IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002842
UI-2024-003099
First-tier Tribunal No: PA/58254/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

12th of September 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE HOFFMAN

Between

MQ
(ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms J Heybroek, Counsel
For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

Heard at Field House on 19 August 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 seeks to challenge the decision of First-tier Tribunal Judge Mark Eldridge promulgated on 13 May 2024 dismissing his appeal against the respondent's decision dated 3 October 2023 refusing his protection claim.

Background

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2. The background to the appeal is as follows. The appellant, who is a national of Iraq of Kurdish ethnicity, claims to have arrived in the UK by small boat on 3 November 2021. He claimed asylum on 5 November 2021. The basis of his claim is that he cannot return to Iraq because he fears persecution on account of his perceived political opinion. The appellant lived in an area of the country controlled by the Kurdistan Regional Government and he claimed that he became politically active through friends, one of whom, H, he designed posters and banners for which were used in demonstrations against the Kurdish authorities. The appellant claimed that H was arrested by the authorities who also confiscated his belongings, including the appellant's laptop which he had used to design the posters and banners. According to the appellant, he then sought the assistance of his maternal uncle who arranged for an agent to take him out the country. The appellant left Iraq on 5 October 2021 and travelled through Turkey and other unknown counties before he arrived in the UK.

3. As explained above, the respondent refused the appellant's protection claim on 3 October 2023 following which the appellant exercised his right of appeal to the First-tier Tribunal.

The appeal before the First-tier Tribunal

4. The appellant's appeal was heard by First-tier Tribunal Judge Mark Eldridge on 9 May 2024. In his decision of 13 May 2024, the judge dismissed the appellant's appeal. Judge Eldridge did not find the appellant's claim to be credible. The key findings for the purposes of the present appeal include that the judge did not accept that the appellant and his uncle would find the means to get him out of Iraq within one hour [31]; the appellant had been unable to produce any images of the posters he claimed to have designed and that it was "reasonable to infer today that it is highly likely it would have been backed up to the Cloud" [33]; it was inconceivable that the appellant would have kept a photograph of himself on his laptop given his acceptance of the danger posed by the material contained on it [34]; and the appellant, being an intelligent and resourceful man, would not make up his own mind and seek to contact his family in Iraq notwithstanding his uncle's instruction not to do so [36].

5. The appellant sought permission to appeal Judge Eldridge's decision relying on the following five grounds:

- Ground 1: The judge made adverse findings against the appellant on points that were not raised in the refusal letter or put to the appellant in oral evidence.

- Ground 2: The judge failed to give adequate reasons for (a) his findings that it was inconceivable the appellant would keep a photograph of himself on his laptop and (b) why he did not accept the appellant had no contact with his family.

- Ground 3: The judge had taken an impermissible approach by requiring the appellant to produce corroborating evidence contrary to the case of MAH (Egypt) v SSHD [2023] EWCA Civ 216.

- Ground 4: The judge failed to deal with a relevant submission made on behalf of the appellant that the tribunal should approach the issue of re-

documentation and risk of travel within Iraq from the perspective of the "worst case scenario".

- Ground 5: The judge had failed to take into account relevant evidence, specifically a membership card and letter from the Kurdish rights organisation Dakok.

6. Permission to appeal was granted on grounds 1 to 3 by First-tier Tribunal Judge Handler on 18 June 2024. The appellant then applied directly to the Upper Tribunal in respect of ground 5 for which permission was granted by Upper Tribunal Judge Mahmood on 8 August 2024 in order to avoid the matter taking up time during the upcoming error of law hearing. The appellant no longer seeks to pursue ground 4.

Findings – Error of Law

7. For the following reasons, we are satisfied that the Judge Eldridge made material errors of law for the reasons set out at grounds 1 to 3. However, we find that ground 5 discloses no material error of law.

8. As explained above, at ground 1, the appellant argues that the judge made findings on matters that were not raised in the refusal letter or put to the appellant in cross-examination. Three examples are given. The first is at [31] where the judge found that it was implausible that the appellant, with the help of his uncle, would be able to find the means for him to leave Iraq within an hour. Mr Terrell argued that the appellant had failed to provide evidence – either a statement from his counsel before the First-tier Tribunal or a transcript of the hearing – to prove how and by whom the questions were put to the appellant on this point. However, we are in any event satisfied that the judge erred in his approach to his evidence. At [31] the judge says that the appellant "told me that when he fled to his uncle, the means were found for him to leave the country within one hour". We take two things from that passage. The first is that the reference to the appellant having "told me" suggests that the appellant was answering a question put to him by the judge and not the respondent. Second, and of greater importance, is that "the means were found for [the appellant] to leave the country within one hour" is ambiguous: by "means" did the appellant mean that agents were found within one hour; that the money to pay for the journey was found within one hour; or that the appellant physically left the country within one hour? At [38], the judge appears to have taken it to be the latter given that he says "I similarly find…that he has not fled at an hour's notice from Iraq because he is of adverse attention to the authorities there". We consider that it does not follow from the answer to the judge's question that the appellant claimed that he had fled Iraq at an hour's notice. It is not apparent from the decision whether the appellant was given the opportunity to explain what he did mean. We are therefore satisfied that the judge made a material error of law by acting in an unfair manner and making an irrational finding.

9. The second example given in ground 1 is the judge's finding at [33] that it was "highly likely" that the posters designed by the appellant would have been uploaded to the Cloud. This finding was made in the context of the appellant having "been unable to produce any image of any poster material he has created". The appellant argues that this was not a point raised by the respondent or a matter put to him in oral evidence. Mr Terrell did not seek to argue

otherwise, and while he acknowledged that the judge's findings in relation to the Cloud were "problematic" because the judge was speculating, Mr Terrell submitted that this was not the lynchpin of the credibility analysis and it did not automatically follow that this was a material error of law. We are, however, satisfied that this finding amounts to a material error. First, by assuming that the appellant would have uploaded the images to the Cloud without this point having been put to him in evidence, not only was the judge impermissibly speculating, but he was proceeding on an unfair basis. The evidence before the judge included the appellant's answer to Q68 during his first asylum interview, when he said that he used a USB stick to transfer the posters to H. Second, the findings at [33] about the appellant's failure to produce copies of the posters was clearly relevant to the adverse credibility finding made against the appellant at [38]. The judge begins that paragraph by saying, "Putting this all together, I find that the Appellant has had limited political activity in Iraq". He then goes on to say that "I similarly find that he has not been involved in the production of posters or related materials". Reading [33] in conjunction with [38], we are satisfied that the point about the images of the poster being uploaded to the Cloud was material to the judge's reasoning.

10. The judge's findings in relation to the likelihood of the posters being saved to the Cloud also demonstrates a material error of law for the reasons argued in ground 3, i.e. that the judge took an impermissible approach to requiring the appellant to produce corroborative evidence. The appellant relies on the case of MAH (Egypt). He argues in his grounds that, following that judgment, "corroborative evidence cannot be required". With respect, that is not what the Court of Appeal said in MAH (Egypt) at [76] and [77]. What the Court of Appeal found was that where certain criteria, set out in both Article 4(5) of the Qualification Directive and para 339L of the Immigration Rules are met, corroborative evidence is not required in a protection claim. At [76] of the judgment in MAH (Egypt), the Court of Appeal provided an excerpt from the Home Office's guidance on "Assessing credibility and refugee status in asylum claims lodged before 28 June 2022" (version 10.0):

> "The principle of the benefit of the doubt reflects recognition of the difficulties some claimants face gathering evidence to support their claim, and the grave and potentially irreversible consequences if international protection is wrongly refused.
>
> You must consider whether to apply the benefit of the doubt to any material facts which remain in doubt, after you have reviewed all the evidence in the round. The concept of the benefit of the doubt in the context of the Immigration Rules is designed to provide a framework for deciding whether to accept or reject a material fact, or the facts as a whole, where the evidence in one or more areas is not sufficient to enable a clear finding to be made.
>
> Paragraph 339L of the Immigration Rules sets out that where a claimant's account is not supported by documentary or other objective evidence, there will be no need for further confirmation when the following conditions are met:
>
> - the claimant has made a genuine effort to substantiate their claim

> • all material factors at their disposal have been submitted, and a satisfactory explanation regarding any lack of other relevant material has been given
> • their statements are coherent and plausible and do not run counter to available specific and general information relevant to their case
> • they have lodged an asylum or human rights claim at the earliest opportunity, unless they can demonstrate good reason for failing to do so
> • their general credibility has been established
>
> If a claimant's account satisfies all five criteria, you must give them the benefit of the doubt – as there would be no reason not to do so. If the claimant only meets one or more criteria, you must still consider whether, on the facts of the case, it is appropriate to give them the benefit of the doubt, bearing in mind the relatively low threshold of 'reasonable degree of likelihood' applicable. All of the credibility indicators must be considered in the round."

11. The correct approach, as explained above, is that the judge should have considered the specified five conditions and then considered whether to give the appellant the benefit of the doubt in relation to the absence of the posters. Instead, the judge erred at [33] by, firstly, finding that it was highly likely the appellant had backed up the posters to the Cloud and, secondly, relying on the absence of the posters as a key point in making an adverse credibility finding.

12. We agree with Ms Heybroek's submission that it is difficult to ascertain from reading the decision at what point the judge found the appellant's evidence to be incredible and whether this flowed from the lack of corroborating evidence or whether it followed an assessment in the round. Having read the decision, ultimately we are satisfied that the judge's findings were based in large part on the lack of corroborating evidence which he identified as including copies of the posters the appellant designed [33] and evidence of "the arrest of his friends, the raid on his flat/shop and his uncle's considerable endeavours to help him remove from Iraq" [35]. The lack of corroborating evidence then tainted the judge's findings at [38] rejecting his claim to have been of adverse interest to the Kurdish authorities in Iraq.

13. Turning to ground 2, the appellant gives two examples of the judge's alleged failure to give adequate reasons. The first is at [34], where the judge found that it was "inconceivable" that the appellant kept an image of himself on his laptop. We are not satisfied that the judge erred in this regard. During his first asylum interview, in answer to Q70, the appellant confirmed that he knew that designing the posters was a dangerous job. Furthermore, during his second asylum interview, in answer to Q22 the appellant said that he did not keep his laptop at his own flat because his home was close to the PUK political bureau and opposite to the former chief of security. At Q45, the appellant again confirmed that he was aware what he was doing with H was dangerous. Given that the appellant was, by his own evidence, conscious of the risks of what he was doing, and that he took steps to keep his laptop at H's house rather than his own simply because he lived in close proximity to PUK officials, we find that it was reasonable and rational for the judge to conclude that it was unlikely the appellant would keep a photograph of himself on his computer.

14. The second example given in ground 2 is that at [35] to [36] the judge rejected the appellant's explanation that he was not in contact with his family because he did not want to put them at risk. The appellant's evidence was that he did not contact his family on the instruction of his uncle. However, at [36], the judge rejected that evidence for the following reasons:

> "He is a 31-year-old man, whom I have found to be intelligent. Whatever his motivation, he is clearly resourceful in coming to this country and I consider he presented as somebody who is well able to make up his own mind."

15. We are satisfied that the judge's finding at [36] is irrational. In particular, it is unclear why being a person "able to make up his own mind" necessarily would mean that the appellant would disregard the instruction of his uncle not to contact his family in Iraq in case he put them at risk. We are also satisfied that the judge's error also infected his findings at [37] by misapplying the law on corroborative evidence, which in turn infected his findings in relation the question of identity documents.

16. Finally, we are not satisfied that ground 5 demonstrates that the judge made a material error with regards to the evidence from Dakok. At [27] the judge noted the submissions made on behalf of the appellant that he had now joined an organisation called Dakok and that he was "asked to accept their assertion" that the appellant had been granted membership "after due diligence on their part concerning his [political] motivation". At [40], the judge took into account that the appellant had only approached Dakok in December 2023, which was after the respondent had refused his protection claim, and that he had only become a member in January 2024. That finding was then considered in the round by the judge when he was assessing the appellant's sur place activities, leading to his conclusion at [45] that the appellant did not have a prominent role in the UK opposing the Kurdish authorities and he did not therefore face a risk on return. The judge was not required to recite the contents of the Dakok letter and we are satisfied that he had proper regard to it when considering the appellant's sur place activities.

Conclusion – Error of Law

17. For the reasons given above, we find that grounds 1 to 3 are made out. We cannot say that the judge's conclusions would have been the same had he not made those errors and we therefore set aside the decision of the First-tier Tribunal.

18. We are of the view that none of the findings of fact can be preserved. At the hearing, the parties were in agreement that, if we were to find an error of law, the appeal should be remitted to the First-tier Tribunal for a hearing de novo. Taking into account that the judge's factual findings are tainted by unfairness and the nature and extent of the findings of fact required to remake the decision, applying paragraph 7.2 of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal* we are satisfied that remittal is the appropriate course of action.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors on a point of law.

The decision of the First-tier Tribunal is set aside with no findings preserved.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal at Hatton Cross, to be remade afresh and heard by any judge other than Judge Mark Eldridge.

M R Hoffman

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3rd September 2024