IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005218
First-tier Tribunal No:
PA/53566/2021
IA/09194/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 March 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A T
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms J. Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr D. Barr, instructed by Barnes Harrild & Dyer

Heard at Field House on 02 February 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the original appellant (AT) 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. For the sake of continuity, I shall refer to the parties as they were before the First-tier Tribunal although technically the Secretary of State is the appellant in the appeal before the Upper Tribunal.

First-tier Tribunal decision

2. The original appellant (AT) appealed the respondent's (SSHD) decision dated 30 June 2021 to refuse a fresh protection and human rights claim. First-tier Tribunal Judge Verghis ('the judge') allowed the appeal in a decision sent on 01 September 2022. The judge noted the appellant's immigration history, which included a previous asylum appeal that was dismissed by First-tier Tribunal Judge Lloyd in a decision sent on 02 December 2019. The judge noted that the respondent relied on the decision in *Devaseelan v SSHD* [2002] UKIAT 702, which stated that the first adjudicator's decision should be the starting point [11]. The judge acknowledged that Judge Lloyd had not found the appellant's account credible. He rejected his claim to have a well-founded fear of persecution due to tribal issues and on grounds of political opinion arising from an incident in which he took down a PMF flag [11].

3. The judge went on to summarise the main points in the decision letter, including the respondent's reliance on the then current country guidance decision in *SMO, KSP & IM (Article 15(c); identity documents) Iraq CG* [2019] UKUT 400 (IAC) ('***SMO (1)***') [11]-[22].

4. The judge outlined the case put by the appellant in the further submissions made to the respondent on 27 May 2020. At the date when the appellant made further submissions, he continued to assert that he would be at risk in his home area of Kirkuk and that he was not in contact with family members in Iraq. He claimed to be at risk because of political content he had posted on social media. The further submissions also referred to the then current country guidance in *SMO (1)*.

5. The judge went on to summarise the evidence given at the hearing. She noted the respondent's concession that the appellant would be unable to redocument himself in the UK [42]. The judge summarised four issues for determination including (i) credibility; (ii) risk on return to home area of Kirkuk; (iii) internal relocation to IKR; and (iv) return without documentation [43].

6. Judge Verghis took as her starting point the decision of Judge Lloyd [45]. She made specific reference to the decision in *Devaseelan* and quoted the guidance given in that case [46]. She concluded that no further evidence had been produced and there was no reason to depart from Judge Lloyd's findings relating to risk on tribal grounds [47]. The judge did not go on to consider whether there was any reason to depart from Judge Lloyd's decision in so far as it rejected the credibility of his claim to be at risk from the Popular Mobilisation Forces ('PMF') on grounds of imputed political opinion.

7. The judge then turned to consider the case being put by the appellant at the date of the hearing. She noted that the appellant's evidence was that he had re-established contact with his family in Iraq. The appellant claimed that his family's identity documents were taken in a raid by the PMF. He claimed that his family had not attempted to obtain new documents because they were fearful of disclosing that the PMF had seized them [49].

8. The judge noted that the appellant was cross-examined on this point. It was put to him that he had not mentioned this fact in the original claim or in the hearing before Judge Lloyd [50]. The judge recorded the appellant's claim that he had mentioned the raid at the earlier hearing, but there was no reference to this evidence in Judge Lloyd's decision. She went on to note that the appellant simply said that his family preferred to be undocumented than approach the authorities for new documents. The judge observed that the appellant would have given evidence through an interpreter. She said: 'I take a neutral stance on this evidence and do not find that the late elicitation of this evidence necessarily weighs against the appellant.' [50]. Nevertheless, she went on to accept on the lower standard of proof that his family was likely to be undocumented and would therefore 'not be able to assist him to redocument himself.' [51].

9. The judge noted that there it did not appear to be disputed that the appellant had posted and reposted various political posts on social media. Although the posts were brief, she found that they were 'significant in volume and nature and once posted, endure.' She found that this evidence 'must be examined through the prism of the appellant as an undocumented Kurdish Sunni Muslim.', which she would consider later in the decision [52]. However, as far as I can see, the judge did not go on to make any specific findings in relation to risk on return on this basis.

10. The judge went on to consider the issues of documentation [54]-[68] and internal relocation [69]-[72], which included many quotes from '*SMO*' to support her conclusions. She concluded that the appellant would return to Iraq 'without family support or documents' and that 'with the additional factor of his sur place activities, the appellant would not be able to complete this vetting process and gain access to the territory' [68]. This finding was made with reference to an EASO report dated October 2020, which indicated that a person might have to provide personal documents to the security committee for vetting on return to Kirkuk.

11. The judge considered sections from *SMO (1)* before concluding that the appellant might be at risk in the IKR during the screening process because he comes from an area associated with ISIL, even though she had earlier noted evidence to show that ISIL had not controlled Kirkuk [68] [70]. She found that internal relocation was not available because the appellant was undocumented, without meaningful family support in IKR, and would have difficulty finding employment [72]

12. The judge concluded that the appellant would be at risk of harm contrary to Article 15(c) of the Qualification Directive and Article 3 of the European Convention on Human Rights if he was returned to Kirkuk and that it would be unreasonable or unduly harsh to expect him to relocate to the IKR [73].

Grounds of appeal

13. The Secretary of State applied for permission to appeal to the Upper Tribunal on a single ground. It was argued that in finding that the judge failed to take Judge Lloyd's negative credibility findings relating to risk from the PMF in assessing the evidence given at the date of the hearing: *Devaseelan* referred. It was argued that the judge erred in finding that the fact that there was no record of the appellant having mentioned the claimed raid on his family home by the PMF in which their documents were said to have been taken was merely a 'neutral' factor. Judge Lloyd had clearly rejected the appellant's claim that he was of

adverse interest to the PMF, which undermined his belated account of his family home being raided. This in turn undermined the claim that his family were undocumented and could not help him to obtain documentation.

Hearing

14. At the hearing, Ms Isherwood made a late application to amend the Secretary of State's grounds. She was unable to provide a reason why the ground was not included in the original application. She said that when she was preparing for the hearing a further point became apparent, which she wanted to add. She argued that the judge failed to have regard to the relevant country guidance in *SMO (2)* in the decision. However, she did not say how or why this would have made any material difference to the outcome of the appeal.

15. Mr Barr objected to the application because it was made at a late stage. In the alternative, he argued that the additional ground would make no material difference because the guidance in *SMO (2)* would have yielded the same result.

16. I reserved my decision in relation to the application to amend until I had assessed the primary argument contained in the grounds of appeal in the context of the evidence.

Decision and reasons

17. Having considered the First-tier Tribunal decision, the grounds of appeal, and the submissions made at the hearing I find that the First-tier Tribunal decision involved the making of an error on a point of law.

18. The First-tier Tribunal decision is detailed and follows a logical structure but is missing essential findings on material matters. In assessing the credibility of the appellant's underlying claim, the judge noted the previous findings made by Judge Lloyd and made direct reference to the principles outlined in *Devaseelan*. However, having directed herself correctly, the judge found that there was no reason to depart from Judge Lloyd's findings relating to the tribal issue, but failed to make any findings relating to the credibility of his claim to be wanted by the PMF for having torn down a flag. It is clear from Judge Lloyd's decision that he rejected the credibility of both aspects of the original claim.

19. Judge Lloyd's previous negative finding was relevant to the appellant's current claim that he could not be documented because his family's ID documents were confiscated in a PMF raid sometime before the hearing in 2019. He claimed that his family was fearful of approaching the authorities to redocument themselves. It is not clear from the appellant's witness statement whether this incident was said to be linked to his earlier claim that he was wanted by the PMF, but it seems to be inferred. In my assessment the judge erred in concluding that the appellant's explanation as to why this incident was not recorded in his earlier evidence was only a 'neutral' credibility issue. She should have taken Judge Lloyd's previous credibility finding as the starting point in assessing whether there might be a risk from the PMF before considering the credibility of the seemingly belated account given at the hearing. It is unclear whether the appellant mentioned this incident in the original asylum interview because no copy of the interview was included in the Home Office bundle. The incident was not mentioned in the witness statement sent with the further submissions or the further statement prepared for the First-tier Tribunal hearing. To this extent there is merit in the point made in the original grounds of appeal.

20. Mr Barr argued that neither the point made in the grounds nor the new point raised at the hearing would make any material difference to the outcome of the appeal. The country guidance in *SMO (2)* showed that the appellant could not be documented in any event because he would need to attend the office in Kirkuk in person to register for an INID.

21. By the date of the First-tier Tribunal hearing on 18 July 2022 the Upper Tribunal had issued new country guidance in *SMO and KSP (Civil status documentation, article 15) Iraq CG* [2022] UKUT 00110 (IAC) ('***SMO (2)***'). The decision was published on 22 April 2022. The Upper Tribunal made clear that it replaced all previous country guidance on Iraq. I note that having given the initial citation for *SMO (1)* the judge thereafter referred to the country guidance as '*SMO*' for the rest of the decision. Because *SMO (2)* replaced *SMO (1)* many of the paragraphs in the headnotes are the same, which gives the impression that the judge might have been quoting from both decisions. However, it is clear from the references and quotes from the body of the country guidance that the judge appeared to be referring to the country guidance in *SMO (1)* throughout. There is no citation of *SMO (2)* or the new evidence referred to in that decision. Nor is there any indication that the judge was aware that it superseded the earlier country guidance.

22. In *SMO (2)* the Upper Tribunal considered up to date evidence relating to the issuing of civil status identity documentation in Iraq and specifically in relation to the new INID biometric system. The headnote at paragraph 11 stated: 'As a general matter, it is necessary for an individual to have one of these two documents in order to live and travel within Iraq without encountering treatment or conditions which are contrary to Article 3.'. Having just made clear in the headnote at paragraph 9 that the mere fact that a person does not have a current or expired passport did not give rise to a Refugee Convention claim, the Upper Tribunal made clear that the question of whether a person would be able to obtain civil status documentation only might only go to the question of whether they might face ill-treatment with reference to Article 3 ECHR.

23. I observe that the failure of the judge to make adequate findings relating to the risk from the PMF with reference to Judge Lloyd's decision is not the only problematic issue. Although this was not pleaded, the judge referred to the recent evidence relating to posts on social media but came to no clear conclusion, or at least did not make reasoned findings, as to whether the appellant would be at risk on return from the PMF in his home area. I note that the judge allowed the appeal on Humanitarian Protection and Human Rights grounds. If she had come to a clear conclusion relating to risk on return to his home area of Kirkuk the matter was likely to have engaged the operation of the Refugee Convention. Although the decision contained headings and an element of structure, when read as a whole, the judge's findings relating to risk on return to the home are somewhat confused with her findings relating to the ability of the appellant to redocument himself. She referred throughout to country guidance that had been superseded.

24. In assessing whether to admit the new ground of appeal raised by Ms Isherwood at the hearing I note that no good reason was given to explain why it was not raised in the original grounds of appeal. However, it is an obvious point that was apparent on the face of the decision.

25. I conclude that it is not necessary for me to make a formal decision whether to permit the grounds to be amended because I have already found that the original ground of appeal had merit. Nevertheless, the judge's failure to consider the

relevant country guidance in *SMO (2)* is relevant to my assessment of what parts of the First-tier Tribunal decision should be set aside and the appropriate disposal of the appeal in the Upper Tribunal. There is some force in Mr Barr's submission that the findings in *SMO (2)* might render any error immaterial because the evidence before the First-tier Tribunal indicated that the appellant would not be able to redocument himself in any event.

26. The Secretary of State appeared to accept that the appellant did not have civil status documentation. The Secretary of State also accepted that the appellant could not obtain new documents from the Iraq Embassy in the UK. In *SMO (2)* the Upper Tribunal considered correspondence from the Iraq Embassy dated 12 July 2021, which suggested that the CSID system was still in use in certain parts of Kirkuk, Basrah and Mosul [64]. Even then, the Upper Tribunal approached the evidence with some caution given the pace of the roll out of the INID system in Iraq [65].

27. By the date of the First-tier Tribunal hearing in this case the evidence had moved on. The Secretary of State produced a copy of email correspondence between the Home Office and an official at the Iraq Embassy in the UK dated 07 July 2022, who confirmed the following information:

> 'I sent the inquiry to my colleagues in the Ministry of Interior and they confirmed that the below departments in Mosul and the surrounding areas of Nineveh Governorate are still issue the CSID, and the rest of Iraq's departments are issue the Iraqi National Card. The offices which is still issued the CSID as follows:-
>
> الشيخان،سنجار،الشمال،القحطانية،زيلكان،البعاج،وانه،الشورة
>
> Sheikhan, Sinjar, North, Qahtaniyah, Zelkan, Al-Baaj, Wanh, Shura'

28. This evidence indicates that at the date of the First-tier Tribunal hearing the only areas in which CSID documents were still being issued were a handful of departments in Mosul. For this reason, it was reasonably likely that the appellant would need to obtain an INID document by presenting himself at the relevant office where his family is registered. He claims not to know the family book number, but given that it is accepted that he is likely to come from Kirkuk, it is reasonable to infer that is the office that he would need to attend. Contrary to Judge Lloyd's understanding, Kirkuk is not in the IKR. Whether the appellant is returned via Baghdad or via Erbil in the IKR, he would need to travel to Kirkuk through checkpoints without civil status documentation.

29. The difficulty is that, although the country guidance suggests that the absence of civil identity documentation is a matter that might engage the operation of Article 3 in relation to the conditions that a person might face and in relation to potential risks at checkpoints, it did not in fact identify this as a specific risk category. Having read the body of both decisions in *SMO*, and having considered the wording of paragraph 11 of the headnote, it is clear that the Upper Tribunal was only making a general point. Each case must still be considered on the facts to evaluate whether an appellant's individual profile would mean they would not be able to access family support or have a profile that might put them at risk when travelling through a checkpoint.

30. Although Mr Barr's submission had an initial attraction, having reflected on the issue and considered the country guidance in more detail, it is not possible to find that it is inevitable that the decision would have been the same. It is unclear on

what basis the judge was allowing the appeal in relation to Humanitarian Protection. The country guidance suggests that an individual assessment is required to evaluate whether the lack of documentation would place a person at risk of Article 3 ill-treatment in an individual case.

31. The underlying factual findings in this case were flawed by an error of law. Having considering whether it was possible to preserve some of the findings, I have concluded that it is not. The findings made by the First-tier Tribunal in relation to credibility and risk on return were incomplete and in places somewhat confused. A holistic assessment will be required. As such, I conclude that it is appropriate on this occasion to remit the appeal to the First-tier Tribunal for a fresh hearing.

Notice of Decision

The First-tier Tribunal decision involved the making of an error on a point of law

The case is remitted to the First-tier Tribunal for a fresh hearing

M.Canavan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

06 February 2023