IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber)Appeal Number: PA/12121/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 April 2021	**On 28 May 2021**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

KMM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K McCarthy, Counsel instructed by Quality Solicitors A-Z Law
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

The Appellant is a citizen of Iraq. His date of birth is 1 January 1985. Upper Tribunal Judge Coker made an order anonymising the Appellant on 11 June 2020. This is to continue.

The Appellant arrived in the UK on 18 October 2017. He made a claim for asylum on 19 October 2017. This was refused on 27 April 2018. The Appellant appealed against the decision. His appeal was dismissed by First-tier Tribunal Judge Walker ("the first judge") on 3 August 2018. The Appellant made further submissions on 26 September 2019. On 20 November 2019 the Secretary of Sate refused the Appellant's claim on protection grounds. The First-tier

Tribunal (Judge Oliver) dismissed the appeal against the decision of the Secretary of State. In a decision of 11 June 2020 Upper Tribunal Judge Coker set aside the decision of First-tier Tribunal Judge Oliver, the Respondent having conceded that the judge had materially erred.

Judge Coker's error of law decision reads as follows:

> "2. The Respondent acknowledged in her Rule 24 response that the First-tier Tribunal Judge had erred in law in his decision such that the decision should be set aside on all grounds pleaded and in particular that the judge had failed to have regard to country guidance in reaching his decision. The Appellant relied upon grounds pleaded and documents before the FtT. Neither party sought an oral determination of the error of law issue. The Appellant sought the quashing of the FtT decision and that the appeal be allowed or alternatively that the appeal be remitted to be heard before a different judge. The Respondent expressed no view as to the future conduct of the appeal."

Judge Coker set aside the decision of the First-tier Tribunal. She said that having considered the grounds of appeal pleaded, the resumed hearing could take place in the Upper Tribunal. She said, "limited, if any, oral evidence is required …". She made directions.

Case law

SMO, KSP & IM (Article 15(c); identity documents) Iraq CG: [2019] UKUT 00400

The headnote confirms the enhanced risk of harm to those critical of the Kurdish government;

> "5. The impact of any of the personal characteristics listed immediately below must be carefully assessed against the situation in the area to which return is contemplated, with particular reference to the extent of ongoing ISIL activity and the behaviour of the security actors in control of that area. Within the framework of such an analysis, the other personal characteristics which are capable of being relevant, individually and cumulatively, to the sliding scale analysis required by Article 15(c) are as follows:
>
> Opposition to or criticism of the GOI, the KRG or local security actors;
>
> Membership of a national, ethnic or religious group which is either in the minority in the area in question, or not in de facto control of that area;
>
> LGBTI individuals, those not conforming to Islamic mores and wealthy or Westernised individuals;

Humanitarian or medical staff and those associated with Western organisations or security forces;

Women and children without genuine family support; and

Individuals with disabilities."

Paragraph 299 of SMO states as follows:

"299. Those who are opposed, or perceived to be opposed, to the government of Iraq or the Kurdistan Regional Government may be at enhanced risk on return to territory controlled by those bodies. A detailed analysis is beyond the scope of this decision but there are credible reports, for example of journalists who are critical of the KRG encountering difficulties as a result.

There is also evidence of such intolerance on the part of the authorities in Baghdad, albeit to a lesser extent. As noted in Mr Thomann's cross-examination of Dr Fatah, the examples he gave in his report of such targeting were limited and outdated but it was not suggested by Mr Thomann that criticism of the authorities is wholly tolerated. The background evidence including the recent EASO report would not have supported such a submission. The fact that an individual is so opposed might serve to enhance the risk of specific targeting which is relevant to the assessment under Article 15(c), even where that risk is insufficient to found a claim under the Refuge Convention."

Paragraph 302 states as follows:-

"302. Journalists who engage in critical reporting on political or other sensitive issues. As we have already stated any decision maker should first consider whether such an individual is deserving of protection under the Refugee Convention on grounds of actual or imputed political opinion or, conceivably, membership of a particular social group. Where they are not, it is possible that such an individual will be at enhanced risk for the purposes of Article 15(c). There is an appreciable overlap between this category of those who are opposed to the GOI or the KRG and those who fail to adhere to Islamic mores. As the UNHCR document makes clear, however, journalists and other media professionals might find themselves at risk or enhanced risk on account of criticism of a range of actors, including tribal leaders or the PMUs. As with the other categories, a full appreciation of the area in question is necessary if such a submission is to be assessed in its proper context."

Devaseelan v SSHD [2002] UKIAT 702.

The Tribunal in Devaseelan gave guidance that can be summarised as follows:

The first Adjudicator's determination should always be the starting-point. It is the authoritative assessment of the Appellant's status at the time

it was made. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.

Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator.

Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator.

Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with greatest circumspection.

Evidence of other facts, for example country, evidence may not suffer from the same concerns as to credibility, but should be treated with caution.

If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be relitigated.

The force of the reasoning underlying guidelines 4 and 6 is greatly reduced if there is some good reason why the Appellant's failure to adduce relevant evidence before the first Adjudicator should not be, as it were, held against him. Such reasons will be rare.

The foregoing does not cover every possibility. By covering the major categories into which second appeals fall, the guidance is intended to indicate the principles for dealing with such appeals. It will be for the second Adjudicator to decide which of them is or are appropriate in any given case.

BK (Afghanistan) [2019] EWCA Civ 1358

The guidance has recently been considered by the Court of Appeal in BK (Afghanistan) [2019] EWCA Civ 1358 where Rose LJ stated as follows:

> "34. The guidance was referred to with approval by the Court of Appeal in *Djebbar v SSHD* [2004] EWCA Civ 804, [2004] Imm AR 497 on the basis that it had not created any difficulty for or inconsistency among special adjudicators. Judge LJ, giving the judgment of the Court, said that the specialist Tribunal was entitled to provide guidance to the entire body of specialist adjudicators about how they should deal with the fact of an earlier unsuccessful application when deciding a later one. The extent of the relevance of the earlier decision and the proper

approach to it should be addressed as a matter of principle. He went on:

> ‘29. … Such guidance was essential to ensure consistency of approach among special adjudicators. The guidelines remedied an immediate and pressing difficulty, with direct application to, but not exclusively concerned with, the many cases in which, after unsuccessfully exhausting all the possible legal channels, asylum seekers remained in the United Kingdom and put forward a case on human rights grounds after October 2000.’

35. He then said this about the application of the guidelines:

> ‘30. Perhaps 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.’

36. Having set out the guidance and considered the criticisms made of it by the claimant in that case, Judge LJ said:

> ‘40. … The great value of the guidance is that it invests the decision-making process in each individual fresh application with the necessary degree of sensible flexibility and desirable consistency of approach, without imposing any unacceptable restrictions on the second adjudicator’s ability to make the findings which he conscientiously believes to be right. It therefore admirably fulfils its intended purpose.’

37. The importance of not allowing the guidance to place unacceptable restrictions on the second adjudicator's ability to determine the appeal in front of him has been emphasised in subsequent cases. In *Mubu and others* [2012] UKUT 00398 (IAC) a tribunal judge, Judge Tipping, had made a finding that copy birth certificates provided by the Mubu family were genuine and showed that Mr Mubu was the grandson of a British citizen, Mr Ernest Alletson. When Mr Mubu later applied for indefinite leave to remain for himself and his family, the SSHD rejected the application on the grounds that the certificates were not authentic. The FTT allowed the appeal on the grounds that Judge Tipping's conclusion on the issue of the relationship between Mr Mubu and Ernest Alletson was determinative of the issue. The Upper Tribunal held that that was an error of law. They confirmed that the principle of res judicata was not applicable in immigration appeals. After setting out the *Devaseelan* guidance, the Tribunal concluded that there was no logical basis for holding that the guidance applied differently depending on whether the previous decision was in favour of or against the SSHD. However they held that the FTT judge had erred because Judge Tipping’s

decision had not been determinative of the issue before him; according to the *Devaseelan* guidance it should have been treated as the starting point. They went on to remake the decision. They examined in detail what had happened before Judge Tipping, the further evidence adduced by the SSHD before them, whether that evidence pre-dated the previous tribunal hearing and why that evidence had not been available previously. The Tribunal concluded:

> '66. We are well aware that, in the field of public law, finality of litigation is subject always to the discretion of the Court if wider interests of justice so require. We bear in mind, however, that the nature of the issue now in dispute between the parties was the same issue that was determinative of the appeal before Judge Tipping. We also bear in mind the failure of the Secretary of State to produce all of the relevant evidence to Judge Tipping that ought to have been, or could have been with reasonable diligence, made available to him. In the light of these considerations we conclude that the determination of Judge Tipping should be treated as settling the issue of the relationship between the first claimant and Mr Ernest Alletson'.

38. The ability of a tribunal to depart, after careful examination, from a previous conclusion on the facts does not always operate in favour of the appellant. For example in *Ocampo v SSHD* [2006] EWCA Civ 1276, [2007] Imm AR 1 the Court of Appeal upheld a decision by the tribunal rejecting the asylum claim of the claimant. This was despite the fact that before a different tribunal, his daughter had been granted asylum on the basis of her father's flight from Colombia. The further evidence which the tribunal hearing the father's appeal had considered would not have met the *Ladd v Marshall* criteria because it could have been put before the adjudicator in the daughter's appeal. The Court held however that it was right that the tribunal as a matter of common sense and fairness took the evidence into account. Auld LJ (with whom Rix and Hooper LJJ agreed) stressed at paragraph 26 that the daughter's status as a refugee was not affected by any finding in reliance on new and cogent evidence that the father had lied in supporting her successful appeal against refusal of asylum. The flexibility for the tribunal to take a fresh decision allowed proper regard to be given to the public interest giving effect to a consistent and fair immigration policy – the matter should be judged, Auld LJ said, 'as one of fairness and maintenance of proper immigration control'.

39. There has been some discussion in the cases about the juridical basis for the *Devaseelan* guidelines. The authorities are clear that the guidelines are not based on any application of the principle of res judicata or issue estoppel. The Court of Appeal in

Djebbar referred to the need for consistency of approach. The Court of Appeal in *AA (Somalia) v SSHD* [2007] EWCA Civ 1040 also referred to consistency as a principle of public law and the well-established principle of administrative law that persons should be treated uniformly unless there is some valid reason to treat them differently."

The Decision of the first judge

The decision of the first judge (AB page 279) is relied upon by the Secretary of State. The first judge heard evidence from the Appellant and submissions from both representatives. He made findings at paragraphs 41 to 61 of the decision. The salient parts of that decision are as follows:

"42. The basis of the Appellant's claim is not related to his membership of the Goran party. In his screening interview (question 4) he clearly stated that he considered that his life was in danger because of his job as a security officer and that there was a group of people threatening his life but he did not know who they are. This was also confirmed in his substantive interview when, in answer to questions 95 to 97 he said that he had been threatened because he tried to stop smuggling and the owners of the goods were behind those threats. He mentioned no threats arising from his membership of the Goran party.

43. Similary, no threat arises to the Appellant by virtue of the claimed investigation by his employers. In his interview he accepted that he was not mistreated by them, he continued to work after his detention was over and in the submissions on his behalf it was accepted that he was the subject of a legitimate investigation into possible corruption.

44. On his account the Appellant's work as a security officer was for the regional government, the Asayish. Whether or not he was, prior to this, a member of the Peshmerga is of no relevance to his claim one way or the other. I therefore am prepared to accept that the Appellant was indeed a member of the Peshmerga as he described as it makes no difference whether he was or not. In fact, the Appellant has provided ample documentary evidence which satisfies me that he was a member of the Peshmerga (pages 9 to 24).

45. The Appellant has a CSID card, as he confirmed this in answer to question 27 in his substantive interview. His parents live in Qaladza and he has distant relatives of his father in Erbil with whom he lived for at least two months after he left Qaladza before leaving the country.

46. Although the Appellant's account about what his daily work routine involved was at best sketchy, I am prepared to accept that he was employed by the Asayish. He has provided his identity card from his employment (pages 25 to 27).

47. Despite accepting those parts of the Appellant's claim, I find the core of his claim fundamentally lacking in credibility. I do not accept that he was threatened in the way he claims or that there was an attempt to kidnap him, and I do not accept that he has any genuine subjective basis for fearing return to Iraq. I find his account inherently incredible. The weaknesses in his account are as follows.

48. I bear in mind that the Appellant was of relatively low rank in the security forces. His oral evidence, which I accept, was that he was one rank lower than an officer. In describing what he would do when combatting smugglers, he made it clear that his role was simply to bring goods, which were seized, together with any captives, back to his base, to write a report and then to forward everything to his superiors. He did not have a senior role.

49. Firstly, the Appellant alleges that members of the security forces were in league with the smugglers and that as a result the smugglers were able to target him. When asked to explain why he suspected senior members of the security forces were involved with the smugglers the Appellant said that he had been advised to accept bribes to keep quiet when goods were coming through (question 116). He was effectively asked four times to say who it was who had advised him to accept bribes (questions 117 to 120) but he gave no satisfactory answer. I would have expected the Appellant to have named or at least identified the rank or title of the senior officers who had advised him to accept bribes if that had indeed happened. I accept that the Appellant, in answer to question 121, stated that his colleagues and family had advised him to co-operate. However, if he was simply advised by those of a similar rank to him to accept bribes this would not be an indication that senior officers were involved in corrupt dealings with smugglers.

50. The Appellant's assertion that senior officers at his station may have been involved with the smugglers is also inconsistent with his claim that his superiors at the station detained him for a month because they suspected him of such involvement. It was made clear to me in submissions that his claimed detention, which in his oral evidence he said was directed by the head of his station, was not as a result of corruption but a genuine investigation into perceived wrong doing. The Appellant was, he said, suspected of involvement because he did not arrest anybody. If that were the case, it would be highly unlikely that those who detained him and who were conducting the investigation were in league with the smugglers. Therefore, if the Appellant were indeed receiving threats from the smugglers and/or other officers who were corrupt, I would have expected him to have informed those conducting the investigation and for his claims to be taken seriously by them and investigated.

51. However, the Appellant's account was that when the threats continued he told his superiors but they did not take him seriously, that when the threats continued he suspected the security forces were involved and that when he told them they did not listen to him (questions 150 to 152). In effect, the Appellant is saying that he suspected the same senior officers who took the step of detaining him for a month as part of what he accepts was a genuine investigation into corruption of themselves being corrupt and involved in making threats against him. Similarly, it makes no sense that those who were conducting a genuine investigation would, as the Appellant alleges, threaten to fabricate a case against the Appellant if he went to court to report a threat to his own life (question 157).

52. The problem with the Appellant's claim is that it is inherently unlikely. There are two possibilities. The first is that the smugglers were operating alone without support from members of the security forces. If that were the case, the Appellant cannot explain how it was that the smugglers were able to identify him, obtain his personal telephone number and start threatening him. On his own account in his oral evidence the conditions were such on the mountain that he could not see what the smugglers looked like – he described them as like shadows – and it is likely that he and the men with him would have appeared similarly indistinctly, especially as the Appellant said that initially they were hiding until they shouted at the smugglers.

53. The other possibility is that the smugglers had the co-operation of one or more members of the security forces. If that were the case, the smugglers would also be aware of the way in which the forces operate. The Appellant explained that the goods which were seized were handed over immediately to his superiors and taken for testing (question 107). This would be something the smugglers would know if they had officers co-operating with them. That being the case, it makes no sense for the smugglers, some 2 months later, to telephone the Appellant and, as he claims, demand the return of the goods or payment of their value (question 99). The smugglers would know that the Appellant did not have the goods and that he certainly would not be able to pay the $1m which he claims the goods were worth. They would also know that he was not senior enough to get the goods back from his superior officers.

54. If the smugglers' contacts were senior officers, as the Appellant suggests he suspected, then the simple thing to do would be to involve those officers, who would be able to take steps themselves to seek to achieve what the smugglers wanted. It would not be necessary to call the Appellant to demand the return of goods which they would know he could not achieve.

55. If, on the other hand, the corrupt officers were only of junior rank then I would have expected the senior officers, who on the Appellant's own account, were keen to investigate possible corruption at the station, to have taken further steps to investigate. It would be obvious to an investigating officer that if the Appellant were being threatened in the way he claimed that some information must have been obtained from the station as this is the only way the smugglers could have identified the Appellant. That being the case, I would have expected the senior officers to have taken steps to seek to identify the source of the information and to take steps to find the source of the threatening calls.

56. I also do not find it credible that senior officers who were not corrupt would simply ignore blatant threats to kill an officer under their command in the way claimed by the Appellant.

57. I find the Appellant's entire account lacking in credibility. A final example of this is provided by his evidence about the goods which were seized. In his interview he said that there were 12 containers of liquid each containing 20 litres (question 107). He also said that he had been told that the goods were worth $1m (page 198). This would make the liquid worth $4,167 per litre. In his witness statement (para 8 at page 5) drafted a week before the hearing he stated that one of the horses had got burned by the toxic chemicals it was carrying but he said nothing more about what the chemicals were. However, when I asked him in the hearing what the liquid was he said that he had heard that it was used for the manufacture of atomic weapons and it was being taken to Iran. This is a very striking statement and I find it incredible that he would not have mentioned this earlier if this were indeed the case."

The judge said it was feasible for the Appellant to return to the IKR. He found that he has a CSID and would be able to access necessary services. The Appellant's appeal was dismissed on all grounds.

The Evidence

The Appellant relied on a supplementary bundle (ASB) served pursuant to Rule 15(2A) of the 2008 Procedure Rules. Mr Tufan did not object to the admission of ASB. I granted the application.

Ms McCarthy relied on her skeleton argument of 25 August 2020. In addition, in compliance with Judge Coker's directions, the parties had prepared an agreed statement of facts. However, at the start of the hearing I queried paragraph 9 of the statement, which identified that the parties contested the Appellant's account of being a Peshmerga. However, in light of the first judge's finding that he was a member of the Peshmerga, the parties agreed before me that this was not in issue.

The Appellant's Evidence

The Appellant's evidence is contained in four witness statements of 7 June 2018 (AB pages 83 – 87) (this witness statement was before the first judge), 25 March 2019 (AB pages 79 – 82), 8 January 2020 (AB 67 – 78) and 19 April 2021 (ASB pages 1 – 3). The Appellant gave oral evidence at the hearing through a Kurdish (Sorani) interpreter, Bayan Karimi (58432326). The Appellant adopted his witness statements as his evidence-in-chief. He also adopted what he said in his asylum interview (save in answer to question 27).

The Appellant's evidence is that he is from Qaladze in the Kurdish region of Iraq. He is of Kurdish ethnicity and a Sunni Muslim. He has family in Iraq but he is not in contact with them. He attended school in Qaladze until grade 12.

In 2005 he joined the Peshmerga security forces working for the Patriotic Union of Kurdistan (PUK). Once he had completed training, he worked as a driver for the Peshmerga until 2009. He was based in Jalawla. The Appellant became disenchanted by the PUK and the Kurdish Democratic Party (KDP). In 2009 the PUK split and the Gorran Movement for Change Party ("Gorran") was created. The Appellant became interest in the party. A Presidential candidate for the party, Dr Kamal Mirawdeli, is from the Appellant's tribe. The Appellant started to tell other Peshmergas about Dr Mirawdeli. The PUK had regular meetings with the Peshmerga telling them that they could not vote for Gorran. The Appellant volunteered to be Dr Mirawdeli's security guard and driver on his campaign tours. He did this six or seven times.

The Appellant was dismissed from the Peshmerga for encouraging people to vote for Gorran. His ID card was taken. Following the election in 2009 when the PUK and KDP unfairly won, and Dr Mirawdeli lost (but Gorran gained 25 seats in Parliament), the Appellant lost his job because of his interest in the party. About 10,000 people lost their jobs because they voted for Gorran. Whilst he was unemployed he helped his father at home and assisted Gorran, for example helping open new office branches in the area. In 2010 there was an agreement between the parties that those sacked for voting for Gorran should be reinstated. The Appellant agreed to return to the Peshmerga because he felt safe following the agreement. He had been in the Peshmerga since 2005. It was very hard to find another job.

The Appellant took a computer course and he worked as an administrator for the Peshmerga in Dolabafra on the Qaladze border. He feels that during this time he was treated unfairly and this was as a result of his support for Gorran. He was not allowed time off if he was unwell or if he had family problems. He was also moved around to work in different locations without explanation.

In 2014 the Appellant joined the Asayish (the Kurdish security organization and the primary intelligence agency operating in the Kurdistan region in Iraq). He worked as a border patrol officer in a border town with Iran. It is an area which is mountainous and smuggling is commonplace. Whenever goods were seized they were taken back to the office and a report prepared to the senior high-ranking officers, of which there were five at the Appellant's work base. In 2015 the Appellant was promoted to assistant manager. He had four to six people in his team.

In 2016 the Appellant's father told him that he had been approached by people who had asked the Appellant to take bribes. His father told the Appellant that he should cooperate. His father said everyone is doing it and nothing will change if he refuses. He urged the Appellant to accept the bribes in order to avoid trouble. However, the Appellant did not want to accept bribes and refused to do so.

In February 2017 the Appellant came across two smugglers with three horses. The men fled and one of the horses fell down the mountain. The two remaining horses were apprehended. They were carrying four containers each carrying twenty litres of liquid with a very strong smell. They were seized. A few days later they were asked to go and find the third horse. It was found dead. It looked like it had been burnt. They found smashed remains of the containers. It was speculated that the liquid could have been intended for the manufacture of nuclear weapons in Iran.

Having heard nothing more about the incident, in April 2017, the Appellant received a threatening phone call from a man who addressed him using his nickname. He threatened the Appellant and told him to retrieve the containers. At first he thought it was a joke by a work colleague. However, there was a second call from the same person who again threatened the Appellant. The same evening, a different man called. He told the Appellant that his life depends on return of the seized containers.

The following day the Appellant reported the calls to the head manager (Ahmed Hamza). He did not believe the Appellant. Five to seven days after that he received another phone call from an unknown caller who said: "You haven't listened to our order so we are now going to kill you." The Appellant again reported the matter to Ahmed Hamza who reacted angrily. He said that if received another such call, he should take the phone to him. The Appellant received another call in April 2017. However, he was at his home in Qaladze, so was not able to take the phono to Ahmed Hamza. The caller said: "We know where you live. We won't let you get away. We will take revenge."

The Appellant reported the matter to Ahmed Hamza. He said he could not help. Ahmed Hamza said that he could not go to court about the matter because the Asayish would testify against him (the Appellant). He felt helpless and at this point suspected that senior ranking officers might be involved. Two or three days after this, the Appellant was detained by the Asayish in his own office. He was told that because the smugglers had not been arrested, he was suspected of being involved and was to be investigated. He was detained for a month. His phone was removed. He was not ill-treated. He was allowed to return to his duties in May 2017. He started to receive threatening telephone calls again. In June or July 2017, he was chased by two men who he believes were security officers planning to kidnap him.

Following this he went into hiding at a distant relative's house in Erbil and disconnected his phone. The Appellant sold his car. His friend (Khalid) gave him money to fund an agent to help him flee Iraq at the end of September 2017. He travelled through Turkey by lorry. He arrived in the UK by lorry on 18 October 2017.

The Appellant had a photocopy of his Civil Status ID (CSID) card in his bag. He did not remember that it was a photocopy and said, at question 27 of his substantive interview, that he had a CSID. However, what he was referring to was a copy and not the original. He showed the copy to the interviewing officer and they returned it to him. He has since lost the copy.

During the interview he was assisted by an interpreter with an Iranian accent. There was some difficulty in understanding.

The Appellant's appeal was dismissed on 3 August 2018 by the first judge. In September 2018 the Appellant was informed by his father that on 21 September 2018 two people came to the family home in Kastana village, asking for the Appellant. His father told them that he did not know his whereabouts. The men said that they would kill the Appellant for the loss that he caused them. The Appellant's father lodged a complaint to the police on the following day.

On 6 October 2018, the Appellant's mother called him and told him that on 5 October 2018 the house was shot at. No-one was hurt. There were twelve gunshot marks on the property. The police came and took statements. They asked the Appellant's father to make complaint at the police station. The family believe that the smugglers are responsible. Smugglers have connections with high-ranking officials.

The Appellant's family received other threats after this incident but they did not tell the Appellant at the time because they did not want to upset him. Many people approached family members, pretending to be friends or acquaintances and asking the Appellant's whereabouts.

In December 2018 the Appellant asked his father to send him evidence of the new incidents. It took time for his father to see a lawyer and to request a copy of the police report from the Kastana village councillor. The Appellant received an envelope with the fresh evidence around the end of January 2019. After the shooting incident the Appellant's brothers do not want to maintain contact with him because they believe it is dangerous for them.

The Appellant has not spoken to his father since the middle of 2019. He speaks to his mother every one or two months. The Appellant spoke with his mother in July 2020. She told him that the family's crops had been burnt. The fire brigade could not stop the fire because it was a windy day. A letter was found in the front yard of the property which states: "If you report this to the police something worse than this will happen to you and your family."

The Appellant's family was too scared and did not report the incident to the police. It was not reported in the local news because no-one was injured and things like this often happen in Kurdistan. The Appellant's mother always says that his father is not free to speak with him. The Appellant thinks he does not want to talk to him. The family are concerned about the threats and one of his brothers blames the Appellant.

The Appellant has continued political activism on Facebook. He relies upon extensive evidence from his Facebook account (ASB pages 16 – 63). His

evidence at the hearing was that he puts posts on Facebook every day. His account and posts are visible to the public. He is a political activist. He wants people in Kurdistan to read the posts. He draw my attention specifically to an entry (64 ASB page) concerning the detention of an Asayish officer. It was made public that he had committed suicide. However, this was a cover-up. He was an officer in the security forces like the Appellant. He was well-informed about corruption in the Asayish and wanted to make it public.

In respect of the decision of the first judge, the Appellant states that Gorran is against corruption. This is viewed as opposition to the government and creates an environment which is discriminatory to Gorran members. They are not promoted and are often transferred from place to place. The investigation against the Appellant was carried out because he was a member of the Gorran Party. There is a culture of bribes and corruption. He was advised at various stages by colleagues and family members that he should not make life difficult but to enrich himself like others. The investigation against him was not genuine. He was detained because he was being threatened by smugglers and would take the organisation to court because of its inaction against the people who were threatening him. The first judge wrongly assumed that the smugglers would know that the superior officers were in charge so would not communicate with the Appellant to retrieve the containers. They came after the Appellant because he confiscated the containers and they thought it his responsibility to have them released. Because he had refused bribes in the past this may have caused them to feel anger towards the Appellant.

In cross-examination the Appellant accepted that in 2013 Gorran became one of the leading three parties in Kurdistan. He referred to the partnership but said that Gorran ministers were sacked in the same year. He knows that the people who came to his family's home are the smugglers because he said that he was accountable for their loss. His parents did not report incidents to the police except the shooting. He referred to the police report in the Appellant's bundle. He also referred to a report from the firefighters who attended the fire. There was no re-examination.

There is evidence in the Appellant's bundle which he submitted in support of the fresh claim. That evidence is listed at paragraph 1 of the letter from QualitySolicitors A-Z Law of 23 September 2019 (AB page 95). It includes evidence from Foad Salam (head of Gorran Council in the UK) of 4 July 2019, a letter of support from Hadi Hassan Ahmed, a witness statement from the Appellant's father (MMR) of 24 March 2019, a letter from Rasul Khidr Qarani, (councillor of Kastana village), a police incident report dated 15 October 2018 and background evidence in support of the Appellant's further submissions.

The Appellant's Facebook Posts

The Appellant has made Facebook posts since 2007. He has produced these with translations (AB pages 177 – 211). Within those posts he has described or endorsed descriptions of the current government in Kurdistan as "corrupt", as having been involved in the assassination of a famous NRT TV presenter, wanting to assassinate anyone who exposes its true face; or being under the control of a "Mafia group"; security forces being involved in smuggling and

threatening anyone who wants to stop them and the KDP and PUK being involved in "terrorist" acts or of being involved in torture and forced confessions. He has accused the KDP and PUK of using the courts for their own interests and of being involved in the killing of a government employee and involved in kidnapping. He has stated that Mayor Barzani is a terrorist and treacherous. His posts threatened the Kurdish authority. One reads, "your end is near, you will be overthrown soon. I warn you to prepare for the people's revenge." The posts exhort readers not to support the KDP and the PUK. One post reads, "how long will you support these two political parties like slaves" and, "it is now a time of revolution; you must wake up and save yourselves from the slow painful death which you will be heaving (sic) because of the Kurdish authority".

The Background Evidence

The Appellant relies on a report entitled Sanctions and Smuggling: Iraqi Kurdistan and Iran's Border Economies: The Global Initiative against Transnational Organised Crime published in April 2019. It was not challenged or referred to by Mr Tufan in submissions.

The Appellant specifically relies on the description of smuggling along the border as being described as "an open secret". The report states that:

> "The goods-smuggling trade from Iraqi Kurdistan to Iran is highly organised. It primarily consists of so-called grey market goods that have been legally imported into Iraqi Kurdistan for local market consumption, but which are then redirected to Iran, largely evading official export or import procedures and duties."

The report describes the management of the border as being politicised with the KRG running the border independently from the Baghdad central government and sections of the border controlled by different political parties: "Although technically the external borders of Iraqi Kurdistan and its official border crossing points should be controlled by Baghdad, in reality they appear to have been largely managed by KRG."

The report goes on:

> "Another layer of complexity in Iraq's border politics is the fact that stretches of Iraqi Kurdistan's eastern border with Iran are managed by border forces from different Kurdish political parties. The ruling Kurdistan Democratic Party (KDP) controls parts of the border, while much larger sections are controlled by the Patriotic Union of Kurdistan (PUK). Several border areas are also managed by the Kurdistan Workers' Party (PKK), whose forces consist of Kurdish fighters from Iraq, Syria, Iran and Turkey, which is designated a terrorist organisation by some countries, including Turkey and the U.S. Smuggling operations are also conducted in PKK areas….[T]he control of smuggling, toleration of it, and monies to be made from it, are inextricably linked to local politics, and also to the power struggle between Baghdad and the Kurdish Regional and alliances between the Baghdad government and Iran".

Mr Tufan relied on the country Policy and Information Note Iraq: Political opinion in the Kurdistan Region of Iraq (KRI) Version 1.0August 2017 (2017 CPIN). He drew my attention to a number of paragraphs. There is no need for me to set these out in full. I summarise them as follows: -

The democratically elected KRG is dominated by the KDP

There is ongoing tension between the KDP and PUK and Gorran which has emerged in recent years to challenge the dominance of KDP and PUK

An individual is not at risk simply being an opponent or having taken part in protests against a political party – each case must be decided on its merits

There are reports that political opponents have been arrested, detained, assaulted and even killed by the Kurdish authorities

Generally a person is not at risk on return as a result of their political affiliation

Journalists, medial workers, human rights defenders who do not have the protection of the KDP or PUK and those who write about certain subjects including corruption or anything construed as endangering security or those critical or perceived to be of prominent figures are more likely to be at risk

There is corruption in the KRG. There are reports of corruption in the main two parties. They have powerful militia. Gorran does not have militia or mechanisms to protect itself. However, there has been a recent alliance between Gorran and PUK,

In the September 2013 elections, Gorran came second, putting PUK in third place. However, KDP did not recognise Gorran as its new strategic partner, particularly because Gorran has no militia or security forces. The share of power was limited and did not reach the depth of KRG administration.

Gorran failed to improve operational control over the region's political institutions.

There was a period of tension between the KDP and Gorran in 2015 and KDP resorted to repressive measures to which Gorran without its own Peshmerga is susceptible.

There was an agreement between the PUK and Gorran in May 2016

There were 300,000 Kurds in Baghdad in 2016 making up 4% of the population

Submissions

Mr Tufan relied on Devaseelan. He said that the Appellant did not claim to be at risk as a result of membership of a political party before the first judge who found that he has a CSID card, and that return was feasible.

Mr Tufan relied primarily on the Country Policy and Information Note Iraq: Political opinion in the Kurdistan Region of Iraq (KRI) Version 1.0 August 2017 (2017 CPIN) ; specifically paragraphs 2.3.1, 7 , 8, 2.2.1, and 2.2.2 and the policy summary at 3 (3.1.2 and 3.1.3).

There are three further incidents on which the Appellant relies which post date the decision of the first judge. There is no evidence that the smugglers were behind any of the incidents. There is no evidence capable of undermining the decision of the first judge.

In respect of the Facebook posts, Mr Tufan stated that the amount of "likes" represents how many people view them. In any event, the regime tolerates opposing views. There is no evidence that the authorities would be interested in the Appellant.

There is no reason for the authorities to be interested in the Appellant or to take any action against him.

When addressing SMO, Mr Tufan relied on paragraph 416. He submitted that it was reasonable for the Appellant to relocate to Baghdad. The Appellant has family in Kurdistan. He has knowledge of the Arabic language, having learnt it at school (teaching of Arabic is compulsory in Kurdistan -see 2017 CPIN 5.3.3 CPIN). The background evidence (see 2017 CPIN 5.1.3) supports that there are 300,000 Kurds in Baghdad.

Ms McCarthy relied on her skeleton argument. The Appellant is a refugee based on his political beliefs. He faces a real risk of harm in the Kurdish region of Iraq because of his support for Gorran. There is no part of Iraq where he could reasonably relocate. He has been an active supporter of Gorran since its foundation in 2009. He continues activity to support them in the UK. The Appellant raised his support for Gorran within his claim from the outset. He raised his support for the party in his asylum interview and in his witness statements of 7 June 2018 and 25 March 2019.

The Appellant relies on his witness statements including his most recent one of 8 January 2020 which explains his unhappiness with the PUK and KDP and why he became involved with Gorran.

The Appellant relies on SMO, specifically the headnote at paragraph 5. Paragraph 299 of SMO confirms that risk applies to the territory of the Kurdistan Regional Government. Paragraph 302 of SMO is relied on to support the Appellant's case that relocation to Baghdad is not a reasonable flight alternative for him because of his personal characteristics. It is submitted that even though the Appellant does not have to prove the 15(c) standard, when considering internal relocation, the guidance indicates that 15(c) is likely to be met on the facts of the case. The Appellant is a Sunni Muslim who speaks Kurdish rather than Arabic, has never lived in Baghdad and has no family members or social support there. Relocation to Baghdad is not reasonable.

Whilst he may have been required to study Arabic at school, it is not an indicator that he is able to communicate in Arabic.

Further or in the alternative the Appellant relies on the risk to him of harm at the hands of smugglers and corrupt senior officials within the Asayish. It was accepted that whilst working for the Asayish the Appellant was assigned to the Iraq Iran border as part of anti-smuggling work. The Appellant gave considerable detail about this when interviewed. The Appellant fears the smugglers as well as the more senior Asayish officers, who he believes are essentially the same people. Corrupt Asayish are actively involved in smuggling. The Appellant relies on new evidence that was not before the first judge. He relies on his more recent statements, the police report confirming the incident on 5 October 2018, the letter from the village councillor of 10 December 2018 and a letter of support from his father of 24 March 2019.

The Upper Tribunal found that all grounds of appeal were made out. Not only the first three grounds which dealt with *sur place* political activities. Ground 4 of the error of law was that the credibility assessment is flawed because documentary evidence had not been considered in relation to the continuing risk from smugglers and senior officers within the Asayish.

The documents were not properly considered by Judge Oliver, whose decision was set aside by Upper Tribunal Judge Coker. The account of senior Asayish officers being involved in corruption is highly plausible and supported by background material in the Appellant's bundle (see the report entitled "Sanctions and Smuggling: Iraqi Kurdistan and Iran's Border Economies", published by the Global Initiative against transnational organised crime in April 2019).

It is plausible that the Appellant's stance of wanting an investigation into those who were threatening him and of this being blocked by other corrupt officers who have a continuing interest in punishing him is a plausible one. It cannot be assumed that all officers are corrupt. It is plausible that the Appellant took a stand in relation to valuable goods seized from a smuggler who had a connection with other corrupt officers and that pressure might be put on him by those officers to shut up about the situation. There is nothing inherently implausible about the events that the Appellant describes.

Given the politics of smuggling along the border, it is likely that any stance taken on corruption will also be viewed as a political stance. The Appellant is a known supporter of Gorran, which has taken a strong position against corruption and the current KRG and was sacked in 2009 from his position for supporting Gorran before being reinstated. The Appellant has always stated that he was supporter of Gorran. His support has expanded through his *sur place* activities in the UK and on Facebook. He is now posting publicly accessible comments which are openly critical of the government. It is not a claim that has materialised since the decision of the first judge. The Appellant was politically active before the appeal before the first judge. The focus of that appeal was on the smuggling allegation. However, the evidence that he became involved with Gorran in 2009, is consistent. The Appellant did not think that the evidence relating to his political opinion was relevant to his

appeal before the first judge. Ms McCarthy submitted that the Appellant has been politically active since 2009. She relied on the letter from Salam, the member of the National Assembly (AB page 111).

The history of Facebook posts does not support the Appellant having made an opportunist claim. The "likes" are not indicative of how many people read the posts considering that political dissent is risky. The Appellant's activity is much more than "liking" other people's posts or retweeting. Posts he puts up are clearly very critical of the government, describing it as corrupt, involved in assassinations, under the control of a Mafia group and responsible for threats, torture and terrorism. The Appellant names politicians as terrorists and has disclosed recent graphic images disputing the official account of what is described as an unlawful execution. The Appellant is at the same risk as someone who is involved in journalism. His posts are extremely inflammatory. He can not be required to lie about his views should he return to Iraq.

Ms McCarthy asked me to attach weight to the evidence that was not before the first judge and the background evidence which supports that smuggling is an "open secret" and that officers are involved in corruption. The smuggling allegation and risk arising from the Appellant's political activity is interlinked. The Appellant is not able to obtain a new CSID. He does not know the family number. His relationship with the family members has deteriorated. They are not willing to assist him. She asked me to allow the appeal.

Findings and Reasons

Having taken into account the evidence as a whole and properly applying the guidance in Devaseelan in the light of what the Court of Appeal stated in the more recent case of BK, in the light of the evidence before me and after careful examination of the evidence, I have decided to depart from the conclusions of the first judge. I accept the Appellant's evidence.

I find that the Appellant has established that he was threatened by those who were responsible (smugglers and corrupt Asayish officers) for smuggling what appeared to be chemicals over the Iraq/Iran border. The Appellant became a target for those responsible and that their pursuit of him was initially motivated by a hope of recovering the property and the Appellant's political affiliation to the Gorran party. Taken together along with the Appellant's Facebook posts, he has discharged the burden of proof. In respect of the Facebook posts, I accept that they are extreme in nature. I accept that the amount of "likes" considered in context does not reflect the number of people who have read the posts. I accept that they, together with the smuggling incident and his support for Gorran would put the Appellant at reasonable likelihood of persecution.

In the letter from Foad Salam, head of the Gorran Council in the United Kingdom dated 4 July 2019, he confirms that the Appellant is an active member of the Gorran movement and that he joined in 2009 and has been active since then. The author of the letter states:

> "As a result of his political activism as part of the Gorran movement he faced danger. He got into trouble because of that support. Both the Kurdish Democratic Party (KDP) and the Patriotic Union of

> Kurdistan (PUK) created problems for [KMM] because of their support to the Gorran movement."

The Appellant has not explained why such evidence was not obtained for the hearing before the first judge. I approach this evidence with some caution. There was no good reason advanced before me why the Appellant's appeal before the first judge was not advanced on the basis that he is at risk as a result of his political activities and this evidence produced. However, he did raise his support for Gorran in his interview, which the first judge accepted. This aspect of his claim cannot be properly categorised as an entirely new claim. I have considered this together with the post-decision evidence which supports *sur place* activities.

The Respondent's position in relation to the documentation that was not before the first judge n 2018 is that it is not reliable applying Tanveer Ahmed. Mr Tufan did not make any meaningful submissions seeking to undermine this evidence. It comprises a police report and evidence from the councillor of the village, Rasul Qarani in support of the Appellant's family having been persecuted in Iraq by people seeking the Appellant and evidence of the fire services. This evidence could not have been put before the first judge because it concerns incidents that postdate the decision of the judge. Considering it in the round, I attach weight to it. It supports the Appellant's account that people are looking for him and that his family has fallen victim to those who seek the Appellant.

I note that the Reasons for Refusal Letter at paragraph 32 states that the first judge found the Appellant's entire account was found to be lacking in credibility, however, while the judge did say at [57] that his entire account lacks credibility, he accepted that the Appellant worked as Peshmerga and Asayish and that he was a Gorran supporter. The Appellant's account of being involved in the seizure of property was not accepted because it was not considered plausible. While the findings of the first judge are my starting point, in the light of the background evidence of corruption and smuggling and the evidence that was not before him, I accept that the Appellant has discharged the burden of proof to the lower standard.

The background evidence supports a degree of discrimination against members of Gorran. It supports that despite coming second place in the election in 2013, real power was limited. The Appellant's account is detailed and broadly speaking consistent in relation to the smuggling incident. Taking into account the further evidence relied on in support of the Appellant's fresh claim and properly applying the low standard of proof, I accept the Appellant's evidence in relation to the smuggling incident and that corruption within the Asayish put him at risk from smugglers and corrupt senior officers.

I accept that the Appellant's problems, as regards the smuggling incident, have been exacerbated by his political activities with the Gorran Party and that this influenced his decision to refuse to engage in corruption and influenced the way that he was treated by senior officers.

Looking at all aspects of the Appellant's claim, I am satisfied that he would be at risk on return to his home area as a result of his political opinion and that he

is of interest to those responsible for smuggling. I accept that corruption is at such a level that it is reasonably likely that there are corrupt officers in the Asayish, who are connected to the smugglers. This is made out in the background evidence. There is no sufficiency of protection available to the Appellant in his home area.

Relocation

I find that relocation to Baghdad would be a safe option for the Appellant. Taking into account the relevant background material and the relevant paragraphs of SMO to which I was referred by both parties, I conclude that relocation would not be reasonable applying the test set out in Januzi v Secretary of State for the Home Department [2006]UKHL 5, [2006] 2 AC 426 and AH (Sudan) v Secretary of State for the Home Department [2006] UKHL 49, [2008] 1 AC 678. Putting aside the issue of documentation, I conclude that relocation of the Appellant to Baghdad would not be reasonable for this Appellant. The Upper Tribunal said in SMO in respect of relocation to Baghdad the following (see paragraph 19 of the headnote),

> *"19. Relocation to Baghdad is generally safe for ordinary civilians but whether it is safe for a particular returnee is a question of fact in the individual case. There are no on-entry sponsorship requirements for Baghdad but there are sponsorship requirements for residency. A documented individual of working age is likely to be able to satisfy those requirements. Relocation to Baghdad is likely to be reasonable for Arab Shia and Sunni single, able-bodied men and married couples of working age without children and without specific vulnerabilities. Other individuals are likely to require external support, ie a support network of members of his or her family, extended family or tribe, who are willing and able to provide genuine support. Whether such a support network is available is to be considered with reference to the collectivist nature of Iraqi society, as considered in AAH (Iraq)"*

Although he is a single able -bodied male, the Appellant has never lived in Baghdad. He may have learnt Arabic at school, but I accept that he cannot speak Arabic to a meaningful level which would help him find work. He is very likely to need external support. He has no family in the place where it is proposed he relocates. The primary unit of social interaction and support in Iraq is family. It is a collectivist society. He is from a minority ethnic group and has been persecuted in his home area. For the above reason the appeal is allowed on protection grounds.

Having allowed the appeal on asylum grounds, there is no need for me to consider documentation.

The appeal is allowed on protection grounds

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 Joanna McWilliam Date 17 May 2021
Upper Tribunal Judge McWilliam