated 23 November 2021 refusing his protection claim was dismissed by First-tier Tribunal Judge Lester in a decision promulgated on 2 March 2022.

2. Permission to appeal was granted on all grounds by First-tier Tribunal Judge Oxlade on 11 April 2022.

3. The matter came before me to determine whether the First-tier Tribunal (FTT) had erred in law, and if so whether any such error was material such that the decision should be set aside.

Error of Law – Grounds of Appeal

4. The grounds assert that the FTT failed to adopt a holistic approach in making findings in respect of the ASHTI document in isolation to the rest of the evidence and failing to consider the reliability of the document with regard to the expert report of Sheri J. Laizer (Ground 1). It is further asserted that the Judge erred in the consideration of the expert's report in two ways: firstly, by making findings about the ASHTI document without regard to it and secondly, in finding that the expert report confirmed that incidents as described by the Appellant could and did take place, in finding that the expert's report had no bearing on the determination of the claim. It is submitted that it is significant that the Appellant's claim was considered to be externally consistent by the expert and the FTT therefore disregarded significant evidence (Ground 2). The Appellant also asserts that the FTT proceeded unfairly in applying the guidance in XX (PJAK) sur place activities, Facebook) (CG) [2022] UKUT 00023 to the Appellant's Facebook evidence when the decision was published between the date of the hearing and the date the FTT decision was promulgated without giving the Appellant an opportunity to comment. It is submitted that the FTT erroneously finds that because the ASHTI report was unreliable, the Facebook evidence is also unreliable (Ground 3). It is further argued that there is no clear finding on s 8 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and that there is ambiguity on how and to what extent this has been taken into account.

The Rule 24 Response

5. The Respondent submits that the findings in relation to the ASHTI documents were open to the FTT and that it was open to the FTT to place little weight on the expert report as this was based on the expert's acceptance that the documents related to the Appellant. The FTT accepted that incidents such as those stated by the Appellant took place but gave adequate reasons for rejecting the Appellant's claim that they happened to him. With regard to XX, the fact that the Appellant's representative was not given an opportunity to comment was not material given that the Facebook account was not in the Appellant's name and there was a limited number of posts. The FTT gave adequate

reasons for finding that the Appellant would not be at risk on account of any sur place/Facebook activity.

The hearing

6. Mr McGarvey accepted that Judge Oxlade in granting permission concluded that Ground 1 was not arguable and he submitted that his strongest point was that the FTT failed to give weight to the expert opinion. As the grant of permission was not limited, he maintained that the ASHTI documentation did pertain to the Appellant although it was not in his name. He was unable to say why the Appellant did not give evidence and explain why the document was not in his name. The expert had concluded that the ASHTI documentation was genuine. In relation to the Facebook material, the Judge did not make a decision in relation to the Appellant's sur place activities and there was no opportunity given to address the case law of XX.

7. Mr Howells accepted that there were flaws in the decision, most notably the repetition of paragraphs making the decision difficult to follow. There were also errors in relation to the findings about sufficiency of protection and internal relocation. However, a material error had not been established. It was open to the FTT to place little weight on the expert's report. The FTT found that blood feud incidents took place. It was unclear why the Appellant did not give evidence but it did not appear to have been on medical grounds. The Respondent had been unable to test his evidence in cross-examination and it would have been open to the Judge to draw an adverse inference from his failure to give evidence. The Appellant did not explain why the ASHTI documentation was not in his name and the grounds of appeal did not challenge that finding. The expert's report was properly considered at paragraph 39 of the decision and the FTT made adverse credibility findings that did not just rely on the ASHTI documentation not relating to the Appellant. Even if the Appellant was not allowed to comment on XX, the Facebook evidence was dealt with adequately for factual reasons and it was found that he would not be at real risk due to his activity. The general adverse findings were not solely based on section 8.

Conclusions – Error of Law

8. Although the grant of permission is not limited, Judge Oxlade concluded that Grounds 1 and 2 based on the ASHTI documents were not arguable errors of law because it was a logical starting point for the Judge to consider whether or not any weight could be given to them as the name on the documents differed from the Appellant's without an explanation given.

9. ASHTI is a Human Rights organization based in Kurdistan. The ASHTI documentation consisted of a recording of a complaint by "HJH", a final report which concludes that following an investigation of the case by a

committee the case was "valid and the statement of the client named above is true", and correspondence between the Appellant's solicitor and ASHTI by email confirming that HJH had approached the organisation, they had investigated it, and that his life would be at risk. Although the name of the complainant is similar to the Appellant's name and the details in the complaint mirror those provided to the Respondent by the Appellant, no explanation was provided by the Appellant for the fact that the documents were not in his name. The Respondent reviewed the letter from ASHTI and the expert report and raised the fact that the name on the ASHTI documents were different from the name provided to the Home Office. The Appellant was therefore on notice that this was a matter in issue. The Appellant did not address this in a subsequent statement and he elected not to give evidence. It appears from paragraph 20 of the FTT decision that no reasons were provided for the fact that he did not give evidence but that there was no difficulties affecting him that might have merited an adjournment application.

10. The Appellant's expert, Sheri Laizer, concluded that the findings that came back from the queries made with ASHTI by the Appellant's solicitor were authentic and the details matched her own recent communication with the organization including the names of the main officers of the project. She verified that the letter from ASHTI originated from the organization because it was identical to the genuine letter she received and came from the same email address in the same form. She concluded that the document was genuine. She did not however, consider the fact that the documentation was not in the same name as provided by the Appellant to the Respondent.

11. It is clear from paragraph 37 of the FTT's decision that the Appellant's counsel made submissions about the difference in the names. The FTT found that as there was no evidence to explain the difference, the Appellant had not demonstrated even to the lower standard that the documentation related to him.

12. It is unclear why the Appellant did not give evidence when credibility was in issue and when he attended the hearing. It cannot be said that he was unaware that the name on the documentation was in issue and required an explanation. I find that it was open to the FTT to conclude that the difference in the name on the documentation was relevant to the question of whether it pertained to the Appellant and the Appellant had failed to provide an explanation. I find that it was open to the Judge, in the absence of an explanation, to conclude that the Appellant had not demonstrated that the documentation related to him. I find that Ground 1 is not made out.

13. Ground 2 asserts that the Judge erred in his treatment of the expert report. The grounds assert that the Judge made his finding about the ASHTI document without regard to the expert report and further erred in finding that the expert's confirmation that incidents described by the

Appellant can and do take place had no bearing on the determination of his claim.

14. The FTT addresses the expert report at paragraph 39 of the decision. Under the heading "Blood feud" the Judge states:

> "39. I have seen the expert report of Sheri J. Laizer. The conclusions of the expert is that incidents such as that described by the Appellant can and do take place. However, the expert is significantly informed in their conclusions by the information from ASHTI. Without the ASHTI information I find that the expert would merely be able to conclude that incidents such as those stated by the Appellant can and do take place. However, such a conclusion would not assist the Tribunal in determining the claim of the Appellant. Accordingly, in the circumstances I can place only limited weight on the report from the expert.
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> 40. In view of my findings with regards to the ASHTI evidence and documentation plus the lack of oral evidence from the Appellant I find that the assertions made by the Appellant are not credible."

15. The FTT does not take issue with Ms Laizer's expertise although no findings are made in this regard. The Judge was correct to state that the expert was informed in her conclusions by the information from ASHTI. However, the report also provided independent evidence as to the plausibility of the Appellant's account when assessed against the background evidence referred to therein. The report was not based entirely on the ASHTI evidence but also on an examination of all the evidence provided by the Appellant including his interviews and witness statement. The report provided evidence as to the external consistency of the Appellant's account not only in relation to honour related cases and blood feuds generally but also in relation to the role of male cousins in reinforcing the patriarchal culture and the consequences of a PUK or KDP family member or official being involved in an 'honour' issue. In the circumstances I find that the FTT failed to give adequate reasons for the finding that little weight should be placed on the expert's report and failed to take account of material evidence with regard to the external consistency of the Appellant's account.

16. Ground 3 concerns the Facebook evidence. The Appellant's appeal was heard on 20 December 2021 and the decision was promulgated on 2 March 2022. XX (PJAK, sur place activities, Facebook) (CG) [2022] UKUT 00023 was published on 26 January 2022. The Appellant relied on Facebook evidence regarding his activities in the UK. The expert concluded that he would be very likely to face risks for his Facebook postings as the Kurdish security service monitor such events at home and abroad. The FTT found that the Facebook account did not include the surname of the Appellant and that "the number of postings on Facebook by the Appellant are of a level and quantity that they seem to be within the scenarios envisaged in the case of XX above". He concluded that the Appellant "was not credible on this topic" due to the number of postings and lack of surname.

17. I consider that it is clear from these findings that the FTT held against the Appellant that he had produced a small part of a Facebook account. He therefore found that the Appellant's evidence and consequently his credibility was adversely affected by the limited evidence produced. It is not in dispute that the Appellant was not provided an opportunity, post-hearing, to comment on XX. In the circumstances I conclude that the requirements of procedural fairness were not met as the FTT made adverse findings without giving the Appellant an opportunity to comment. The Respondent submits that this error was not material. I do not agree. The weight the Judge attached to the Facebook evidence was clearly influenced by the application of the guidance in XX. It cannot be concluded that the outcome would have been the same had the Appellant been given an opportunity to comment.

18. Ground 4 asserts that there is no clear finding on section 8. I find that it was open to the FTT to find that he did not believe the Appellant's explanation for failing to claim asylum in a safe third country. He took account of the explanation provided by the Appellant, rejected it and provided adequate reasons.

19. However, I find that the errors in relation to the expert evidence and the failure to give the Appellant an opportunity to comment on the guidance in XX before making an adverse finding are material. I conclude that the nature of the errors is such that the findings in relation to the credibility of the Appellant's account cannot stand.

20. I have considered whether to remit or retain the case within the Upper Tribunal with regard to the recent decisions of Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC) and AEB v Secretary of State for the Home Department [2022] EWCA Civ 1512. I have concluded in view of the extent of fact finding and due to procedural unfairness that the case should be remitted to the First-tier Tribunal for a de novo hearing with no findings of fact preserved.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard by any judge except Judge Lester.

L Murray

Deputy Upper Tribunal Judge
Immigration and Asylum Chamber

15 February 2024