



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005629

First-tier Tribunal Nos: PA/50969/2022
IA/03077/2022

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 17th April 2024**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

**SAA
(ANONYMITY ORDER MADE)**

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Alex Coyte, Senior Caseworker for Qualified Legal Solicitors
For the Respondent: Ms S Rushforth, Senior Presenting Officer

Heard at Cardiff Civil Justice Centre on 8 April 2024

Order Regarding Anonymity

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. 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 Lester dated 27 September 2022, who dismissed his appeal against a decision by the Secretary of State dated 30 November 2021 refusing his protection and human rights claim.

Background

2. The appellant is a citizen of Iraq. He is of Kurdish ethnicity and a Sunni Muslim. He comes from Makhmur in Ninewa Province, which is a “formerly contested area”. He entered the United Kingdom on 6 December 2016. His substantive asylum interview took place on 10 October 2018. His claim for asylum was refused and on 12 March 2019 an appeal against that refusal was dismissed by First-tier Tribunal Judge Davidge (“the first judge”). The appellant subsequently submitted a fresh claim, which resulted in the current decision under appeal.
3. The appellant’ original claim for asylum was that in during the period prior to 2014, he assisted the Kurdish Peshmerga by providing them with gas cannisters. He was threatened by Daesh as a result. He claims he received threatening letters and that his name was on a hit list. He and his family fled Makhmur after ISIS invaded their village in 2014. His family subsequently returned to Makhmur in the same year. However, the appellant remained in Erbil, living in a refugee camp as an internally displaced person until he left Iraq in 2016. He believed that it was too dangerous for him to return to Makhmur. More recently, he has participated in protests against the Kurdistan regional government and the Iraqi government in the United Kingdom. He has also posted material on Facebook critical of both governments. He claims to still be at risk from Daesh in his home area of Makhmur and at risk from Shia militias who control that area because of his individual profile as a Kurdish Sunni male. He claims to be at risk from the Iraqi and Kurdish authorities because of his political views, either actual or imputed. He also claims that it would be a breach of Article 3 ECHR to return him to Baghdad as he has no documentation and would not be able to travel safely to either his home area or elsewhere in Iraq.

The Decision of the Judge

4. The judge’s starting point was the decision of the first judge. In that decision, the appellant was found to be entirely lacking in credibility as a result of discrepancies in his account. When making negative credibility findings, the judge took into account a failure to mention that he was on a Daesh hitlist prior to the appeal hearing, discrepancies in his evidence relating to his journey out of Iraq and implausibilities in his account. The first judge found that the appellant had not established that he had received threatening letters from Daesh, nor had he been targeted, nor was he on a hitlist. He found that the appellant was not at risk in Makhmur from Shia militias. The first judge also did not accept that the appellant had lost his original documents, that he did not have any copies of his documents nor that he was unable to obtain identity documentation from Iraq.
5. These findings formed the starting point of the judge’s decision. Having set out at length the first judge’s decision and legal authorities in respect of the assessment of credibility as well as lengthy extracts from XX (PJAK – sur place activities – Facebook (Iran) CG [2022] UKUT 00023, the judge found that the appellant was not credible. The judge also found that the appellant was not credible in respect of SMO & KSP (Civil status documentation; article 15) Iraq CG [2022] UKUT 110 (IAC) and he could not depart from the findings of the first judge. He found that the appellant either still retained his documentation or was still in touch with his family who could assist him.

Grounds of Appeal

Ground 1 - Failure to give adequate reasons.

The judge failed to give reasons for his finding that “it is clear that the appellant’s “sur place” claim could not succeed” by reference to an Iranian country guidance case without making any reference to the background country information on Iraq. The judge failed to explain the reasoning which underpins his findings.

Ground 2 -The judge failed to assess the appellant’s claim by reference to the Elgafaji sliding scale as endorsed in SMO & KSP (Civil status documentation; article 15) Iraq CG [2022] UKUT 110 (IAC) in relation to the risk to him on return to Makhmur.

The judge failed to carry out a holistic assessment of the risk factors which included the appellant returning as a member of an ethnic and religious minority, which is neither in de facto nor de jure control of the formerly contested area of his proposed return.

Ground 3 - Failure to give adequate reasons.

The judge failed to adequately explain why he did not depart from the negative credibility findings made by the first judge and did not apply the current country guidance.

Rule 24 response.

6. The respondent provided a brief Rule 24 response defending the decision.

Permission to Appeal

7. Permission to appeal was granted by First-tier Tribunal Judge Thapar on 21 November 2022 in a very brief decision. In the body of the grant of permission it is stated that grounds 1 and 2 raise an arguable error of law but that there was no merit in the third ground raised within the application.
8. At the outset of the hearing, we had a brief discussion about the grounds of the appeal since no direction was given limiting the grounds of appeal in accordance with EH (PTA: limited grounds; Cart JR) Bangladesh [2021] UKUT 0117 (IAC). In these circumstances I indicated to the parties that I considered that all grounds were arguable.

Discussion and Analysis

9. My general observation is that the lengthy decision of the judge mainly consists of extracts from the previous decision and case law as well as standard paragraphs on legal principles. For instance, pages 7 to 13 set out the decision of the first judge and pages 15 to 19 quote extensively from XX. There is very little analysis of the appellant’s further evidence and the judge’s findings are extremely brief. Judges are being encouraged to avoid cutting and pasting at length and to focus on the real issues in the appeal – see for instance TC (PS compliance - “issues based” reasoning) Zimbabwe [2023] UKUT 164 (IAC).
10. It is trite that a decision can be lawful, notwithstanding that it is imperfectly expressed and that the judge does not need to set out all of the evidence or the

reasoning but it is also the position that the reasoning must be adequate for the party who loses the appeal to understand why their appeal has been dismissed and a judge must say enough to show that care has been taken and that the evidence as a whole has been properly considered (Simetra Global Assets Limited v Ikon Finance Ltd and Others [2019] EWCA Civ 1413). In this appeal, Ms Rushforth's primary position was that although the reasoning could have been fuller, it was adequate. I am in disagreement. I am satisfied that the reasoning was deficient. I take each ground in order.

Ground 1

11. Ms Rushforth's primary argument in respect of this ground is that the judge's finding that the appellant would not be at risk because of his "sur place" activities is adequate.
12. The judge makes his primary finding at [51] as follows:
 - "51. When this case law is applied as relevant to the appellant it is clear that his social media and sur place activities are not such as to amount to a successful appeal. Given the adverse credibility findings already made in respect of the appellant, when considering the evidence in the round I find that his credibility on sur place is not made out. When this is added to the level of actions by the appellant which are not significant then I find that sur place is not established."
13. At [49] the judge had set out the appellant's oral evidence and what the respondent put to him. At [51] the judge's findings are opaque and the reasoning is unclear. The appellant had provided a detailed statement and extensive evidence on his attendance at the demonstrations in the United Kingdom. His evidence was that the demonstrations were monitored by Iraqi authorities, there was a CCTV camera present at one demonstration and he also understood that an informant was taking pictures of the demonstrators. Although at [49] the evidence is set out the judge has failed to make proper findings. It is manifest from the background country guidance in respect of Iraq that those who oppose the government may well be at risk of persecution on account of their political opinions, whether genuinely held or imputed to them. There was no reference to the country guidance on Iraq and XX relates specifically to Iran. The appellant's appearance at the demonstrations was also loaded onto his Facebook pages, which were reproduced in the appellant's bundle in full. In accordance with XX the Facebook profile was "open" and reproduced in full and there were numerous posts critical of the Iraqi government. The judge does not deal with this. In this respect, I also note the recent authority of WAS (Pakistan) v SSHD [2023] EWCA Civ 894 endorsing the common-sense point of Sedly LJ in YB(Eritrea) v SSHD [2008] EWCA Civ 360 that an appellant cannot be expected to provide evidence that a repressive regime actively monitors protestors. The Iraqi government is such a regime. In his statement, the appellant gave detailed evidence in relation to why he held his specific political views and this was not assessed by the judge. It is impossible to understand from this brief paragraph what is not credible. Is the judge making a finding that the appellant has not carried out these activities? Is he making a finding that the appellant's political activities are not genuinely held or that his political activities have not come to the attention of the authorities? The findings are unclear, and it is not possible to understand, if this is what he meant to do, why the judge rejected the appellant's evidence that his political activities and posts would not place him at risk. I am satisfied that the judge's reasoning was inadequate, and that Ground 1 is made out.

Ground 2

14. I am also satisfied that ground 2 is made out. There is no holistic assessment by the judge in respect of the factors which might place the appellant at risk of indiscriminate violence in his own area pursuant to Article 15(c) because of his individual profile. Ms Rushforth did not attempt to persuade me that the judge had carried out such an assessment.
15. When the first judge heard the appeal, neither SMO1 nor SMO2 had been promulgated and so the previous judge did not address, in detail, any of the particular risk factors which might attach to this appellant. The previous judge at [41] referred to the lack of country evidence in this respect and found at [42] that the appellant had not demonstrate that as a Sunni Kurd he was at real risk of persecutory or ill treatment from a Shia militia controlling his home area. This was the situation in 2019.
16. SMO2 which was published on 22 April 2022 dealt further with this issue in the headnote which states:
- 3. The situation in the Formerly Contested Areas (the governorates of Anbar, Diyala, Kirkuk, Ninewah and Salah Al-Din) is complex, encompassing ethnic, political and humanitarian issues which differ by region. Whether the return of an individual to such an area would be contrary to Article 15(c) requires a fact-sensitive, "sliding scale" assessment to which the following matters are relevant.*
- 5. The impact of any of the personal characteristics listed immediately below must be carefully assessed against the situation in the area to which return is contemplated, with particular reference to the extent of ongoing ISIL activity and the behaviour of the security actors in control of that area. Within the framework of such an analysis, the other personal characteristics which are capable of being relevant, individually and cumulatively, to the sliding scale analysis required by Article 15(c) are as follows:*
- (i) Opposition to or criticism of the GOI, the KRG or local security actors;*
- (ii) Membership of a national, ethnic or religious group which is either in the minority in the area in question, or not in de facto control of that area;*
17. The skeleton argument in the appeal addressed the "sliding scale" assessment in detail from paragraphs 24 to 29. There was no acknowledgment by the judge that a careful holistic assessment needed to take place. Nor was there any attempt by the judge to evaluate those factors which are said to enhance the appellant's risk in his home area of Makhmur, which, regardless of his credibility in relation to his political opinion were his profile as a Sunni Kurd in an area over which Sunni Kurds no longer exert de facto or de jure control and where Shia militias operate and Daesh carries out attacks.
18. This error was further compounded by the failure of the judge to make any adequate findings on the appellant's political views and activities, which potentially is another risk factor when looking at his risk of being subjected to indiscriminate violence on the Elgafaji sliding scale.
19. Miss Rushforth's submission was that the failure of the judge to address Article 15(c) would not have made any difference to the outcome to the appeal because the appellant would not have been able to demonstrate that there was any risk to him in his home area. I am not in agreement that this is the case. The appellant's

individual profile required careful assessment in line with the background evidence from the date of the hearing. I am satisfied that the judge has completely failed to grapple with the appellant's submissions and evidence in respect of this and as such is vitiated by error. Ground 2 is also made out.

Ground 3

20. Ms Rushforth's submissions in respect of ground 3 are that the judge took the correct approach to the decision of the first judge, which was the starting point in this appeal. She submitted that the appellant's attempt to undermine the first judge's decision was inappropriate. That decision only should have been challenged at the time by drawing attention to errors of law or fact in an application for permission to appeal. The judge was correct to treat it as a starting point.
21. Although of course, it is trite that that the first judge's decision did form the starting point of this appeal, this was not determinative of the appellant's credibility. It was one factor to be taken into consideration in the round. There were lengthy submissions and evidence from the appellant before the judge in which it was demonstrated that the previous judge had made some errors of fact when assessing the appellant's credibility. In particular at paragraphs 30 to 31, the first judge found against the appellant that he had failed to mention that he was a Daesh hitlist before the hearing. This was a factual error, because the appellant manifestly mentioned this at the substantive interview. It was legitimate for the judge to consider errors of fact in the round with the new evidence.
22. Additionally, the appellant presented new evidence in this appeal, which was not before the first judge, including evidence from the Red Cross about his attempts to trace his family. The first judge also appears to have made an unsupported finding that the appellant's family is running the business when this has never been the appellant's evidence. The appellant had also submitted further evidence of his links to the Peshmerga, which was not before the previous judge. The judge has failed to consider whether this evidence could undermine the first judge's finding that the appellant did not have any connection with the Peshmerga. The judge does not explain why the further detailed evidence does not alter his view on the appellant's credibility, in particular with respect to his "sur place" activities. The appellant has given considerably more detail in his witness statement explaining some of the points which were held against him. Although a second judge should be cautious of further evidence which elaborates on an appellant's discredited account, the judge failed to acknowledge or to analysis this evidence. I am satisfied on this basis that the judge failed to give adequate reasons why he did not depart from any of the previous negative credibility findings.
23. This failure to deal with the credibility issue impacts both on the judge's assessment of whether the appellant would be returning with a political profile and also on the judge's finding at [52] "that the appellant either has the documentation or is in touch with his family who can assist him" because the first judge's findings in respect of documentation were made because it was not accepted that the appellant was credible. Ground 3 is made out.

24. Having found that all three grounds of appeal are made out, I therefore set aside the decision.
25. The issue of documentation is important. It appears to have been accepted by the first judge that the appellant was living separately from his family after Daesh took control of his home area in 2014 when the appellant travelled to Erbil. The appellant remained in Erbil until 2016, when he was able to obtain the necessary visas to fly on his passport to Turkey. On this basis, it seems to be tacitly accepted by the first judge that he would have had his documentation with him when he left Iraq. The background situation before the first judge was somewhat different, in that it would have been possible for the appellant to have arranged to obtain replacement documentation with the assistance his family. By the time of the second appeal, the situation in respect of documentation has changed with the implementation of the new INID system.
26. It will of course be a matter for the judge hearing the remitted appeal to decide whether it is possible to depart from the negative credibility findings made by the first judge and to give reasons for that decision. The judge will be tasked with making a finding on whether the appellant retains his documentation and is therefore able to travel safely within Iraq.

Disposal

27. Mr Coyte submitted that the appeal should be remitted to the First-tier Tribunal because of the extent of the factual findings to be made and Ms Rushforth was in agreement with that course of action. I have considered the guidance and case law and in this appeal I find that it is appropriate to remit the appeal to the First-tier Tribunal to be heard de novo because of the extensive findings which need to be made and because the decision of the First-tier Tribunal is so vitiated by error that the appellant should be entitled to have a second hearing of his appeal by the First-tier Tribunal.

Notice of Decision

28. The making of the decision of the First-tier Tribunal involved the making of an error of law.
29. The decision is set aside in its entirety.
30. The appeal is remitted to the First-tier Tribunal to be heard de novo by a judge other than First-tier Tribunal Judge Lester.

16 April 2024

Judge of the Upper Tribunal
Immigration and Asylum Chamber

R J Owens

