



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2024-000761

First-tier Tribunal No:
PA/50076/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 7th of June 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

BDMK

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Aslam, Counsel; instructed via Direct Access

For the Respondent: Mr E Banham, Senior Home Office Presenting Officer

Heard at Field House on 8 May 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

Introduction

1. The Appellant appeals with permission against the decision of First-tier Tribunal Judge Webb, who by a decision promulgated on 5 February 2024, dismissed the Appellant's appeal against the Respondent's refusal of his protection and human rights claims.
2. The Appellant is an Iraqi citizen of Kurdish ethnicity. The facts of his appeal may be summarised as follows. The Appellant fled Iraq due to his fear of serious harm from an organisation associated with the PUK. He was previously hired by the organisation as IT/technical support. He was asked to set up a programme spying on civilians around the end of 2020. He refused, and was then threatened by the organisation. He first resisted their request by delaying, but soon realised their threats were serious. He then fled Iraq in January 2021 with assistance from an agent. He was held by people he travelled with during his journey. He was told he would only be safe when he arrives in the UK. He arrived in the UK in March 2021 and claimed asylum. He also learned that his family has been harassed and threatened by the organisation. In the UK, the Appellant has been participating in political activities against the PUK and KDP parties of Kurdistan. The Appellant claims he would be at real risk on return to Iraq as a genuine political activist from the Counter-Terrorism Group ('CTG'), which is part of the PUK faction of the Kurdistan Regional Government.

3. At §§29-39 the judge found the Appellant's claim did not meet the required threshold because (i) in his Screening Interview the Appellant did not mention any person or organisation that he feared in Iraq despite having the opportunity do so; (ii) when completing his initial contact and Home Office Questionnaire, the Appellant did not equivocally indicate he had previously worked for the CTG but was only approached by them, which was corroborated by his previous occupation being stated as "IT Programmer, Mobile and Electronics Shop, work as self-employed"; (iii) at the outset of his asylum interview he said he worked in Iraq doing a IT job, repairing mobile phones and it was not until he was directly asked why the anti-terrorist group approached him and when that he provided his answer that he had worked for them in 2017 and many times after doing IT jobs for them; (iv) "by the date of the appeal hearing" (i.e. in the Appellant's witness statement), the Appellant claimed he had worked with Kurdish fighters from 2014-2017 and worked for the CTG from 2017-2020 simultaneous to part-time study. This led to the judge's conclusion at §34 that the Appellant's account had "greatly changed over time". The judge in summary took issue with this "significant inconsistency" he had identified, in that the Appellant's account had changed from not working for public administration to working for the CTG for three years, which he describes as "obvious on its face" but which was not addressed by the Appellant and impacted upon his credibility. The judge went on to find at §35 as follows:

"It is well known that powerful surveillance technology has existed for a number of years. Indeed, sophisticated software programs are commercially available and are regularly sold to 'vetted' Governments and Law Enforcement Agencies to prevent terrorism and serious crime. (Regrettably, it appears that versions of such software can also be unlawfully accessed and purchased from the dark web.) Specialist high-tech firms specifically design and market their software for the surveillance of people by viewing/hearing someone else's messages and conversations on their phones and by accessing their social media and internet connections.

Frankly, I would be most surprised if an organisation such as the CTG have not been using such software for many years, particularly in light of its previous and possibly continuing connections with the United States of America”.

4. This finding was followed by a further contingent finding that it was unlikely that a counter terrorism unit would not already have the “spy software” for monitoring people using “PC’s, laptops and certain Android mobile phones” that the Appellant was going to develop for them, and that the head of IT would not appoint the Appellant to develop this software as he had only just received his Diploma in Computer Programming.
5. The Appellant appealed on several grounds, arguing chiefly that the judge had erred in relying on inconsistencies in the appellant's evidence which had not been raised by the Respondent or put to the appellant at the hearing (referring to §§30-34) and that the judge erred in relying on assertions about the use of surveillance technology in Iraq at §35 without citing the source of his information. The grounds also complained that the judge’s findings at §37, that the appellant has not provided any explanation as to how and when he came to have concerns that the CTG wanted to use spy software to monitor the ordinary public, nor why he believed senior members of the CTG were setting up the program for self-gain, were not put to the Appellant to provide an explanation either.
6. Permission was granted on all grounds by First-tier Tribunal Judge Grimes.
7. In relation to the grounds complaining that various matters had not been put to the Appellant, we brought to the parties’ attention the judgments in Abdi & Ors v. Entry Clearance Officer [2023] EWCA Civ 1455 and TUI UK Ltd v. Griffiths [2023] UKSC 48.
8. For the Appellant, Mr Aslam argued that the Appellant had not been provided with a fair opportunity to answer the judge’s concerns, pointing out that the “significant inconsistency” went to the core of the Appellant’s appeal and that the inconsistency the judge had identified was not so obvious that the Respondent had raised and relied upon it in

his Refusal Letter. Given that it had all been raised before the hearing, it was also not raised by the Respondent in his Review, nor was it put to the Appellant by the Respondent in cross-examination nor relied upon in closing submissions. It was also highlighted that the judge had not sought to raise the discrepancy either in clarification.

9. For the Respondent, Mr Banham sought to rely upon HA v. Secretary of State for the Home Department (No 2) [2010] SC 457, Secretary of State for the Home Department v. Maheshwaran [2002] EWCA Civ 173 and WN v. Secretary of State for the Home Department [2004] UKIAT 00213 (all referred to at [29]-[32] of Abdi) and argued that (a) in respect of HA, there is “no general obligation” on the tribunal to give notice to the parties during the hearing of all the matters on which it may rely in reaching its decision and there will generally be no unfairness in a tribunal proceeding without drawing attention to a point which the Appellant could reasonably expect to be plainly relevant to that assessment or clarification.
10. We reject Mr Banham’s submission as it overlooks that the remarks in HA are preceded by the guidance that the tribunal may identify an issue which has not been raised by the parties to the proceedings, but it will be unfair, ordinarily at least, for it to base its decision upon its view of the issue without giving the parties an opportunity to address it upon the matter. Fairness may, depending on the facts, require a judge to disclose its concerns about the evidence so as to afford the parties an opportunity to address them.
11. We are mindful that fairness requires an intuitive judgment in the context of the decision, and in our view HA in fact persuades us that it was, in the particular circumstances of this case, unfair for the judge to have not given the Appellant the opportunity to address the issue in question, given that it formed what was in the judge’s view a “significant inconsistency” and taking into account that it had not been raised by the Respondent at all.
12. We also reject Mr Banham’s reliance upon Maheswaran in pointing to the guidance that where a party has “made several inconsistent

statements, that party has a forensic problem as to whether to confront them or focus attention elsewhere”. That is not the scenario with which we are concerned: we are not examining the Respondent’s decision-making stage, but rather an appeal where the judge is an independent arbiter charged with resolving the issues raised by the parties. Given that neither party raised this issue, and given that Maheswaran also confirms that “a failure to put to a party a point which is decided against him can be grossly unfair and lead to injustice because he must have a proper opportunity to deal with the point”, we are not dissuaded from our above view.

13. Mr Banham’s relied upon WN, and Mr Justice Ouseley’s judgment that paragraph 5 of the Surendran Guidelines should be expanded to cover scenarios where no issue of credibility has been raised in the Refusal Letter and where it may be obvious that further material provided to the adjudicator raises issues of credibility. Credibility issues should be put to the Appellant, but it is not necessarily unfair if they are not, particularly if the parties are represented. Whether there is unfairness in such a scenario may depend on whether the issues are “obvious” and go to the individual’s credibility which he could be expected to have addressed himself. In our judgment, this aspect of Mr Banham’s submissions misses the point that a judge may take into account inconsistencies found in “further” material provided to the judge in the absence of another party and where the judge is charged under the Surendran Guidelines with ensuring that all points that may be taken by an absent party are examined in order to ensure a fair hearing in that party’s absence.

14. We remind ourselves of the Surendran Guidelines which confirm *inter alia* at paragraph 6 that, where the Respondent is not represented at a hearing:

“... It is not the function of the (tribunal judge) to expand upon (the refusal letter), nor is it his function to raise matters which are not raised in it, unless these are matters which are apparent to him from a reading of the papers, in which case these matters should be drawn to the attention of the

appellant's representative who should then be invited to make submissions or call evidence in relation thereto”.

15. Although this guidance applies to scenarios where the Respondent is unrepresented at a hearing, we do not see that it loses all application where the Respondent is represented at a hearing, particularly as the Surendran Guidelines at paragraph 6 also confirm that:

“... it is not the function of a (tribunal judge) to adopt an inquisitorial role in cases of this nature. The system pertaining at present is essentially an adversial (sic) system and the (tribunal judge) is an impartial judge and assessor of the evidence before him”.

16. On a fact-sensitive assessment, we find that the inconsistencies raised at §§30-34 of the decision should have been raised by the judge and put to the Appellant for explanation, if he was so able to give one. The failure to do so resulted in unfairness which in turn constitutes a material error of law.

17. For the sake of completeness, although not strictly necessary for the purposes of our error of law conclusions overall, for the same reasons previously set out, we also find that the concerns raised at §37 should also have been put to the Appellant and the failure to have done so is a further material error of law.

18. In respect of the final aspect of the Appellant’s challenge, namely that the judge erred in relying on assertions about the use of surveillance technology in Iraq at §35 without citing the source of his information, we were informed by Mr Aslam that he was unable to find any objective materials which made reference to the specialised subjective knowledge that the judge appeared to possess at §35 of the decision. Mr Banham did not seek to disagree and did not seek to otherwise contradict this ground, nor could he point us to where the judge had found this information.

19. Having perused the evidence in the bundles before the First-tier Tribunal, we are unable to find the source of this information and we therefore conclude that the judge erred in making assertions about the use of surveillance technology in Iraq without citing the source of

evidence upon which they were based. If the judge was aware of any relevant evidence in respect of what was a controversial issue, this should have been referred to in terms in the decision. Further, as a matter of fairness we conclude that if the judge was aware of relevant evidence, he should also have alerted the Appellant to this so that there was an opportunity to respond to it. We are therefore satisfied that the judge has impermissibly speculated as to the technological state of affairs within the CTG and PUK, and/or acted unfairly by failing to raise a point which was not raised in the refusal letter, nor relied upon by the Respondent in any event. This was material to the judge's credibility assessment and was one of the key reasons why the judge disbelieved the Appellant's claim.

20. In light of the above, the judge's decision must be set aside.

Disposal

21. Given the unfairness identified above, and as indicated by the parties' wishes should the decision be set aside for material error, the appeal is remitted to be heard de novo before the First-tier Tribunal at IAC Taylor House by any judge other than First-tier Tribunal Judge D. Webb.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

The appeal is remitted to be heard de novo by any judge of the First-tier Tribunal other than Judge D. Webb.

P. Saini

**Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber**

Dated: 29 May 2024