IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006663
First-tier Tribunal No: PA/55803/2021

THE IMMIGRATION ACTS

Decision Issued:

5th February 2024

Before

UPPER TRIBUNAL JUDGE SMITH

Between

A O A
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms L Brakaj, Counsel instructed by Iris Law Firm
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

Heard at Field House on Thursday 1 February 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

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge S Y Loke dated 18 August 2022 ("the Decision"), dismissing on protection and human rights grounds his appeal against the Respondent's decision dated 24 November 2021 refusing his protection and human rights claims (for a second time).

2. The Appellant is a national of Iraq of Kurdish ethnicity. It is common ground that he comes from Tuz Khurmatu, and it is also not disputed that Tuz Khurmatu is within the area of Iraq under the control of the Government of Iraq and not the Kurdish region of Iraq ("KRI" or "IKR").

3. The Appellant entered the UK clandestinely on 29 October 2018 and claimed asylum on the same day. His asylum claim was refused on 19 March 2019. His appeal against that refusal was dismissed by the Tribunal on 1 July 2019 ("the Previous Appeal Decision"). He made further submissions on 15 April 2021 which were refused by the decision under appeal.

4. The Appellant claims that his home village was attacked by Hasdht Al Shabi ("HS") in 2017. That was accepted in the Previous Appeal Decision. He claimed that as a result of the HS attack, he and his family fled Tuz Khurmatu and that he lost contact with his family thereafter. The loss of contact was not accepted in the Previous Appeal Decision. In the Previous Appeal Decision, the Judge found that the Appellant would have family support on return and noted that the Appellant remained in contact with a friend in Erbil. The Judge found that the Appellant would be able to get the information from his family necessary to obtain a new Civil Status Identity Document ("CSID") either from the Iraqi Embassy in the UK or in Baghdad on return. Those findings formed the starting point for the Judge on this occasion.

5. The Appellant relied in his further submissions on further evidence from the Red Cross in relation to the issue of contact with his family. He also claimed that he would be at risk on return as a result of his sur place activities. He relied in that regard on posts on his Facebook account and attendance at demonstrations in the UK.

6. The Respondent did not accept that the Facebook evidence or attendance would put the Appellant at risk on return. He did not accept that return to Iraq would breach the Appellant's rights under the Qualification Directive. He accepted that the Appellant would not be able to obtain a CSID prior to return or in Baghdad and accepted that it would be unlikely that the Appellant could return to the KRI without a valid CSID or INID (Iraqi National Identity Document). However, given the contact with his family which the previous Judge had found continued, the Appellant would be able to have his CSID sent to him or would be able to meet his family in Baghdad for them to pass that to

him for onward travel to his home area or the KRI. Alternatively, a replacement CSID could be obtained by proxy by a family member.

7. In relation to sur place activity, Judge Loke rejected the Appellant's claim ([15] to [23] of the Decision). She found that the Appellant's activities would not come to the attention of "the authorities" on return. She also found that the Appellant would not be at risk on the basis of political activity within the KRI. She also found that there was a lack of evidence of any political activity prior to the Appellant coming to the UK and no evidence that the Appellant would continue political activity "in Iraq". She concluded that whilst the Appellant "may hold a generally anti-government view", his activities were conducted "in order to bolster his asylum claim".

8. Turning to the issue of returnability, the Judge followed the latest country guidance – SMO & KSP (Civil Status documentation; Article 15) Iraq CG [2022] UKUT 00110 (IAC) ("SMO2"). She found that there was no general risk of indiscriminate violence giving rise to serious harm in Iraq so there would be no breach of Article 15(b) of the Qualification Directive ([25]). The Judge noted the Appellant's sur place activity but concluded that it was at too low a level to give risk to any enhanced risk ([26]). She took into account the Appellant's Kurdish ethnicity ([26]). Adopting the findings in the Previous Appeal Decision, she found that, based on continuing contact with his family, the Appellant could obtain his CSID whilst in the UK. Using that CSID, the Appellant would be able to travel to Baghdad and from there to the KRI ; alternatively, he could travel directly to the KRI by air ([33]).

9. Judge Loke therefore rejected the Appellant's case based on his further submissions, in essence relying on the findings in the Previous Appeal Decision, concluding that the further evidence was insufficient to displace the earlier findings and finding that the Appellant's sur place activities were insufficient to place him at any risk on return.

10. The Appellant appeals against the Decision on essentially three grounds as follows:

    Ground 1: The Judge has erred by assessing return on the basis that it will be to the KRI when Tuz Khurmatu is not within the KRI. It is said that this affects the entirety of the Decision ([2] of the grounds of appeal).
    Ground 2: The Judge has provided no reasons for the finding that the sur place activities were conducted only to bolster the Appellant's asylum claim and such is inconsistent with the Respondent's acceptance that the Appellant's activities were genuine and that the Judge accepted that he genuinely held "anti-government views". It is also said the Judge's findings are infected by the error made in the first ground.
    Ground 3: In relation to family contact, the Judge's findings in this regard are infected by her error as to the location of Tuz Khurmatu

which therefore fails to take into account that the Appellant's home area is under the new INID system. The Judge erred in finding that the Appellant could travel to KRI when he does not originate from that area.

11. Permission to appeal was granted by First-tier Tribunal Judge Barker on 28 September 2022 in the following terms so far as relevant:

> "..2. The grounds disclose an arguable error of law in the First-tier Tribunal Judge's decision.
>
> 3. It is arguable that the Judge erred in her assessment of where in Iraq the appellant came from. Whilst it is not specifically addressed, it is inferred throughout the decision that the appellant's home area was within the IKR, this is arguably incorrect.
>
> 4. It is arguable that the Judge's findings on risk on return and the issue of redocumentation are vitiated by such error.
>
> 5. Whilst the other grounds may have less merit, I do not limit the grant of permission. All grounds may be argued."

12. I received, on the day prior to the hearing before me, the Respondent's Rule 24 Reply. That was dated 13 October 2022 but for some reason had not reached the Tribunal previously. I intend no criticism of the Respondent in that regard. The Rule 24 Reply reads as follows so far as relevant:

> "..2. The respondent does not oppose the appellant's application for permission to appeal in line with the grant of permission. In addition, paragraphs 46 and 47 of the refusal letter argues that the appellant can return to his home area and the IKR and both issues need to be resolved. The Tribunal are invited to determine the appeal with a fresh oral hearing."

13. The matter comes before me to consider whether the Decision does contain errors of law and, in light of the Respondent's concession, the extent of those errors. Once it is concluded that the Decision does contain errors and the extent of those, I then have to consider whether to set the Decision aside in consequence (which includes consideration whether any findings ought to be preserved). If I set aside the Decision or parts of it, I then have to decide whether to re-make the decision or remit the appeal to the First-tier Tribunal to do so.

14. I had before me a bundle of documents lodged by the Appellant which included the Appellant's bundle before the First-tier Tribunal and the Respondent's bundle also before that Tribunal. Given the Respondent's concession and the nature of the submissions made to me, I do not need to refer to any documents apart from the Decision and grounds of appeal save as otherwise noted below.

15. Having heard submissions from Ms Brakaj and Ms Isherwood, I indicated that I would reserve my decision as to the extent of the setting aside of the Decision and whether the appeal should be

remitted or retained in this Tribunal for re-making and provide that in writing which I now turn to do.

DISCUSSION

16. The Respondent's concession disposes of the Appellant's first ground. It is accepted that the Judge could consider return to KRI but that had to be as an alternative to removal to the Appellant's home area which is not in KRI. As such, the error made as to the location of Tuz Khurmatu is not immaterial as removal to KRI would involve internal relocation. As it was put in the Rule 24 Reply, the Judge had to consider return both to the Appellant's home area and to the KRI (if the Appellant would be at risk in his home area) as an alternative for internal relocation.

17. The issue thereafter is whether the error made impacts on the other two grounds.

18. I can deal with the third ground shortly. I accept that the way the ground is pleaded means there is significant overlap with the first ground which is conceded. Moreover, whether the Appellant's home area is now under the INID system may have an impact on the documentation issue. That is not considered by the Judge as she has assumed that the availability of the Appellant's CSID would resolve this issue (as was found in the Previous Appeal Decision which however pre-dates SMO2). Paragraphs [29], [32] and [33] of the Decision are particularly problematic in that regard as they assume that the Appellant could obtain a CSID based on information received from his family ([29] and [32]). In relation to onward travel to KRI, there is no consideration whether the Appellant would be able to travel with whatever document he could secure if he were not from that area ([33]).

19. Ms Isherwood submitted that I should preserve the part of this section ([29] to [33]) which finds that the Appellant retains contact with his family. However, as Ms Brakaj pointed out, that is a finding which arises from the Previous Appeal Decision. Accordingly, on re-making, that finding would be the starting point for consideration of this issue in any event.

20. For those reasons, I find that the error in the first ground sufficiently impacts on the third ground and that the Judge's findings in relation to documentation cannot stand.

21. In relation to sur place activity, the main thrust of the Appellant's second ground is that it was not open to the Judge to find that the Appellant had engaged in activities in the UK only in order to bolster his asylum claim. Ms Brakaj relied in this regard on [16] of the Decision where the Judge noted that the Respondent had not disputed the activities and raised only the issue whether the activities would come to the attention of the authorities based on the Appellant's profile. She

also pointed out that the Judge had accepted at [23] of the Decision that the Appellant "may hold a generally anti-government view".

22. I would not on that basis have found an error. The Respondent may well have accepted that the Appellant had involved himself in activities in the UK but did not concede the genuineness of the Appellant's motivation (see in particular [19] of the decision letter). The fact that the Appellant "may hold" a particular viewpoint (which is only a finding of a possibility in any event) does not mean that his motivation in expressing those views by posts and demonstrations has to be accepted as genuine. There is no inconsistency in the Judge's findings.

23. However, the issue is not whether the Appellant's motivation in engaging in those activities is genuine but whether he would be at risk on that account. It is here that there is an overlap with the first ground. The Judge deals with opposition to the KRI government at [21] of the Decision finding that opposition to the authorities there would not give rise to a real risk of serious harm or persecution even if those activities are conducted in the KRI (by reference to the background evidence).

24. However, that issue only becomes relevant if the Appellant is found to be at risk in his home area and internal relocation has to be considered. When considering the risk that the Appellant would come to the attention of the authorities on return based on sur place activities, the Judge refers only to "the authorities" and it is not clear whether she is there speaking of the authorities of the KRI or Iraq. Given that this immediately precedes the paragraph dealing with risk based on opposition within KRI, it is quite likely that it is the former. As above, that would only be relevant if internal relocation becomes an issue.

25. Although what is said at [22] may be intended to differentiate between the KRI and Iraq, when one looks at the Decision as a whole, it is difficult to read it in that way.

26. Accordingly, I cannot be satisfied that the Judge has properly considered the risk on return to either Tuz Khurmatu or, if it becomes relevant, KRI based on the Appellant's sur place activities.

27. I am therefore satisfied that [4] and [5] of the grounds of appeal (under the second ground) are made out.

28. In consequence of the errors which I have accepted, I am satisfied that it is appropriate to set aside the Decision in its entirety without preserving any findings, as Ms Brakaj asked me to do.

29. As Ms Brakaj pointed out, such findings as were made in the Previous Appeal Decision will remain the starting point on re-making. I also accept her point that it is artificial and probably also "messy" to preserve findings in relation to parts of a protection claim when a Judge has to reconsider the overall risk on return in a re-making.

30. Both parties agreed that if I were to set aside the Decision in its entirety, I should remit the appeal to the First-tier Tribunal for re-making. That is particularly so given the passage of time since the hearing before Judge Loke (about eighteen months ago) and the likelihood of the need to take further evidence and re-make all findings of fact. I agree that remittal is the appropriate course.

31. I also record that Ms Brakaj mentioned that the Appellant is now in a relationship with a British citizen and would wish to raise this as a further reason why he cannot be returned. This would of course be a new matter which would require the consent of the Respondent. As Ms Isherwood noted, the Respondent's position in this situation would generally be that the Appellant ought to make a paid application for leave to remain. The First-tier Tribunal may however wish to note this development as, whether the issue can be raised in this appeal is something which may require consideration at a CMR prior to re-hearing.

CONCLUSION

32. The Appellant's grounds of appeal disclose errors of law in the Decision. For the reasons given, I set aside the Decision in its entirety in consequence of the errors. For the reasons given, I consider it appropriate to remit the appeal to the First-tier Tribunal for re-determination. The appeal needs to be reconsidered entirely afresh.

NOTICE OF DECISION

The decision of Judge Loke dated 18 August 2022 contains errors of law which are material. I set that decision aside in its entirety and remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than First-tier Tribunal Judge Loke or First-tier Tribunal Judge J Robertson (who determined the previous appeal brought by the same Appellant).

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 February 2024