Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/07718/2019 (V)**

THE IMMIGRATION ACTS

Heard via Skype for Business at Field House	**Decision & Reasons Promulgated**
On 12th March 2021	**On 30th March 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

MR D D M
(ANONYMITY DIRECTION MADE**)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Georget, Counsel instructed by Malik & Malik Solicitors
For the Respondent: Mr S Kotas, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the determination of First-tier Tribunal Judge M A Khan promulgated on 2nd December 2019 and dismissing the appellant's appeal against the decision of the Secretary of State for the Home Department dated 30th July 2019. The Secretary of State refused the appellant's protection and human rights claim. The appellant is an Iraqi national born on 1st April 1982 and of Kurdish ethnicity, born in Makhmour, Iraq. In 2001 he clandestinely entered the United Kingdom at the age of 19 years and claimed asylum in June 2001 on the basis that he was at real risk of serious harm from the Jaff tribe in

the Iraq Kurdish region and that he had evaded military service, which had resulted in him being detained and tortured. His asylum claim was refused on 20th June 2001 and his appeal against the refusal was dismissed on 14th November 2001.

2. On 21st February 2006 he was convicted of two counts of using false instruments and failing to surrender to bail and sentenced to eighteen months' imprisonment. On 13th August 2006 a deportation order was signed. His appeal against that order was dismissed by the First-tier Tribunal on 20th October 2006 and he became appeal rights exhausted on 30th October 2006.

3. Following further submissions the deportation order was revoked but the Secretary of State refused the protection and human rights claim on 1st October 2012. An appeal was dismissed on 20th February 2013 by the First-tier Tribunal.

4. In January 2019 the appellant travelled to France and claimed asylum. He was told that his claim had to be considered by the UK authorities and he was returned to the UK in March 2019. He made further submissions which were refused in the decision dated 30th July 2019 and owing to his criminal record it was concluded he fell within the exclusion criteria under Rule 339D(iv). It was decided that he did not qualify for asylum or humanitarian protection, but his appeal was considered under paragraph 399 of the Immigration Rules although he has neither a partner nor children in the United Kingdom. The Secretary of State considered whether he met the private life exception to deportation set out at paragraph 399A of the Immigration Rules, but his claim was refused.

5. The appellant submitted that his return to Iraq without a reasonable prospect of him obtaining a CSID would breach his Article 3 rights and that his circumstances taken cumulatively constituted very compelling circumstances such as to displace the public interest in his deportation.

6. First-tier Tribunal Judge M A Khan dismissed his appeal under the Immigration Rules, Articles 2 and 3 and 8 of the ECHR and also dismissed a protection appeal.

7. Permission to appeal was sought on four separate grounds as follows.

Ground 1, a flawed approach to credibility

8. It was submitted that the judge placed undue reliance on adverse credibility findings made previously such that he lost sight of his obligation to assess the appellant's credibility for himself. The appellant had been tendered for evidence and had given oral testimony. The basis of the judge's adverse credibility finding was based on the mother's death certificate and findings of adverse credibility in previous decisions but there was no independent assessment of the appellant's oral testimony in the instant case, and any findings thereto were invisible in the determination. Following **Djebbar [2004] EWCA Civ 804** at paragraph 30 it was said of the guidance in **Devaseelan v SSHD [2002] UKIAT 00702** that, "*the most important feature of the guidance is that the fundamental obligation of every Special Adjudicator independently to decide each new application on its own individual merits was preserved*". As per **Djebbar**

the judge should have taken into account the appellant's oral evidence to decide whether he departed from the previous findings on credibility but instead at paragraph 44 the judge remarked that since the appellant "*has been found not be credible on three previous hearing, (sic) there is not a great deal he can say now to this Tribunal, which would (sic) credible and/or consistent*".

Ground 2

9. A central feature to the appellant's account was that he did not have a Civil Status Identity Document (CSID). At paragraph 28 the judge recorded a submission that there was no evidence that he was in possession of a CSID but that the judge failed to give any proper consideration to this crucial aspect of the appellant's claim save for a one sentence reference at paragraph 60. This was woefully inadequately reasoned and that was an error of law. It was never even the Secretary of State's own position that the appellant had access to his CSID but that the appellant could obtain another card. The judge's alternative finding that the appellant could obtain his CSID with the help of his family in Iraq demanded explanation. Even if the appellant's mother was alive, which was denied, given the patrilinear registration system in Iraq this would be of no assistance.

Ground 3

10. There were procedural irregularities and unfairness. At paragraph 56 the judge stated: "*In the light of his lengthy avoidance of the immigration authorities in the UK and due to credibility finding (sic) by three previous Tribunals and fourthly by this court, I do not accept his evidence that her went to France in January 2019*".

11. The appellant's travel to France was not in dispute and no issues thereon were raised in the Secretary of State's decision letter nor in any cross-examination. This matter only arose as a result of the judge's questioning and the appellant was not put on notice that this would be an issue and the judge at 16 incorrectly recorded Belgium instead of France. In **YHY (China) (AP), Re Judicial Review [2014] CSOH 11** it was held that there was a procedural unfairness where points which were not previously taken against the appellant were taken by a judge unless there was proper notice.

Ground 4, inadequate consideration under Article 8

12. The judge appeared to treat the previous determination as conclusive of the issue contrary to the principles of **Devaseelan**. It was submitted that the judge failed to assess properly the proportionality of the appellant's deportation and the individual merits of the case for himself. There was no consideration of the appellant's length of residence in the UK, his absence from Iraq, the difficulties he may face upon return to Iraq and any difficulties in obtaining a CSID upon return nor of his medical issues, all of which should have been considered.

13. The permission to appeal granted by First-tier Tribunal Judge Ford failed to comply with the guidance in **Safi & Ors (permission to appeal decisions) [2018] UKUT 388** such that unless the permission is restricted under the "Decision" heading, any

ostensible restriction of permission in the "Reasons" section will not restrict the grant of permission and the actual decision does not restrict the grant of permission in any way.

14. At the hearing before me Mr Kotas did not seek to argue with Mr Georget that the permission was restricted.

15. Mr Georget argued at the hearing that it was not just a question of consideration of the CSID standing or falling with credibility and an assessment of the appellant's ability to obtain a CSID needed to be considered objectively, and separately from any credibility considerations, of where the appellant could in fact obtain such a card or replacement.

16. Mr Kotas submitted that the appellant gave oral evidence and repeated his claim and the judge dealt with the death certificate, finding it was not a reliable document, and that was rationally open to the judge. It was open to the judge to rely on **Tanveer Ahmed (Documents unreliable and forged) Pakistan [2002] UKIAT 00439**.

17. The CSID consideration stood or fell with credibility and his asylum claim had been rejected in three previous decisions which were referred to in the determinations. Mr Kotas also referred to the refusal letter which made comprehensive observations on the appellant's credibility.

Analysis

18. I raised the issue of whether the appellant was excluded from protection grounds, because the judge displayed an apparent confusion in his legal self-direction on Article 8. At paragraph 55 it appeared that the judge had confused **IT (Jamaica) [2016] EWCA Civ 932** with **KO (Nigeria) [2018] UKSC 53** and stated: "*However Section 117C does not contain 'very compelling circumstances' test (**IT (Jamaica) [2018] UKSC 53**)*". If this appeal is focussed only on Articles 3 and Article 8 it is even more imperative that the judge directs himself appropriately with respect to Article 8. I note the grounds of appeal to the First-tier Tribunal relate only to Articles 2, 3 and 8.

19. It is correct that the judge reviewed the previous determinations and stated at paragraph 38 that: "*Under the principle of **Devaseelan**, the starting point for this Tribunal are the previous determinations of 2001, 2006 and 2013*". The judge indeed set out large sections of those determinations from paragraph 38 to paragraph 41. At paragraph 41 the judge stated: "*The appellant's asylum and protection claim is essentially on the same basis as before, he has now produced his mother's death certificate, which was collected from Kurdistan at the end of 2014 by the witness, Mr Aziz*". The judge proceeded to deal with the witness, Mr Aziz, and then addressed Counsel's submissions at paragraph 43 whereupon the judge also stated, "*I find that this appellant is willing to say anything that would assist his case*" and at paragraph 44, the judge stated: "*The fact that this appellant has been found not to be credible on three previous hearing (sic), there is not a great deal he can say now to this Tribunal which would credible (sic) and/or consistent*". As the judge identified, **Devaseelan** was the starting point but it would appear from his comment at paragraph 44 that he had closed his mind to the appellant's evidence from the

outset. Of course the previous determinations were relevant, but it was incumbent upon the judge to deal independently with the further evidence, including the oral evidence, submitted by the appellant and which was recorded from paragraphs 22 to 23. That is not to say that the appellant does not have a hurdle to climb but that the judge needed to include and address the further evidence holistically.

20. Mr Kotas made reference to the refusal of the Secretary of State, but the judge must draw his own conclusions and findings on the evidence before him as per **Djebber** and as outlined in ground 1 above. There was reference to **Tanveer Ahmed (documents unreliable and forged) Pakistan *** [2002] UKIAT 00439 by Mr Kotas but I could detect no reference to reliance by this judge himself on that authority within the determination.

21. Additionally, there needed to be adequately reasoned findings in relation to the CSID and the judge in his last paragraph, having addressed the protection, Article 3 and Article 8 grounds, as an afterthought found: "*I find that the appellant has held CSID card (sic) previously and he still has that in his possession or it is with a member of his family. I find that the appellant can return to Iraq (Kurdistan) and there is not a risk to his life as claimed by him*". That would appear not even to be the position of the Secretary of State.

22. Overall, the approach to credibility was flawed, there was a failure to consider evidence, and make relevant findings. There was also a failure to give adequate reasons as per **MK (duty to give reasons)** Pakistan [2013] UKUT 00641 (IAC)

'(1) It is axiomatic that a determination discloses clearly the reasons for a tribunal's decision.

(2) If a tribunal finds oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it is necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight is unlikely to satisfy the requirement to give reasons'.

23. There was also an inadequate consideration of Article 8, not least with a misdirection in law and a failure to address the issue of the CSID card. For these reasons I find there were material errors of law and the determination will be set aside. The errors which relate to credibility are fundamental to the consideration of the appeal and hence the matter is remitted to the First-tier Tribunal for a hearing de novo.

Notice of Decision

The Judge erred materially for the reasons identified. I set aside the decision pursuant to Section 12(2)(a) of the Tribunals Courts and Enforcement Act 2007 (TCE 2007). Bearing in mind the nature and extent of the findings to be made the matter should be remitted to the First-tier Tribunal under section 12(2) (b) (i) of the TCE 2007 and further to 7.2 (b) of the Presidential Practice Statement.

Direction

All further evidence should be filed and served at least 14 days prior to the substantive re-hearing.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Helen Rimington* Date 22nd March 2021

Upper Tribunal Judge Rimington