



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002600

First-tier Tribunal No: PA/54326/2023

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 18 November 2024**

Before

UPPER TRIBUNAL JUDGE PINDER

Between

**R R M
(ANONYMITY ORDER MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Hingora, Counsel instructed by Freedom Solicitors.

For the Respondent: Ms K Simbi, Senior Presenting Officer.

Heard at Field House on 2 October 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant is further 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 the permission of First-tier Tribunal Judge Dainty against the decision of First-tier Tribunal Judge Thapar. By her decision of 7th May 2024, Judge Thapar ('the Judge') dismissed the Appellant's appeal against the Respondent's decision to refuse his protection and human rights claims.

Background

2. The Appellant is an Iraqi national of Kurdish ethnicity, from Kirkuk – a formerly contested area. The Appellant’s first protection claim was refused and dismissed on appeal in 2021. Following the lodging of further submissions in January 2023, the Appellant’s fresh claim was considered by the Respondent and refused on 29th June 2023. It was not disputed that the Appellant has been politically active in the UK against the Kurdish Regional Government (the ‘KRG’) and the Iraqi authorities and that he would continue to be politically active on any return to Iraq. The Respondent took issue with the Appellant not having demonstrated that his political involvement would place him at risk since he did not hold a significant role or a political profile that would bring him to the attention of the relevant authorities.
3. The Appellant appealed against that decision. The Appellant’s claim and appeal fell to be considered under the relevant provisions of the Nationality and Borders Act 2022 since his fresh claim was submitted in January 2023. Before the Judge, the Appellant was represented by Ms Bachu of Counsel. The Respondent was represented by a Presenting Officer. The Judge heard oral evidence from the Appellant and submissions from the advocates before reserving her decision.

The Decision of the First-tier Tribunal Judge

4. In her reserved decision at [14]-[16], the Judge considered the parties’ competing background evidence, which included the CPIN on *‘Iraq: Opposition to the government in the Kurdish Region of Iraq’* of July 2023. She found that the country materials suggest that prominent politically active individuals may be at risk of persecution in Iraq. Applying this to the Appellant, the Judge then found that the Appellant had established on the balance of probabilities that he does fear persecution in Iraq as a result his political opinion – the Judge answering here the second question that needs to be considered pursuant to the structured approach set out in *JCK (s.32 NABA 2022) (Botswana)* [2024] UKUT 00100 (IAC).
5. At [20]-[21], the Judge engaged with the Appellant’s evidence of having received threats on his Facebook account from persons claimed to be associated with the Kurdish Democratic Party (‘KDP’). The Judge found with reasons that she could only attach limited weight to that evidence. The Judge continued her analysis of the Appellant’s Facebook evidence at [21]-[24], applying the guidance contained in *XX (PJAK - sur place activities - Facebook) Iran CG* [2022] UKUT 00023 (IAC). The Judge concluded at [24] that the Appellant’s Facebook posts suggested that the Appellant did not hold a prominent political profile and that his online activities were limited to Facebook, also suggesting a low level of involvement. At [25], the Judge considered that the Appellant had failed to establish that he received threats from individuals associated with the authorities or that his limited political activities have come to the adverse attention of the authorities.
6. The Judge’s findings that the Appellant had not held any form of prominent political role in the UK were supplemented by further findings at [26]-[31]. At [30], the Judge found that there would be no reason for the authorities to have placed the Appellant’s Facebook account under surveillance. The Judge then drew her findings together and concluded at [31] that overall the objective material did not support the assertion that low level political activists were systematically persecuted and that the Appellant had failed to establish that

continuation of his low level political activity in Iraq would place him at risk of persecution.

7. At [32]-[35], the Judge considered the issues and evidence relating to the Appellant's re-documentation to enable his return to Iraq. Critically, she found that whilst the Appellant had provided documents to show that he had registered his details with the British Red Cross and that he maintained having no contact with his family, the Red Cross documentation did not indicate what information had been provided by the Appellant regarding his family. The Judge returned to the earlier determination of the Appellant's first asylum claim where adverse findings were reached concerning the credibility of the Appellant's account of not having contact with his family. The Judge ultimately concluded at [33] that the Appellant had not provided further information or evidence sufficient to justify a departure from those earlier findings.
8. Applying *SMO and KSP (Civil status documentation, article 15) (CG)* [2022] UKUT 00110, the Judge considered at [34] that the Appellant's fear of ISIS on return was not made out and at [35], the Judge acknowledged that the Appellant was from Kirkuk. She continued to consider that his low level political activity had not come to the adverse attention of the authorities, that the Appellant did not have a prominent political profile, was not a journalist or prominent human rights defender and if returned, his political activism would remain at a low level. In addition, the Appellant would be returning to his family, the Appellant was otherwise in good health and there was nothing before the Judge to suggest that the Appellant displayed any other characteristics which would place him at an enhanced risk on return.

The Appeal to the Upper Tribunal

9. Permission was granted on all grounds by First-tier Tribunal Judge Dainty. The Appellant pursued three grounds, which can be summarised as follows:
 - (i) The Judge was said to have made an error in considering the CPIN focusing on the IKR rather than background materials on Kirkuk, the Appellant's home area. It was said that objective material in the bundles as to monitoring activities outside Iraq had not been considered. It was further said that the hypothetical assessment of risk to higher profile individuals (at [15]) was inappropriate since the Judge should have focused on risk to the Appellant and the distinction between high and low level activists was artificial/inappropriate.
 - (ii) It was an error not to assess the Appellant, since he originated from Kirkuk, under the sliding scale as provided for in *SMO*.
 - (iii) The Judge has misunderstood the Red Cross tracing evidence.
10. Judge Dainty considered that Ground 1 was arguable: the Judge's approach to the assessment of objective risk was arguably infected by the error in referring to objective country evidence relating to the IKR rather than Kirkuk. With regards to Ground 2, Judge Dainty observed that arguably having dismissed the asylum claim and because the representatives had put humanitarian protection in issue, the Judge erred in failing to carry out a sliding scale assessment as provided by *SMO*. Lastly, on Ground 3, there had arguably been a misunderstanding of the Red Cross document and this had arguably affected the credibility assessment *vis a vis* contacting family for the purposes of obtaining any ID documentation they may hold for the Appellant.

11. There was no response to the grounds of appeal under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Submissions

12. For the Appellant, Mr Hingora addressed the first ground pursued by the Appellant submitting that the Judge had essentially assessed the Appellant's claim against the incorrect factual background, focusing on the IKR CPIN and taking a broad-brush approach thereafter as opposed to focusing on the particular area of Kirkuk. He argued that on this basis alone, the Judge had made a material error of law sufficient to require the setting aside of the Judge's decision. Mr Hingora submitted that the Judge's conclusion at [31] was so wedded to the Judge's findings on the background materials concerning the IKR that it cannot be said that the same appeal outcome would have been reached had the correct background evidence, specific to the Appellant's home area, been considered. I was also taken to parts of the background evidence that the Appellant had relied upon before the Judge addressing the risks faced by political activities in Kirkuk and Iraq more widely, as opposed to the IKR, which it was submitted the Judge had not engaged with.
13. For Ground 2, Mr Hingora focused on the guidance contained in *SMO* for the required sliding scale assessment that should be carried out for those due to be returned to Kirkuk. Whilst very fairly acknowledging that the Judge had clearly been aware that the Appellant was from Kirkuk, Mr Hingora submitted that the lack of such an assessment was a material error of law, sufficient again to justify setting aside her decision.
14. Concerning the re-documentation issue pursued in Ground 3, Mr Hingora argued that new evidence had been submitted in the form of the Red Cross letter and she had not approached this correctly.
15. Ms Simbi opposed the appeal and in reply, submitted that the Judge had not erred since the country guidance contained in *SMO* made clear that claims under Article 15(c) of the Qualification Directive concerning indiscriminate violence in Kirkuk could no longer succeed. She submitted that the articles that were relied upon by the Appellant pre-dated *SMO*, as well as the Respondent's CPIN. She also submitted that there had not been any particular emphasis by the Appellant, that he was at an enhanced risk because of a return to Kirkuk. Ms Simbi further argued that the Judge had not erred since it was the Respondent's case that the Appellant could relocate to the IKR, following a return to Baghdad. Thus the CPIN addressing the IKR was clearly relevant to that assessment of internal relocation. She also emphasised that there had been no evidence before the Judge that the Appellant was at a heightened risk particularly in Kirkuk.
16. With regards to the sliding scale assessment and the Appellant's submissions under Ground 2, Ms Simbi maintained the position that the Judge had effectively considered all of the relevant factors at [35], ultimately finding that the Appellant does not fall into the relevant risk categories and/or would not be placed at a heightened risk. Ms Simbi acknowledged that the terms 'sliding scale' were not used by the Judge but that was not material or even required, since the Judge had effectively carried out the necessary and relevant assessment.

17. Lastly, on the issue of documentation, Ms Simbi argued that the Judge had directed herself correctly as to the starting point within the earlier determination of Judge Barker and that the Judge had taken that forward when assessing the new evidence in the form of the Red Cross letter. She submitted that the Red Cross evidence was self-serving and the Judge's conclusion that the Appellant had not provided sufficient evidence to justify a departure from those earlier findings was a conclusion that was fully open to the Judge. Ms Simbi emphasised that the Judge had formulated a detailed and well-reasoned decision, setting out all of the relevant factors and considering the credibility of the Appellant's account. Ms Simbi invited me to uphold the Judge's decision and to dismiss the Appellant's appeal.
18. In reply, Mr Hingora submitted that the Judge had been correct to adopt Judge Barker's findings as her starting point but she had then taken those as her end point as well. Mr Hingora argued that the Judge had misunderstood the evidence of the Red Cross, failing to consider the Red Cross' prominence as an organisation and its specialism in attempting to trace persons and family members. Considering that this issue went to the heart of the Appellant's case on documentation, it was incumbent of the Judge to consider this more carefully. With regards to the background evidence and the case pursued before the Judge by the Appellant, Mr Hingora drew my attention to paragraphs 25-28 of the appeal skeleton argument, which specifically addressed the risks in Kirkuk claimed by the Appellant. Mr Hingora did not accept that the shortcomings in the Judge's decision pursued by the Appellant were immaterial to the outcome of the appeal. Mr Hingora invited me to allow the Appellant's appeal, to set aside the Judge's decision and to remit the appeal for re-making in the FtT.
19. I reserved my decision at the conclusion of the submissions.

Analysis and Conclusions

20. Whilst it is plain from the entirety of the decision that the Judge had considered the matters addressed therein very carefully, I cannot be satisfied from the Judge's findings at [13]-[16] that the Judge approached the Appellant's appeal with his home area of Kirkuk at the forefront of her mind. Ms Simbi is correct to note that part of the Respondent's case was that the Appellant could internally relocate to the IKR. Thus, an assessment of risk on internal relocation was necessary but it is trite to note that in the first instance, the assessment of risk fell to be considered against the conditions in Kirkuk.
21. At [14], the Judge specifically considered the information contained in the Respondent's CPIN 'Opposition to the government in Kurdistan Region of Iraq', namely that persons will not be at risk of serious harm of persecution on the basis of political activity *within the IKR*, distinguishing those individuals with prominent human rights defender profiles and journalists, whom the Judge said may be at an enhanced risk of persecution in the IKR and then in Iraq - [14]-[15]. The difficulty is that nowhere in her decision does the Judge consider how the materials relating to political activities in the IKR relate to an assessment of risk for the Appellant in Kirkuk.
22. The Judge returned to her findings on the objective materials at [31] and I accept Mr Hingora's submission that her conclusion there is wedded with her findings at [14]-[16]. At [31], the Judge stated:

The objective material does not support the assertion that low level political activists are systematically persecuted. I bring forward my findings above and conclude the Appellant has failed to establish that continuation of his low level political activity in Iraq would place him at risk of persecution.

23. I am satisfied therefore that the conclusion reached at [31] by the Judge is entangled with the Judge's consideration of the background material concerning low level political involvement in the IKR only. An assessment of risk for a return to Kirkuk entails a more nuanced assessment - this is pursuant to the guidance contained in *SMO*, extracted immediately below and relevant to the Appellant's second ground of appeal, which I turn to now.

24. Similarly, whilst the Judge had noted at [35] that the Appellant was from Kirkuk and continued to consider a number of factors listed therein, I am persuaded that the Judge did not carry out a fact-sensitive, "sliding scale" assessment pursuant to the guidance contained in *SMO* at [144], sub-paragraphs 3-6:

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.

4. Those with an actual or perceived association with ISIL are likely to be at enhanced risk throughout Iraq. In those areas in which ISIL retains an active presence, those who have a current personal association with local or national government or the security apparatus are likely to be at enhanced risk.

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;
- (iii) LGBTI individuals, those not conforming to Islamic mores and wealthy or Westernised individuals;
- (iv) Humanitarian or medical staff and those associated with Western organisations or security forces;
- (v) Women and children without genuine family support; and
- (vi) Individuals with disabilities.

6. The living conditions in Iraq as a whole, including the Formerly Contested Areas, are unlikely to give rise to a breach of Article 3 ECHR or (therefore) to

necessitate subsidiary protection under Article 15(b) QD. Where it is asserted that return to a particular part of Iraq would give rise to such a breach, however, it is to be recalled that the minimum level of severity required is relative, according to the personal circumstances of the individual concerned. Any such circumstances require individualised assessment in the context of the conditions of the area in question.

25. The factors considered by the Judge at [35] included the following:
- (i) The Appellant was from Kirkuk;
 - (ii) He had been involved in low level political activity in the UK, which had not come to the adverse attention of the authorities;
 - (iii) If returned, his political activism would remain at a low level;
 - (iv) It had not been established that low level political activists were systematically persecuted;
 - (v) The Appellant would be returning to Iraq where he has family members;
 - (vi) The Appellant is of good health;
 - (vii) There was nothing before the Judge to suggest that he displayed any other characteristics which would place him at an enhanced risk on return;
 - (viii) The Appellant spoke the language, could be re-documented and could seek the support of his family;
 - (ix) His return from the UK would dispel any suspicion that he had previously been involved with ISIS.
26. I am satisfied that had the Judge been considering the case of an appellant who was due to be returned to a different area than Kirkuk, or than any of the other formerly contested areas listed at sub-paragraph 3 of [144] in *SMO*, the assessment at [35] would have been more than sufficient and adequate. However, the Judge in my judgment has clearly limited her consideration of the Appellant's political activism to being low-level in nature when there is no such qualification in *SMO* of the personal characteristic relating to the opposition to or criticism of the GOI, the KRG or local security actors. Neither has the Judge considered whether the Appellant has opposed and/or criticised the local security actors, when this is expressly referred to in the Appellant's appeal skeleton argument before her at paragraph 28 of that document.
27. Similarly, the Judge did not list at [35] the Appellant holding other relevant personal characteristics: being from a minority ethnic and/or religious group and/or not in de facto control, which would apply to him as a Sunni Kurd in Kirkuk. This was also expressly addressed by the Appellant in his statement at paragraphs 17-19 of that document.
28. For the reasons above, I reject Ms Simbi's submission that the absence of any reference to a 'sliding scale' assessment is a matter of form and that the assessment undertaken by the Judge at [35] demonstrates that she has applied the required guidance.
29. In the circumstances, the Judge's errors in her approach to the background evidence on political activism and the Appellant's return to Kirkuk, together with her failure to conduct a full fact-sensitive 'sliding scale' analysis required and the taking into account of other personal characteristics of this Appellant, which are capable of being relevant, individually and cumulatively, lead me to conclude that the Appellant's first and second grounds of appeal are made out.

30. With regards to the Appellant's third and final ground, it does appear that the Judge may have misunderstood the nature of that evidence when stating that the documentation from them does not indicate what information was provided by the Appellant regarding his family. The letter dated 19th February 2024 confirms that the Appellant has provided a photograph of himself and the consent for this to be posted on the "Trace the Face" public website. The letter also informs the Appellant that *"Trace the Face relies on someone recognising your photo and then contacting the Red Cross or Red Crescent in the country that they are in. We would also be grateful if you could let us know if you hear any news about your family or have re-established contact with your relatives through other means."*
31. Considering the information confirmed by the Red Cross in that letter, I agree with Ms Simbi that, on its face, it is far from clear that such evidence would be sufficient to justify a judge to depart from earlier findings of fact that an appellant's account of having lost contact with their family lacked credibility. However, I accept Mr Hingora's submission that considering that the issue of re-documentation remained a live and core issue in this matter, the Judge has erred in expecting the Red Cross to have provided further information for the reasons set out above.
32. I am satisfied that the Judge has materially erred in law for the reasons above and the Judge's decision to dismiss the appeal is therefore set aside pursuant to s.12(2)(a) of the Tribunals, Courts and Enforcement Act 2007. Both parties agreed that were I to find in favour of the Appellant, particularly in relation to the first and/or second grounds of appeal, that this matter would need to be remitted to the FtT for re-making. Having given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal at [7.2], I am satisfied that the nature or extent of the judicial fact finding which is necessary in order for the decision in this appeal to be re-made is such that, having regard to the Overriding Objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.

Notice of Decision and Directions

33. The decision of the First-tier Tribunal is set aside. None of the findings of fact shall stand.
34. The Appeal is remitted to the First-tier Tribunal for a hearing *de novo*, before any Judge of the First-tier Tribunal, other than Judge Thapar.

Sarah Pinder

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 October 2024