Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02276/2020 (V)

THE IMMIGRATION ACTS

Heard by a remote hearing
On the 18 June 2021

Decision & Reasons Promulgated
On the 30 June 2021

Before

UPPER TRIBUNAL JUDGE REEDS

Between

KQS
(ANONYMITY DIRECTION MADE)

Appellant

AND

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Gulamhussein, Counsel instructed on behalf of the appellant
For the Respondent: Mr Diwnycz, Senior Presenting Officer

DECISION AND REASONS

Introduction:

1. The appellant, a citizen of Iraq, appeals with permission against the decision of the First-tier Tribunal who dismissed his protection and human rights appeal in a decision promulgated on the 2 November 2020.

2. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008 as the proceedings relate to the circumstances of a protection claim. 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.

3. The hearing took place on 18 June 2021, by means of *teams* which has been consented to and not objected to by the parties. A face-to-face hearing was not held because it was not practicable, and both parties agreed that all issues could be determined in a remote hearing. The advocates attended remotely via video as did the appellant so that he could listen and observe the hearing. There were no issues regarding sound, and no technical problems were encountered during the hearing and I am satisfied both advocates were able to make their respective cases by the chosen means.

Background:

4. The history of the appellant is set out in the decision of the FtTJ, the decision letter and the evidence contained in the bundle.

5. The appellant is a citizen of Iraq of Kurdish ethnicity and was born in Sulaymaniyah but went to live in Tuz Khurmatu and later claimed to have moved to Kirkuk.

6. The appellant's problems began in or about July 2018 when members of the PMF came to his garage to repair their car which was riddled with bullet holes. He told them that he could not begin the repair process until he got a police report as he needed police approval as set out in the law. Following this he reported them to the police (Asayesh) because the PMF by forcing him to fix the car meant he would have broken the law as garage owners have been informed by the authorities they must report vehicles with bullet holes if they do not have a police report.

7. Having gone to the police station he gave the men's description the make of the car and the registration plate.

8. Sometime later around 30 July 2018 four men from the PMF raided his house and told him not to underestimate them. They demanded keys to the garage. They threatened to kill his mother if he did not hand over the keys and that he should never have reported them. Out of fear he handed the keys to the garage. They tied the appellant and his mother. He fled to his cousin's house.

9. The appellant also had problems with the PUK because the PMF took one of the cars in the garage and the car belonged to a PUK high ranking member. The appellant claimed that he was in fear of the PUK because they wanted to kill him as they believed he drove the PUK vehicle and harassed locals with the car. The PUK came to his house looking for him and they assumed he drove the car

because it was kept in his garage and that only had access to it. The appellant claimed that his life is in danger if he was caught by the PMF or the PUK.

10. The appellant left Iraq on 23 July 2018 and travelled through a number of countries before arriving in the UK by lorry on 13 November 2018. The Home Office records show that he was fingerprinted in Italy on 2 August 2018.

11. The appellant claimed asylum on 14 November 2018.

12. In a decision letter dated 19 February 2019 the appellant's claim was dismissed. The respondent accepted that he was from Iraq and was of Kurdish ethnicity. From paragraphs [32 – 47], the respondent set out the appellant's claim and identified that the appellant's account was internally inconsistent concerning his claim relating to the PMF. At paragraphs [48]-[56] the respondent addressed his claimed fear of the PUK. At paragraphs [57]-[64] the respondent referred to the questions the appellant was asked about Kirkuk, a place he identified as having lived in. For the reasons set out, the respondent concluded that the appellant had not demonstrated that he was resident or had lived in Kirkuk. The respondent therefore rejected the factual claim advanced by the appellant.

13. As to the issue of return to Iraq, it was noted that he was born in Sulaymaniyah before moving to Tuz and as such he originated in the IKR. The respondent considered that he could contact the embassy to replace his CSID and the decision letter set out the decision of SMO and others. At paragraph [102] the respondent considered that it was not unreasonable to expect him to return to Erbil (or another location in Iraq). When considering article 15 (c) the respondent concluded that his personal circumstances did not amount to a breach based on the situation in Tuz or Sulaymaniyah. His claim was therefore refused.

14. The appellant appealed that decision came before the FtTJ on 10 September 2020.

15. In a decision promulgated on the 2 November 2020 the FtTJ dismissed his appeal. At paragraphs [38]-[45] the FtTJ set out his analysis of the evidence and his findings of fact concerning events in Iraq relating to his fear of the PMF and the PUK. The basis of the appellant's claim was that he feared reprisals from those identified groups.

16. Having considered his claim, the FtTJ set out a number of inconsistencies in his evidence. In summary the FtTJ rejected his account to be at risk of harm from either named group.

17. The FtTJ then turned to the issue of return to Iraq. The FtTJ set out the CG decision of *SMO and others (article 15 (c) identity documents) Iraq* CG [2019] UKUT 00400 (hereinafter referred to as "SMO").

18. The FtTJ consider the issue of documentation at [46 – 48]. The judge considered his claim that he did not know the volume and page number of the family book but concluded that he had run his own business for at least a year and had been educated and was familiar with administrative procedures. The level of education and knowledge was in contrast to his claimed ignorance of details of any CSID card or family book. The judge considered this in line with paragraph 13 of SMO that "given the importance that information, most Iraqi citizens will recall it." Thus the judge did not accept that he did not know the details of his CSI D card to be re-documented.

19. In conclusion, the judge considered as he was a Kurdish Sorani speaker and may emanate from the IKR, but he would be able to re-document himself. The judge therefore dismissed his appeal.

20. Permission to appeal was sought on 3 grounds and permission was refused by the FTT but granted by the Upper Tribunal on 1 March 2021.

The hearing before the Upper Tribunal:

21. In the light of the COVID-19 pandemic the Upper Tribunal issued directions on the 12 June 2020, inter alia, indicating that it was provisionally of the view that the error of law issue could be determined without a face-to-face hearing and directions were given for a remote hearing.

22. Both parties have indicated that they were content for the hearing to proceed by this method. Therefore, the Tribunal listed the hearing to enable oral submissions to be given by each of the parties. I am grateful for their assistance and their clear oral submissions.

23. Mr Gulamhussein appeared on behalf of the appellant and relied upon the written grounds of appeal and a skeleton argument that he had filed on the morning of the hearing.

24. There was no rule 24 response on behalf of the respondent. Both advocates provided oral submissions to which I have had regard when reaching my decision.

25. At the conclusion of the submissions, I reserved my decision which I now give. I intend to consider the submissions of the parties by reference to each of the grounds.

Decision on error of law:

26. By way of a preliminary matter, it was necessary to consider the issue of the grounds of challenge. On the morning of the hearing Mr Gulamhussein filed a skeleton argument on the tribunal and upon the respondent. In that skeleton argument he sought to rely on a number of matters including new policy guidance issued by the respondent and submissions based on the failure of the

judge to consider the evidence in determining where the appellant was from and submissions relating to the area of Tuz Khurmatu. Issues of documentation was set out at paragraph 25.

27. No application had been made prior to the hearing for any amendment of the grounds or any notice that this was being sought.

28. The original grounds of challenge before the FtT were based on 3 matters. Firstly, it was asserted that there were irrational findings relating to the judge's assessment of the evidence relating to the PMF/PMU. Secondly, they related to paragraph 40 – 42 of the FtTJ's assessment relating to the analysis of the affiliation of the PMF with the Iraqi government and the 3rd ground referring to a mistake of fact relying on paragraph 43 of the decision relevant to material in the screening interview.

29. The original grounds raise no challenge relating to the issue of Article 15 (c) or raising any issue that the judge had failed to deal with that or by reference to the appellant's home area. Nor were there any ground issues relating to the FtTJ's assessment of the issue related to documentation.

30. Mr Gulamhussein referred to the grant of permission of the Upper Tribunal. That grant of permission states: "the appellant relies on the grounds before the FTT. I do not have a copy of these but from the refusal to grant permission I can see that the issue of documentation was raised."

31. In relation to the grounds relating to the PMU (which are set out in grounds 1 to 3) the UTJ granted permission and further stated "without sight of the original grounds, the grant is limited to the above 2 grounds".

32. The UTJ also made directions which included the appellant to file and serve a copy of the grounds of appeal and stated "if the appellant seeks to rely on any other ground which is properly raised in the grounds before Judge Parks that should be raised in written submissions and/or at the error of law hearing. Reference is made to the judge determining the error of law will consider whether permission be granted, or any other ground pursued by the appellant and that the secretary of state must be prepared to engage with all grounds.

33. The UT's grant of permission does not follow the guidance given in SYR (PTA: electronic materials (Iraq)) [2021] UKUT 00064 where the presidential panel held that it is particularly important for the judge engaging in the permission to appeal process at whatever level to satisfy themselves they have the requisite material before them in order to make a proper decision on permission.

34. In this case UTJ did not have the grounds of challenge. If they had been made available it would have been noted that there had been no ground of challenge raised on the issue of documentation. The refusal of permission by the FtTJ did refer to the issue of documentation and it is unclear to me why the judge did so when the grounds made no reference to it.

35. Mr Gulamhussein accepted that the other issues set out in the skeleton argument had not been relied on in the grounds of challenge. It is important that advocates approach the issues of appeal to the Upper Tribunal by reference the grounds upon which permission was sought. It is not sufficient to file a skeleton argument setting out other grounds for which permission had neither been sought or granted and if the grounds are to be enlarged, there should be an application made on notice to the other party.

36. However, as set out above the issue of the ambit of the appeal was more problematic because of the terms of the refusal of permission by the FtTJ which raised issues not in the grounds and the UT's grant of permission relying upon that refusal in the absence of the grounds of challenge.

37. Furthermore the directions stated that if the appellant sought to rely on any other grounds which had been properly raised before Judge Parks it should be raised in written submissions or at the hearing and in determining the error of law the judge will consider whether permission should be granted on any other ground pursued by the appellant. As can be seen from the directions, the reference to the grounds only related to the issues that had been raised before Judge Parks and not any new grounds. The contents of the skeleton argument were drafted to include both new and the original grounds but I accept that the directions given were unclear.

38. On the issue of documentation I was prepared to accept that the UTJ had granted permission on this issue and that it could be said to be a "Robinson obvious point". Mr Diwnycz on behalf of the respondent also made reference to paragraph 47 of the FtTJ's decision and the reference made to paragraph 13 of SMO relating to the issue of the family book. He submitted that this was an issue that had been set aside by the Court of Appeal and one which the Upper Tribunal was to reconsider. Any finding relying upon this issue would be an error of law.

39. Mr Gulamhussein submitted that the issue of the appellant's home area was similarly "Robinson obvious" however if it were so obvious a point, this raises the issue as to why it had not been set out in the original grounds.

40. Be that as it may, in the light of the submissions that I have heard relating to the grounds of which permission was granted (grounds 1 and 3) it is not necessary for me to set reach any finding on the grounds which were not originally raised or pleaded. In respect of grounds 1 to 3, Mr Diwnycz on behalf of the respondent accepted the ground 1 was made out and acknowledged that the submission made on behalf of the appellant had been reflected in the respondent's CPIN and also addressed in the decision of SMO. On ground 2 he stated that he was neutral and as to ground 3 he accepted that that was also made out in relation to the PUK.

41. Given the acceptance of the grounds which form the central plank of the credibility assessment of the FtTJ, I shall set out briefly why I agree with that concession and why there is an error of law.

42. The basis of the appellant's claim related to the events in July 2018 when the PMF came to the garage to repair their car. I have set out earlier the factual account given which included the appellant reporting the PMF to the Asayesh (police) because the PMF said they would force them to fix the car which meant he would have broken the law as garage owners had been informed by the authorities that they must report vehicles with bullet holes if there was no police report. His account also referred to members of PMF later raiding his home. Arising from this the appellant also had problems with the PUK.

43. The FtTJ set out his findings at paragraph 39 – 44. At [39] the judge found the appellant's account to not be credible because the PMF are closely affiliated to the Iraqi government and thus would not encounter any difficulties in obtaining the permission for the car to be repaired. The judge made the finding on the basis that the appellant had stated that the PMF were unable to obtain the proper paperwork (at [41]). However as the grounds that out, the appellant had not stated that the PMF would not encounter any problems with obtaining the paperwork to report the car, or that the appellant had said they had not obtained it. Therefore the judge did not take into account the appellant's evidence on this issue.

44. Furthermore the FtTJ's credibility findings were based on the assumption that the PMF were closely affiliated with the Iraqi government. The skeleton argument on this issue at paragraph 13 – 16 is not easy to follow but the evidence set out both in SMO and in the respondent's CPIN: actors of protection set out the background and constitution of the PMU/PMF. In SMO the tribunal heard evidence concerning the existence of the PMF. They are described that the most powerful of the militia who have ties to Iran and whilst technically under Baghdad control since 2016, they answer to their Iranian sponsors and therefore not all militias are answerable to the Iraqi authorities. At paragraphs 146 and 147 of SMO Dr Fatah provided general observations concerning Iraq and at [146] referred to the significant corruption in the government, Peshmerga and the PMF and that there was "significant international interference, particularly in relation to the Iranian influence over the PMF which did not fall under the Iraqi Ministry of interior and had no code of conduct. It was to be recalled that the PMF had been created after Ayatollah Sistani in Iran called for in a 2014 fatwa for sheer Muslims to mobilise against ISIL."

45. Dr Fatah also gave evidence that the PMU and other actors do not provide security for the people and their roles are not defined. There was no operational police force and now, if you knew an influential person, you could get away with murder. He pointed out that there was no one to stop ISIL or the abuse of power by the PMU and reminded us that the PMU were not under the

control of an elected body. That evidence appeared to be given in relation to the area of Mosul, but it demonstrates that it is necessary to consider the area in which the PMU is said to operate to consider its allegiances and its conduct. At paragraph 89 of SMO, Dr Fatah gave evidence about Salah al Din and that "the PMU was not like the police; they are not educated and are hard-line, sectarian people who had responded to a fatwa. Iran relied on them and had trained them. They had narrow political and religious views. They had not forgiven the Sunnis and they did not like the Kurds".

46. Mr Diwnycz accepted that the CPIN also gives details of the PMU which operated with an "autonomous agenda and extra-legal authority" which also undermines the basis of the credibility assessment.

47. At paragraph 40 the judge found against the appellant based on his answer to question 98 in his interview where he stated that the PMF were not supported by the government and he did not know and was not sure. The judge found that the appellant would be expected to know of their affiliation with the Iraqi government if he lived in Kirkuk or the government-controlled area in Iraq. However as the country material set out both in the CPIN and in SMO, they make it clear that the issue is not as straightforward and that some PMF are supported by the Iraqi government, but others are not in that they have their own agenda and act outside of the authority of the Iraqi government.

48. Thus the assessment of the appellant's account in the context of the evidence concerning the PMU was central to his account and given the differences set out in the country material which were not taken into account, it is accepted, and I find it to be the case that the assessment did not take that into account when reaching a decision on the issue of credibility.

49. There are other matters set out in the grounds relating to the FtTJ's consideration of the failure to mention the PUK in his screening interview. Whilst the appellant did not mention the risk in his screening interview at paragraph 4.1 and referred being threatened by ISIS or PMF, that had to be seen in the context of his interview where he referred to the basis of his claim as being in fear of PMF but could have been from ISIS. As the core of his claim was based on the fear of the PMF, the failure to mention the PUK in the screening interview does not by itself undermine the account.

50. There were other findings made that were adverse to the appellant's account but given the centrality of the findings concerning the PMF to the appellant's case, I am satisfied that it is been demonstrated that the findings are unsafe.

51. As to the issue of documentation, in the light of the decision of the Court of Appeal which was specific to paragraph 13 of SMO which the judge relied upon at [47], it is also accepted that this constituted an error of law. There can be no criticism of the FtTJ in this respect, but it remains the position that the issue of

knowledge of details of the family book remains one which is to be considered afresh by the Upper Tribunal.

52. This leads me to the ground for which permission was not granted and was not set out in the original grounds of challenge. As I have already reached the conclusion that the decision of the FtTJ involved the making of an error on a point of law it is not strictly necessary to deal with this ground. However it will be relevant to any rehearing.

53. The appellant stated that whilst he was born in Sulaymaniyah he lived in Tuz Khurmatu which is in the Salah al-Din governorate lying directly to the north-west of Baghdad.

54. It is submitted that the FtTJ made no assessment of the appellant's claim in this regard and appeared to address the issue of return on the basis that he maybe from the IKR. It is right that no finding was made as to what the appellant's home area was and at best the FtTJ considered that he may emanate from the IKR given his failure to be able to answer questions about Kirkuk (at [50]). The respondent and the decision letter accepted he was of Kurdish ethnicity but did not accept that he had ever lived in Kirkuk (at paragraphs [57 – 64]. However the decision letter did record the appellant's account that he was born in Sulaymaniyah but that he lived in Tuz and considered whether the appellant will be at risk of article 15 C treatment based on the situation in Tuz (at paragraph 118). In his interview at question 17 he set out that the family had moved to Tuz when he was a baby and lived there until 2017 before moving to Kirkuk. The FtTJ therefore did not consider the issue of return and the documents that would be required in the context of the appellant's former place of residence. It is unclear whether the judge considered him to be from the IKR and if so on what basis.

55. Those were relevant issues set out in the decision letter and did not appear to be the subject of any analysis in the conclusions reached.

56. Consequently, I am satisfied that as this was a protection claim and thus the requirement of anxious scrutiny applied, the findings of fact are unsafe and therefore cannot stand.

57. For those reasons, I am satisfied that it has been demonstrated that the decision of the FtTJ did involve the making of an error on a point of law and that the decision should be set aside.

58. I have therefore considered whether it should be remade in the Upper Tribunal or remitted to the FtT for a further hearing. In reaching that decision I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-
> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the 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."

59. Both advocates agree that the venue for hearing the appeal should be the FtT. I have carefully considered the submissions of the advocates and have done so in the light of the practice statement recited. It will be necessary for the appellant to give evidence and to deal with the evidential issues, and therefore further fact-finding will be necessary alongside the analysis of risk on return in the light of the relevant country evidence, and in my judgement the best course and consistent with the overriding objective is for it to be remitted to the FTT for a hearing. As to the revision of SMO by the Upper Tribunal it will before the FTT to decide when to list the hearing after considering any relevant submissions from the parties.

Notice of Decision

The decision of the First-tier Tribunal did involve the making of an error on a point of law and therefore the decision is set aside and remitted to the FtT for a 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. 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 22 June 2021