Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-003548**
(PA/55488/2021); IA/17778/2021

THE IMMIGRATION ACTS

Heard at Bradford IAC
On the 23 November 2022

Decision & Reasons Promulgated
On the 11 January 2023

Before

UPPER TRIBUNAL JUDGE REEDS

Between

L M R
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Schwenk, Counsel instructed on behalf of the appellant
For the Respondent: Mr M. Diwnycz, Senior Home Office Presenting Officer

Anonymity:
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008:
Anonymity is granted because the facts of the appeal involve a protection claim. and 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. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. The appellant appeals with permission against the decision of the First-tier Tribunal Judge (hereinafter referred to as the "FtTJ") who dismissed the appellant's protection appeal in a decision promulgated on the 24 June 2022.

2. Permission to appeal that decision was sought on behalf of the appellant and permission was granted by FtTJ Roots on 19 July 2022.

The background:

3. The appellant is a citizen of Iraq and is of Kurdish ethnicity. The basis of his claim is set out in the decision letter in the respondent's bundle and summarised in the decision of the FtTJ at paragraphs 4 and 5 as follows:

4. The appellant has a wife and four children (three sons and a daughter) who are 'dependents' upon his claim. He is from x village in the Kirkuk governorate of Iraq. He and his family left Iraq on the 15th January 2016, arriving in the United Kingdom on the 4th November of the same year.

5. The appellant claimed international protection on the basis that he was at risk of harm from his own and his wife's family due to their anger at them for marrying against their wishes. That claim was refused on the 20th September 2019, and his appeal against that decision was dismissed by Judge Monaghan on the 24th March 2020.

6. He made a 'fresh claim' for protection on the 2nd March 2021, this time based upon the religious and political views that he has expressed whilst in the United Kingdom, and a fear that his daughter will be subjected to female genital mutilation (FGM) on return to Iraq. He also claimed that his forcible return to Iraq would be contrary to this right under Article 3 of the Human Rights Convention to freedom from the inhumane conditions that he would likely experience due to his lack of an Iraqi identity document (CSID).

7. The appellant's case is summarised by saying that whilst in the UK he has attended demonstrations and posted anti-government and anti-Islamic comments on his Facebook page that have resulted in him receiving death threats from his father-in-law and others, and that he cannot relocate to the semi-independent governorates of Iraq due to the risk created by his aforementioned activities in the UK and the high incidence of FGM in the region to the risk of which his daughter would thereby be exposed. Moreover, he is estranged from his family and would thus be unable to obtain a replacement CSID on return to Iraq, which would in turn lead to him and his family suffering humanitarian conditions that are in breach of Article 3 of the Human Rights Convention.

8. The respondent's case is summarised in the decision letter of the 21 October 2021 and set out in the FtTJ's decision as follows:

(1) that background country information suggests that simply being an opponent of - or playing a low-level part in protests against - the Kurdish Regional Government (KRG) is unlikely to result in treatment amounting to persecution, and that criticising Islam on Facebook is not looked upon as something scandalous and has indeed become something of a social trend in the KRI.

(2) Little weight attaches to the threatening messages/videos sent to the appellant given that (a) there is no evidence as to their provenance, and (b) they were sent within a group chat that indicates a level of familiarity between their authors and the appellant.

(3) Furthermore, Judge Monaghan found that, despite his claim to the contrary, the appellant is not estranged from his family in Iraq and that they could therefore assist him in overcoming any difficulties he may have in acquiring an Iraqi identity document.

(4) Moreover, the areas where FGM is practised in Iraq are small and declining and, given that the appellant and his wife are opposed to the practice, it is not reasonably likely that anybody else would subject their daughter to it.

9. The claim was refused by the respondent for the reasons set out in the decision letter dated 21 October 2021. The appellant appealed before the FtT on 15 June 2022. The appellant was represented by Counsel but there was no attendance on behalf of the respondent.

10. In a decision promulgated on 24 June 2022 the appellant's appeal was dismissed. The FtTJ set out his findings on the primary facts at paragraphs 16 – 23. The FtTJ found that it was plausible that the appellant would take interest in events in his home region in Iraq which included following and commenting upon them on social media and by attending at protests whilst residing in the United Kingdom. The FtTJ also took as his starting point the decision of Judge Monaghan (see B1 of the respondent's bundle) and her assessment that he had fabricated his reasons for leaving Iraq and his consequent loss of contact with his family. The judge found that there was no further independent evidence in support of his claim to have lost contact with his family and thus he saw no reason to depart from the earlier findings made by Judge Monaghan. The judge considered that the attempt at persuading him otherwise was relevant to his overall assessment of credibility. As to the issue of documentation, the FtTJ set out the appellant's evidence that he had handed his original CSID to the agent whilst in Turkey however the judge found there was no evidence to support that claim and it was not one that had featured in the original decision of Judge Monaghan. He therefore did not attach weight to that evidence (see paragraph 19).

11. The FtTJ accepted that the appellant had attended with his son at a protest in the UK and that they were interviewed by a YouTube channel. The FtTJ also refer to further demonstrations. As to comments posted on the

Facebook page, the FtTJ consider that they were no more than the thoroughly abusive and unpleasant comments often posted on Facebook by "trolls" but there was nothing to suggest the authors had any genuine intention to carry out any threats. The FtTJ rejected the appellant's evidence that one of the threats was issued by his father-in-law. The FtTJ found that the appellant continued to maintain contact with his family in Iraq and had ready access to his original Iraqi identity documents.

12. The FtTJ's assessment of risk or conclusion on the claim was set out at paragraphs 24 – 28. Whilst the FtTJ accepted that the appellant had posted political and religious views on his Facebook account, which was set to a public setting, the FtTJ was not satisfied that that placed him and his family at risk of serious harm on return to Iraq. The FtTJ found that the authorities were concerned with protests taking place within their own territory rather than those within the United Kingdom. The judge was not satisfied that the NRT TV interview was widely disseminated but even if it were the relevant social media platform could be deleted however the judge found that the authorities would not find any of his expressions to be sufficiently troubling to motivate them into taking even this limited action. The FtTJ rejected the claim that his daughter would be at risk on return by reason of FGM (see paragraph 28). As to the issue of documentation, the judge found at paragraph 27 that the appellant had no need of any replacement Iraqi identity documents and that he continue to have access to the originals.

13. Permission to appeal that decision was sought on behalf of the appellant and permission was granted on 19 July 2022 by FtTJ Roots.

Discussion:

14. The appellant was represented by Mr Schwenk of Counsel, and the respondent is represented by Mr Diwnycz, Senior Presenting Officer.

15. Mr Schwenk relied upon the written grounds and provided oral submissions in relation to the grounds and by reference to the documentation. He submitted that there were 5 grounds of challenge to the decision of the FtTJ. Ground 1 asserted that there was a failure to consider the risk on return as a perceived atheist. Ground 2 referred to a mistake of fact/evidence relevant to the appellant's appearance on MRT Tv. Ground 3 asserted there was insufficient reasoning. Ground 4 asserted that there was an error in the assessment of risk on return to Iraq and the IKR and ground 5 related to the issue of redocumentation.

16. Mr Diwnycz who appeared on behalf of the respondent confirmed that there was no rule 24 response filed on behalf of the respondent. In his oral submissions he accepted that there was a material error of law in the decision of the FtTJ as set out in ground 5 and the issue of redocumentation. As to the other grounds, whilst he accepted that there were errors, he did not make any concession that they amounted to a material error of law. He did not engage with the detailed submissions

made by Mr Schwenk. In relation to ground one, Mr Diwnycz submitted that the FtTJ came to a sustainable decision on his asserted atheism. As to ground 2 Mr Diwnycz appeared to accept that there had been insufficient reasoning on the NRT Tv interview evidence and in relation to ground 3 he submitted that the findings were open to the FtTJ.

17. Having had the opportunity to hear the submissions of both advocates and there being a limited concession made by Mr Diwnycz relating to ground 5, for the reasons set out below I am satisfied that the decision of the FtTJ involved making an error on a point of law.

18. Dealing with ground 5, the advocates agree that the FtTJ erred in law in his consideration of the issue of documentation. It is necessary to set out why that is the position.

19. It is submitted on behalf of the appellant that the FtTJ erred in law in his consideration of the issue of redocumentation and highlights paragraph 19 where the FtTJ set out the evidence of the appellant concerning the location of his CSID. The FtTJ recorded the appellant's claim that he had been required to hand his original CSID to his agent whilst in Turkey and that he had informed the respondent of this during his original asylum interview. The FtTJ went on to find that there was no evidence before him to support the contention that the appellant had made this claim during his original asylum interview and that it was not a claim that had featured in the decision of Judge Monaghan and was contrary to her more general findings that the appellant retained access to the necessary information to achieve full documentation. Thus the FtTJ attached little weight to the appellant's evidence and this "recent elaboration."

20. In his oral submissions, Mr Schwenk also refers to paragraph 27 where the FtTJ found that the appellant would not need any replacement Iraqi documentation in light of that earlier finding made at paragraph 19 and that he continues to have access to the originals.

21. Mr Schwenk submitted that there had been no dispute that in the appellant's previous claim he had stated he did not have his CSID. Mr Schwenk referred to documents that were sent with the grounds of appeal. They consisted of an extract from the original Home Office interview on 17 July 2019 where at question 157 the appellant was asked if he had taken any ID documents when he left Iraq. The appellant replied "yes" when asked where his CSID card was the appellant responded, "the agent took it off my (sic) in Turkey" (question 158) and also his wife's CSID. There were other questions asked in relation to the CSID, for example at question 161 he was asked if he had any other documents in Iraq to which the appellant replied "no" when asked why he gave the CS ID to the agent he replied, "he asked us". (Question 162). Question 163 concerned whether the appellant or his wife had ever tried to obtain a CSID from the Iraqi embassy however the extract finishes there and no answer is provided. There has been no further transcript of the SEF interview provided for these proceedings.

22. The 2nd document relied upon is an extract from the decision letter dated 20 September 2019, at paragraph 76 reference is made to the appellant being able to apply for a replacement CSID from the Iraqi embassy.

23. There is no dispute that the FtTJ was required to consider as the starting point the previous decision of Judge Monaghan. At paragraph 18 the FtTJ gave his reasons for not departing from the previous findings relating to the appellant remaining in contact with his family members. However at paragraph 19 and as cited earlier in this decision, the FtTJ referred to the appellant's claim to have handed his CSID to the agent but found that this was not a claim made originally to the respondent nor that it featured in the decision of Judge Monaghan.

24. On the basis of the evidence now provided Mr Diwnycz on behalf of the respondent accepts that the FtTJ erred in law on this issue as set out at paragraph 19 and 27 of his decision. As can be seen from the earlier evidence provided by the appellant, he had stated in his initial interview that he had given his CSID to the agent whilst in Turkey. The respondent appeared to proceed on this factual basis as can be seen from paragraph 76 of the original decision letter and the stance taken by the respondent at that time which was that the appellant could apply for a replacement CSID from the Iraqi embassy.

25. The FtTJ referred to the decision of Judge Monaghan stating that the appellant's claim as made to him did not feature in her decision however a careful reading of Judge Monaghan's decision at paragraph 44 is that the appellant was not estranged from his family and that they would be able to assist him in re-documenting himself and his family members by sending him the details of the family book in Iraq. Thus Judge Monaghan considered that the appellant could redocument by the family sending him information rather than the family sending him his original CSID. Judge Monaghan's finding is in line with the decision letter and with the evidence given in interview that his CSID was taken in Turkey.

26. The current decision letter dated 20 October 2021 refers to the issue of documentation at paragraph 55 onwards. At paragraph 57 the respondent sets out that consideration has "therefore been given to whether you currently have a CSID or whether you would need to apply for a new one" and then cites the decision of Judge Monaghan at paragraph 43 (rather than paragraph 44) and later at paragraph 59 the respondent concludes that the appellant provided no information to indicate that he had not made attempts to locate his family and therefore steps could be taken by him to locate his family members in order for them to assist him in obtaining the necessary documents.

27. The current decision letter therefore makes no reference to the appellant's earlier evidence as to the location of the CSID or his claim made in his interview that it was taken from him.

28. The appellant's witness statement before the FtTJ sets out the position at paragraphs 22 onwards where he states that he has no documentation in the UK and that he lost contact with his brother. Paragraph 23 he refers to having no valid documentation and at paragraph 24 refers to the rollout of the INID.

29. Whilst Mr Schwenk referred to the skeleton arguments filed on behalf of the appellant neither of the 2 skeletons expressly state or make reference to the appellant's earlier account of the CSID being taken by the agent. It is therefore not surprising that in the absence of the previous evidence provided by the appellant in his earlier claim that the FtTJ formed the view that this was fresh evidence now being provided. The FtTJ had not been provided with the original evidence given by the appellant as to the location of his CSID by either party. I would however accept that it was reasonable for the appellant's solicitors to proceed on the basis that the factual issue concerning the CSID was not in dispute and that his case was now based on the changed procedure for redocumentation which included the new INID which required the biometric information being provided in person. Furthermore, as Mr Diwnycz submitted, this may not have arisen if a presenting officer had been present at the hearing who would have been able to obtain the relevant evidence from the respondent's file.

30. During those matters together, both parties agree that the FtTJ erred in law in his assessment of the issue of documentation. The current position in relation to redocumentation is confirmed by the Upper Tribunal in SMO & KSP (Civil status documentation; article 15) Iraq CG [2022] UKUT 00110 (IAC).

31. For the reasons set out above, I am satisfied that the FtTJ's analysis of the issue proceeded on a mistaken factual basis which both parties accept had the effect of undermining his assessment of the issue of return in the light of the documentation available to him. Ground 5 is therefore made out.

32. Turning to ground 1, this has some overlap with ground 4 as submitted by Mr Schwenk. It is submitted that the FtTJ failed to engage with the risk to the appellant as a perceived atheist and that the FtTJ focused on the appellant's political opinion/activities rather than undertaking an assessment of the appellant's religious beliefs and the risk to him as a perceived atheist or being anti-Islamic.

33. Mr Schwenk submitted that the FtTJ failed to deal with the detailed documents presented to the tribunal in his assessment of the issue at paragraph 25. In particular the respondent did not doubt that the appellant held anti-Islamic views. Mr Schwenk referred the tribunal to the skeleton argument dated 17/2/22 at paragraph 26 – 33. At paragraph 28 reference was made to the penal code. He submitted that at paragraph 25 of the FtTJ's decision the FtTJ referred to the monitoring of the Internet and social media sites and that there was some overlap as the appellant's claim was that he was openly critical of Islam online. However the only part of paragraph 25 that dealt with the issue of the appellant's religious

beliefs was that the appellant's views would not be considered as apostasy, nor would they be viewed as a threat to the "moral system" which was a social threat in the IKR".

34. Mr Schwenk submitted that the reasoning was inadequate in light of the evidence referred to in the skeleton argument (see the supplementary skeleton dated June 2022) that in relation to the appellant's social media activity, the issues that arose as to what would likely to be known to the authorities in Iraq and the consequences of such activities. He referred to the Supreme Judicial Council issuing a statement confirming the order to create a joint committee to monitor social media sites to ensure adherence to the penal code and the Iraqi constitution. In this context Mr Schwenk submitted that the earlier part of paragraph 25 referred to the appellant's political belief expressed in Facebook posts but did not consider the appellant's religious beliefs or if the FtTJ purported to do so he failed to deal with the arguments set out in the skeleton arguments.

35. In particular Mr Schwenk referred to paragraph 28 (original skeleton argument dated 17/2/22) and the other issues that are set out between paragraphs 29 – 31. He therefore submits that none of those arguments were considered in the FtTJ's decision as relevant to risk on return.

36. He further submitted that there was evidence as to how the penal code was enforced as set out in ground 4 paragraph (ii) by reference to page 451 of the bundle and the Gulf Centre for human rights report and also the United Nations assistance Mission for Iraq OHCHR; human rights and freedom of expression trial in IKR dated December 2021 and this undermined the FtTJ's assessment where he stated there was no evidence as to how the penal code is enforced.

37. Mr Schwenk submitted that there was a body of background evidence not considered which showed how it was implemented and punished those who expressed their views. He submitted that this linked to ground 4 and the assessment of risk.

38. By way of response Mr Diwnycz submitted that the FtTJ came to a sustainable decision on the appellant's atheism although he made no reference to the evidence on this issue.

39. Having considered the submissions made, I am satisfied that the FtTJ erred in law when undertaking his analysis of risk on return in relation to the appellant's religious views. The appellant's case before the FtTJ was set out in the recent witness statement that he had been openly expressing anti-Islamic views via social media and through demonstrations and that he would raise his children in a non-Islamic way. The appellant relied on his Facebook and social media posts in addition. Whilst there was an overlap in the evidence relating to the appellant's political views as expressed in his social media and his religious views, in the analysis undertaken, the FtTJ appears to consider the 2 issues as one rather than considering each separately and also there is confusion in the analysis as to whether the

FtTJ assessed risk in accordance with the evidence relating to his home area which is in the Iraqi government controlled area or the evidence relating to the IKR.

40. The confusion is apparent at paragraph 25 where the FtTJ considers the evidence relating to the monitoring of social media. His assessment was that the Facebook post would not be construed as "posing a threat to the public moral systems to achieve electoral gain." The judge also found that the views were "most" an expression of the appellant's opinion about political and religious matters that appear to be widely shared within the IKR. There was no assessment from the evidence relating to the Iraqi authorities as opposed to the IKR. It is correct however to state that the judge did not accept the appellant's views would be construed as apostasy as they did not attack the Islamic religion, although that was not consistent with the appellant's evidence.

41. It did not appear to be in dispute that the appellant held anti-Islamic views which it is expressed online via social media, and which were accessible to the public. The respondent's decision letter did accept that outside the KRI it would be unlikely that someone would be able to access a sufficiency of protection for their religious beliefs however within the KRI religious minorities may be able to access effective protection (see paragraph 25) although there remained issues of whether ill-treatment will be sufficient to constitute persecution (see paragraph 17 – 24 of the decision letter).

42. Therefore the FtTJ was required to engage with the evidence which concerned the appellant's religious views and as they would be viewed in his home area as well as his expression of political views separately. Apart from the brief reference to paragraph 25, the FtTJ did not assess the risk to the appellant based on his religious beliefs and on the basis advanced in the skeleton argument. Mr Schwenk referred to the skeleton argument at paragraph 28 which referred to the blasphemy laws and the penal code and how they were used. Paragraph 29 also referred to the risk to the appellant by openly criticising Islam on social media and reference is made to the evidence showing that in October 2021 the supreme judicial Council issued a statement for a judicial order to be issued to enable the monitoring of the social media sites which included media sites promoting atheism. At paragraph 30, the skeleton argument raised the issue of the appellant's expression of his religious beliefs and how they will be viewed by the Muslim population in his area (non-state agents) and referred to the position in Iraq (see paragraphs 31 and 32 of the skeleton argument). Those issues identified above were not considered in the assessment of risk undertaken by the FtTJ.

43. Furthermore as set out above the FtTJ erred in his consideration of risk by conflating the evidence. It is common ground that the appellant does not originate from the IKR as he is from a village within the Kirkuk governorate outside the IKR. The assessment of risk on return should therefore be considered in relation to the evidence relevant to the place of origin and the Iraqi authorities rather than the KRI as the first step in the assessment.

I accept the submission made by Mr Schwenk that the assessment of risk (both based on his political views and his religious views) was based on the position of evidence relevant to the IKR (see paragraphs 25 and 26).

44. In summary I accept the submissions made by Mr Schwenk that ground 1 when taken with ground 4 is made out and also for the reasons set out above both advocates agree the ground 5 on the issue of documentation is made out. In those circumstances it is not necessary to consider the other grounds; ground 3 was a general assertion of insufficient reasoning.

45. As the errors of law identified in grounds 1 and 4 are relevant to risk on return to the appellant's home area or in the alternative, based on internal relocation to the KRI, the errors undermine the Judge's overall assessment. As to ground 5, the FtTJ's assessment of redocumentation is also in error as it proceeded on a mistaken factual basis.

46. The Judge's decision is therefore set aside. As to how the decision should be re-made, Mr Schwenk submitted if errors of law were found on grounds other than ground 5, that the tribunal would be required to consider the appellant's factual claim afresh on all issues and that the correct forum would be by way of a remittal to the FtT. Mr Diwnycz did not disagree with that submission.

58. In light of the practice statement, I accept the submission made by Mr Schwenk and I am satisfied that the appeal falls within paragraph 7.2 (b) of the practice statement, as the errors relate to the factual assessment of risk and fresh findings on the evidence will be necessary and I therefore remit the appeal to the First-tier Tribunal for that hearing to take place. It will be for the tribunal to undertake a holistic assessment of risk in the light of the evidence as a whole. For the avoidance of doubt, none of the factual findings shall be preserved however the factual findings made by Judge Monaghan remain as the starting point applying the decision in Devaseelan.

Decision

The decision of the First.-tier Tribunal involved the making of an error on a point of law; the decision is set aside and shall be remitted to the FtT for a hearing.

Rule 14: 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. 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 Upper Tribunal Judge Reeds
Dated : 29 December 2022