Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/12383/2019 ('V')**

THE IMMIGRATION ACTS

Heard at Field House
And via Skype for Business
On 6th April 2021

Decision & Reasons Promulgated
On 21st April 2021

Before

UPPER TRIBUNAL JUDGE KEITH

Between

'TM'
(ANONYMITY DIRECTION CONTINUED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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. Failure to comply with this direction could lead to contempt of court proceedings.

Representation:
For the appellant: Mr J Walsh, Counsel, instructed by Davjunnel solicitors.
For the respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 6th April 2021.

2. Both representatives and I attended the hearing via Skype, while the hearing was also open to attend at Field House. The parties did not object to attending via Skype and I was satisfied that the representatives were able to participate in the hearing.

3. This is an appeal by the appellant against the decision of First-tier Tribunal Judge M B Hussain (the 'FtT'), promulgated on 5th October 2020, by which he dismissed the appellant's appeal against the respondent's refusal on 6th December 2019 of his protection and human rights claims.

4. In essence, the appellant's immigration history was that he had entered the UK clandestinely on 2nd October 2017 and claimed asylum on the same day. He was an Iraqi citizen of Kurdish ethnic origin who entered the UK as a minor but by the time of the respondent's impugned decision was now over the age of 18. However the respondent continued to treat him as an unaccompanied asylum-seeking child. The respondent accepted that the appellant was an Iraqi national of Kurdish ethnic origin but did not accept that he supported the United Kurdistan National Party ('UKN'), as a result of which he had faced adverse interest from political rivals within the KDP, prior to leaving Iraq; or that he had lost his identity or 'CSID' card, based on his assertion that his stepmother mistreated him and had burnt his belongings. The respondent rejected his protection claim as well as his claim for leave to remain based on right to respect for his private life. The appellant was no longer an unaccompanied asylum-seeking child aged under the age of 17 ½ and therefore did not qualify for discretionary leave.

The FtT's decision

5. The FtT considered, at §10, the appellant's claim to have engaged in 'sur place' activities, in particular attending a demonstration in the UK on 1st September 2020 in respect of which photographs had been taken. At §13, the FtT noted the appellant's claim that various Arabic and Kurdish TV channels had filmed the demonstration which was available on their website and he would face risk even on return to his hometown of Sulaymaniyah, given the national influence of his political rivals. The FtT did not accept as credible the appellant's account at §§22 to 39, including the plausibility of the appellant's timeline in becoming interested in the work of the UKN (more accurately described as the PUK); and §35, the FtT rejected the appellant's claim to have distributed leaflets on behalf of the PUK. At §36, the FtT rejected the account of ill-treatment by the appellant's stepmother, and at §42 the claim that she had burnt his CSID. The FtT found at §40 that the appellant would be able to return to Sulaymaniyah, under the control of the PUK.

6. The FtT therefore rejected the appellant's appeal.

The grounds of appeal and grant of permission

7. The respondent's appeal is on a single ground, namely that the FtT had erred, having concluded that the appellant had attended a demonstration in London on 1st September 2020, in concluding that the appellant would not be at risk as a result of 'sur place' activities. The appellant had not only been photographed but filmed at the event and the FtT had before him the expert report of Dr Fatah, referred to at §28 of the FtT's decision, which had referred to the consistency, with background evidence, of the risk of the appellant's raised profile as a result of his attendance at the London demonstration and; the existence of a Kurdish channel known to oppose the KDP-dominated government.

8. The FtT's conclusion that there was no evidence that any filming or transmission included a recording of the appellant or transmission in his home country was not consistent with the authority of YB (Eritrea) [2008] EWCA Civ 360, where at §18, the Court of Appeal had stated that there was no requirement for affirmative evidence that intelligence services of repressive states monitor the internet for information and instead, the real question was whether an individual was not identified as a mere hanger-on with no real commitment to an oppositional cause. A requirement for the appellant to prove that the IKR authorities actually monitored the demonstration and had identified the appellant through various mechanisms was an impossible one to fulfil. Instead, his evidence of repression by the authorities and his opposition activities at the demonstration were sufficient.

9. First-tier Tribunal Judge Andrew initially refused permission, but on a renewed application, permission was granted by Upper Tribunal Judge Macleman on 27th November 2020. The grant of permission was not limited in its scope.

The hearing before me

The appellant's submissions

10. In terms of the hearing before me Mr Walsh referred to the grounds of appeal that had been permitted to proceed and which had been settled by Mr Mukherjee. In particular the paragraph in question was §41 of the FtT's decision which stated:

> "*41. In regards to the appellant's sur place activities, namely, attendance at a demonstration in front of the Iraqi Embassy in September 2020, whilst I accept that he did attend the event, there is absolutely no evidence that any filming included a recording of the appellant nor that any transmission in his home country depicted him in any way. The appellant's expert comments generally that those who oppose the government are not kindly treated, however, the appellant has not proven that he has come to the attention of the authorities. He claimed that there were references in Facebook and the Kurdish television channel's website, but it is not proven that any broadcast included a picture of him.*"

11. In that regard the grounds had cited the Court of Appeal's decision of YB (Eritrea) v SSHD [2018] EWCA Civ 360 and in particular §18, which stated:

> *"In my judgment, and without disrespect to what is a specialist Tribunal, this is a finding which risks losing contact in reality. Where, as here, the Tribunal has objective evidence which 'paints a bleak picture of the suppression of political opponents' by a named government, it requires little or no evidence or speculation to arrive at a strong possibility – perhaps more – that its foreign legations not only film or photograph their nationals who are demonstrating in public against the regime but have informers amongst expatriate oppositionist organisations who can name the people who are filmed and photographed. Similarly it does not require affirmative evidence to establish a probability that the intelligence services of such states monitor the internet for information about oppositionist groups. The real question in most cases will be what follows for the individual claimant. If, for example, any information reaching the embassy is likely to be that the claimant identified in a photograph is a hanger-on with no real commitment to an oppositionist cause, that will go directly to the [relevant] issue…."*

12. In this case there was the context of Dr Fatah's report, an expert. Dr Fatah had specifically referred to the risk, to which I was referred at §80 of that report, of the plausibility, if the appellant were indeed filmed, of him being perceived by the IKR authorities to have a higher profile. Where the FtT had fallen into error was to say that because there was no direct evidence of the appellant being filmed, or such film being broadcast (the appellant had adduced still photographs), the appellant had failed to meet the burden of proving his case. What the FtT should have done was to consider whether it was possible to infer risk, in particular, by considering whether the appellant would be seen as a 'hanger on,' from the surrounding evidence, such as the nature and quality of the appellant's involvement in 'sur place' activities. The FtT had committed the very error cautioned against in YB (Eritrea). To require the appellant to prove his being filmed or observed by agents of the IKR authorities or political rivals was too high, and indeed an impossible burden.

The respondent's submissions

13. Mr Tufan reiterated the contents of the respondent's Rule 24 response, the gist of which was that the findings made by the FtT were open to him to make on the evidence before him. There was no evidence of any filming being broadcast in the IKR. The FtT had been entitled to draw adverse inferences from the lack of such evidence on Facebook or the TV channel's website, when the appellant had referred to the possibility of it being there. Mr Tufan went on to criticise the still photographs, which appeared to show that the appellant was criticising the political party he claimed to support; and the limited evidence in Dr Fatah's report on the risk because of 'sur place' activities, as opposed to oppositional activities within the IKR, although Mr Tufan accepted that Dr Fatah had referred at §80 to the risk because of attending demonstrations in the UK.

The appellant's reply

14. Mr Walsh urged me to consider that there was a risk in following the line of argument pursued by Mr Tufan of making an assessment of the merits of the appeal

(by considering the quality of photographic evidence), rather than considering whether the FtT had erred in law. As could be seen from §80 of the expert's report, Dr Fatah had clearly considered and referred to the risk to the appellant as a result of 'sur place' activities in the UK and it was that evidence that should have been assessed in the wider context by way of inferential reasoning. The question of whether he was also critical of the some people within the PUK, whom he claimed to support, had been referred to by the FtT at §12 of the decision. In essence, we returned to the central challenge which was that at §41, the FtT had imposed too high, and indeed an impossibly high, burden upon the appellant and therefore had impermissibly rejected his account in the circumstances.

Discussion and conclusions

15. I do regard the FtT as having materially erred in law. I accept the force of Mr Walsh's argument that I should not assess the primary evidence before the FtT or the merits of the appellant's protection claim, and instead should consider whether the FtT erred in imposing an impossible burden on the appellant. Whilst I note Mr Tufan's criticism of both the expert report and the photographic evidence, I accept the proposition of Mr Walsh that this would stray into a consideration of the merits of a protection appeal rather than, as an appellate jurisdiction, the sole question before me, which was whether the FtT had in his reasoning, erred in law.

16. I accept that the FtT did, at §41, impose not only too high a standard, but an impossible one, namely to require the appellant to prove that photographs or footage of him had been watched by political opponents, whether in the IKR or the UK. Instead, the Court in YB (Eritrea) encourages decision makers and Tribunals to assess the likelihood, by way of inferential reasoning, of a person coming to the notice of hostile governments. It might also be of key relevance to that issue (but not in all cases), whether 'sur place' activities were contrived, in the sense of being without genuine conviction, to bolster a protection claim, which in turn may have an impact on whether an individual is perceived as a 'hanger on'.

17. In contrast, the FtT focussed on the absence of evidence regarding the broadcasting of material, rather than the wider circumstances, for which there was potential evidence, of the nature of such 'sur place' activities, in the sense of the nature and extent of personal involvement and the regularity and commitment to such activities; the extent to which such activities were contrived; and the extent to which political opponents would perceive such activities as contrived and even if contrived, whether that made a difference to the well-founded fear of persecution, based on 'sur place' activities.

18. The FtT therefore erred in his assessment of the risk posed by the appellant's sur place activities, and this error was material. I considered what of the FtT's findings, if any, it was safe to preserve. Mr Tufan rightly pointed out that the appellant's appeal had only been in respect of the FtT's reasoning in relation to 'sur place' activities, and not in respect of the findings about adverse interest in the appellant's country of origin. It would be perfectly possible, Mr Tufan urged me, to separate out

the findings of adverse credibility in relation to events in Iraq, versus events in the UK.

19. The practical difficulty with preserving the FtT's findings about events in Iraq is three-fold. First, the FtT clearly links, in his reasons, adverse credibility findings about political activity in Iraq with, for example, the claimed destruction by the appellant's stepmother of his CSID card – at §42, the FtT says that:

> *'It is my view that given the negative findings on the appellant's credibility that I have made, that this claim is also made up…."*

20. It is clear that the FtT was considering the issues of credibility as linked together, although he does not expressly link this to 'sur place' activities, which in turn leads to the second issue.

21. The second problem, in separating out and preserving findings on events in Iraq, is the absence of any finding on whether the appellant's 'sur place' activities are contrived. It might be that the FtT believed, as with the findings on the destruction of the CSID card, that because the FtT believed the appellant to be not credible in one respect, this impacted on his credibility in relation to the genuineness of his 'sur place' activities; or it may be that the FtT had intended to conclude that despite not believing him in relation to events in Iraq, that the appellant's commitment to activities in the UK was genuine and committed, albeit his fear was not objectively well-founded. Any Judge remaking would have no sense of what the FtT had found on this issue.

22. Third, the difficulty for any Judge in remaking, if compelled to follow preserved findings in relation to events in Iraq, as separate from events in the UK, is that this requires the drawing of such clear distinction, where the necessary fact-finding requires consideration of credibility as a continuum, even recognising that a witness may be credible in one respect and not in another. Finding that a witness may be credible in one respect but not another is perfectly possible, but that does not mean that in making such divergent findings on different aspects of a narrative, it can safely be done in isolation from the evidence as a whole. It also calls in to question the safety of preserving findings, however clearly reasoned, in relation to events in Iraq, in the context of a nuanced assessment of credibility. Put simply, it cannot safely be said that the credibility of the account of events in the UK could have had no impact on the assessment of credibility of events in Iraq.

23. For all of the above reasons, it is unsafe to preserve any of the FtT's findings, other than the undisputed facts that the appellant is an Iraqi citizen of Kurdish ethnic origin.

Decision on error of law

24. In my view there are material errors here and I must set the First-tier Tribunal's decision aside, subject to the preserved finding that the appellant is an Iraqi citizen of Kurdish ethnic origin.

Disposal

25. With reference to paragraph 7.2 of the Practice Direction and the necessary fact-finding, this is clearly a case that has to be remitted to the First-tier Tribunal for a complete rehearing.

26. The remittal shall involve a complete rehearing of the appeal. All aspects of the claims must be addressed. I preserve the FtT's findings that the appellant is an Iraqi citizen of Kurdish ethnic origin, but not the remainder of the findings, bearing in mind that the appellant's credibility and plausibility are key to this appeal, and issues relating to both run throughout the claim.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside, with the only preserved finding that the appellant is an Iraqi citizen of Kurdish ethnic origin.

I remit this appeal to the First-tier Tribunal for a complete rehearing.

Directions to the First-tier Tribunal

This appeal is remitted to the First-tier Tribunal for a complete rehearing, preserving only the finding that the appellant is an Iraqi citizen of Kurdish ethnic origin.

The remitted appeal shall not be heard by First-tier Tribunal Judge M Hussain.

The anonymity directions continue to apply.

Signed *J Keith* **Date: 12th April 2021**

Upper Tribunal Judge Keith