Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI- 2021-001185
(PA/53006/2020) [IA/00058/2021]

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 14 July 2022	**On 9 September 2022**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

RFS
(Anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms H Masih, instructed by Braitch Solicitors.
For the Respondent: Mr Williams, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission a decision of First-tier Tribunal Judge Fowell ('the Judge') promulgated following a hearing at Birmingham (Priory Court) on the 13 July 2021, in which the Judge dismissed the appellant's appeal on all grounds.

2. The appellant is a citizen of Iraq from the Independent Kurdish Region (IKR) who grew up in the Sulamaniyah Governate, to the south of that region.

3. The appellant entered the United Kingdom by lorry in June 2016 claiming to be in fear of his uncle who wanted to kill him because he had lost his faith in Islam and drank alcohol.

4. The Judge noted an earlier asylum claim had been refused by the Secretary of State and his appeal against that decision dismissed on 17 December 2016 by another judge of the First-tier Tribunal. The earlier decision found the appellant's fear of his uncle was not for a Refugee Convention reason and that the appellant could have relocated to another part of the IKR. The Judge sets out specific extracts from the earlier determination.

5. Having considered the written and oral evidence and submissions the Judge sets out his findings from [30] of the decision under challenge.

6. The Judge notes that the earlier tribunal rejected the appellant's claim to be at risk on return [31] seeming to accept that the appellant had been living with his uncle, that his uncle might have been angry with him on occasions over his drinking and abandoning his religion and that his uncle may have threatened him verbally on three occasions when he came home drunk at night, but that was a reminder of the count which had been rejected.

7. The Judge directed himself that the starting point was the rejection of the claimed persecution in accordance with the Devaseelan principles [33].

8. The Judge also properly reminded himself of the more recent decision of the Court of Appeal in BK (Afghanistan) [2019] EWCA Civ 1358 in which it was found that fairness required every tribunal to conscientiously decide cases presented to them and that in deciding whether earlier findings of fact should be carried forward the second tribunal should not be restricted to looking only at material post dating the earlier decision and that the earlier findings were starting point but were not determinative.

9. For the reasons set out at [36-40] the Judge concluded that there was no real risk from anybody from which the appellant would need protection and nor was there any need to relocate away from his uncle.

10. In relation to the question of documentation, the Judge made reference to country guidance SMO [2019] UKUT 00400(IAC) and in light of the guidance contained therein found:

> 45. Pausing there, it follows that Mr S should be able to obtain a replacement CSID in the UK. He can rely on his paternal uncle to forward his documents and also to know and inform him of the relevant volume and page of the Family Book. I note that it is said that he lost his passport in Greece, but the previous decision also noted that he had previously held a CSID, a nationality certificate and driving licence. If need be, if all of these are lost, his uncle can help him to obtain the necessary details from the Family Book and begin the process of obtaining replacements on his behalf. Hence, the risk from lack of documentation can be avoided. He can arrive at Baghdad with a CSID and make the journey to the IKR by air or road, through the checkpoints, without undue risk.

46. Without setting out the remaining paragraphs from SMO on this aspect, he would then be able to use that CSID to obtain an INID on arrival at his local CSA office. There was some issue over where his local CSA is, but the email from Dr Fatah merely confirmed that the office in Dukan issued INIDs. That is no sort of barrier to return. Armed with a CSID and support from his uncle he could return to the CSA and obtain and INID.

11. The Judge noted it was not suggested the appellant was entitled to a grant of humanitarian protection and rejected any such entitlement together with finding that the appellant would have family to turn to in his home area, rejected the claim based on articles 2 and 3 ECHR, and noted there was no separate ground of appeal being pursued by reference to article 8 ECHR [47].

12. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on 4 November 2021, the operative part of the grant being in the following terms:

1. The application is in time. The grounds at [1]-[9] all concern redocumentation on return to Iraq. At [45] the Judge applies para 13 of the country guidance in **SMO, KSP & IM (Article 15 (c); identity documents) Iraq CG** [2019] UKUT 400, to find that an INID or CSID could be issued in the United Kingdom. Given the respondent's explicit concession in her review at para 25 that it could not (in accordance with the up to date CPIN) an arguable error of law is established: whether or not the Judge accepted this as a basis to depart from country guidance, it was still necessary to engage with the point.

2. A question must be raised as to the materiality of that error, if established, as the grounds failed to set out how the appellant engages with **SMO** at [389], requiring the appellant to show that a CSID is now unavailable at his local CSA. If a CSID can still be obtained then this could be done by proxy, applying the Judge's findings that there remain those who are willing and able to assist the appellant. Taking into account, however, the arguable contention at para 6 that the Judge took the previous findings too far in that respect, and the I grant permission.

3. Applying the pragmatism suggested by the relevant Joint Presidential Guidance at paragraph 48, remaining grounds may also be argued.

Error of law

13. The Judge is criticised for not taking the earlier findings properly into account, for failing to adopt the correct approach to the Devaseelan principles, and in not properly considering all the evidence.

14. The Judge had available the determination of First-tier Tribunal Judge Meyler promulgated on 14 February 2017. Judge Meyler sets out his findings from [19] of his decision in which, in relation to the appellant's asylum claim, Judge Meyler wrote:

19. I find that the respondent's concession in relation to nationality and origins in the KRI are well made and well reasoned.

20. I find that there is nothing inherently implausible about the appellant clashing with his religious uncle over his drinking habit and loss of interest in practising Islam. However this does not make him a refugee. If the appellant were really at real risk of serious harm from his uncle, he could easily have lived away from his uncle given that he had a good job. Also, before claiming protection from another country, an applicant must show that there is no other area in his home country where he could live safely and without undue harshness away. He must also show that the authorities are unable or unwilling to protect him. The appellant has not shown either of these elements to his claim.

21. The appellant worked as a labourer in the building industry for at least seven years in Sulaimaniya (2009 – 2016). He had friends in Chamchamal and Sulaimaniya. His mother and maternal uncle also live in Sulaimaniya, although he lost touch with them in 2000. The appellant attended school from the age of six years old until the age of 18. He acknowledged before me that he had Arabic lessons each day or a few days a week. Based on the fact that Arabic was mandatory in schools when the appellant attended school, I find that the appellant could get by in Arabic if he needed to.

22. I find that the appellant's uncle may not have wanted his nephew coming home drunk at night. I am prepared to accept that his uncle may well have tried to keep his nephew on the straight and narrow and that he was angry that he had abandoned his religious habits. I accept that his uncle may have been angry and may have verbally threatened the appellant on the three occasions when he caught him coming home drunk at night (in 2009, 2013 and 2015). The appellant was inconsistent about whether he was physically or only verbally abused by his uncle (questions 88, 89, 90, 92, AIR B13). However I find that even if he had been physically assaulted by his uncle, the appellant would not be at risk from his uncle if he did not live in the same house as him. The appellant is an educated grown man who has a useful trade and could live on his own away from his uncle.

23. From the appellant's answers to questions from me, the appellant drank out of choice and was able to limit his alcohol intake. At present he only drank once a week. He drank half a bottle of whiskey or vodka once a week. The rest of the week he would only drink beer; perhaps two cans of beer a day. The appellant was able to stop himself from drinking when he wanted to. In Iraq he drank once a week with friends from work in Chamchamal or in Sulaimaniya. He never got into trouble at work because of his drinking. From this I concluded that the appellant did not have an alcohol dependency problem and would be able to control his drinking on return to Iraq.

24. The appellant stated that he feared he would die of starvation if he left his uncle's house yet he took US$9000 in cash from his bedroom the night he escaped. He kept this money in cash dollars because it was more compact than the local currency and he did not trust the banks. The appellant earned a living from his work in the building industry from 2009 until 2016 when he left Iraq. He became chief labourer in 2014 and had a pay rise; the money was good (AIR 196). When the inconsistency of earning a good living and fear he would die of

starvation was put to the appellant by Mr Oi in cross examination, the appellant suggested that it was not possible for single men to live on their own in Iraq. However I found no country information in support of this assertion and applying the lower standard of proof, I felt unable to accept this argument. I find that the appellant could live on his own with friends and support himself with work as a builder.

25. The appellant failed to move out of his uncle's house to avoid being assaulted by him for his drinking and lack of interest in Islam. The appellant has no fear of the authorities. He did not explore the possibility of state protection of the local authorities in the KRI from his uncle or the Islamic Komal party. Further, as explained above, who did not explore the internal flight alternative. I find that both would be available to him. There is sufficiency of protection in the KRI and the appellant could safely relocate to any other area of the KRI without undue harshness if he were truly at risk. I find that his application for surrogate protection is not well founded.

26. The appellant claimed to fear the Komal party as his uncle used to be involved with them. However he acknowledges in his interview that no one from the Komal party had ever caused him any problems in the past (AIR 76, B11). I find that there is no reasonable degree of likelihood that the appellant would be at risk of persecution from the Komal party or from his uncle. The appellant could live away from his local area in Chamchamal and his uncle would not even be aware of his presence. I find the appellant could work as a labourer anywhere in the KRI.

27. I find that the appellant does not have a well-founded fear of persecution or serious harm from his uncle. I find that there is no real risk of serious harm from his uncle so long as he does not live under the same roof. If he wishes, he can live further away from his uncle in Sulaimaniya , Erbil or any other uncontested governorate of the KRI. He is educated; having attended school from the age of 6 to the age of 18. He speaks Kurdish Sorani and I have found he would be able to get by in Arabic. He has a useful trade and seven years experience in the construction industry. He has friends in Sulaimaniya.

28. The appellant claimed that he was interested in converting to Christianity. The letter from Mr White, the retired pastor, dated 29 January 2017 confirmed that the appellant had attended Jireh Baptist Church for Bible study and Sunday morning services for four weeks. At the appeal hearing, the appellant stated that he had been given a Kurdish bible, however when I asked what he had learned from the Bible he explains that he had not started reading his Bible yet as he had only been given it the day before the hearing. The appellant has not actually converted to Christianity and has only attended church in the four weeks leading up to his appeal hearing.

29. I have considered the current Home Office *Country information and guidance report on Iraq and religious minorities, dated August 2016,* which notes that the KRI has traditionally been a haven for religious minorities (2.3.3.) and there are fewer reports of official abuse and discrimination against religious minorities in the KRG/KRI (2.2.7.). In general, a person from a religious minority would not be at risk of persecution in the KRI (2.2.13.); the KRI authorities provide effective protection (2.3.3). I find, based on the evidence before me and on the

extent of the appellant's interest demonstrated in Christianity at the date of the hearing, the appellant is not reasonably likely to attract persecution on account of his interest in Christianity on return to the KRI. I find that the appellant would not be at real risk of serious harm on return to the KRI on account of his lack of faith in Islam or his interest in Christianity.

30. Based on the evidence before me therefore, I find that the appellant has failed to show to the lower standard of proof; reasonable degree of likelihood, that he has a well-founded fear of persecution in Iraq for a Convention reason.

15. Judge Meyler also found no evidence the appellant was entitled to a grant of leave pursuant to Article 15(C) of the Qualification Directive for the reasons set out at [31 – 34] or that the appellant had established any entitlement to a grant of leave on any human rights ground.

16. The approach to cases by reference to the Devaseelan has recently been considered by the Court of Appeal in Secretary of State for the Home Department v Patel [2022] EWCA Civ 36 which made reference in its judgement to earlier decisions of the Court of Appeal in Ocampo v Secretary State for the Home Department [2006] EWCA Civ 1276 and AL (Albania) v Secretary State the Home Department [2019] EWCA Civ 950. In giving the leading judgement, to which the other members of the Court agreed, Lord Justice William Davies stated:

35. In her judgment in *AL (Albania)* Nicola Davies LJ observed that the appellant's case was that the FTT should have approached the earlier determination as something stronger than a starting point when making findings of fact in relation to the appellant. She said that this was inconsistent with the guidance in *Devaseelan* as upheld by the Court of Appeal in *Ocampo* and *AA (Somalia).* She went on to say at [25]:

> "… following the *Devaseelan guidelines*, not only is the earlier determination the starting point, it should be followed unless there is a very good reason not to do so. The FTT treated the determination in R's appeal as the starting point but departed from the findings of fact because of the evidence of the uncle's travels. In my judgment that evidence did constitute a very good reason for departing from the determination in R's case as it contradicted a core aspect of the appellant's claim, namely that his uncle had fled from Albania because of the blood feud, was fearful of being killed and could not safely return. The FTT's reliance on that evidence in order to depart from the findings made in R's determination demonstrates no material error of law…."

36. The issue of whether the evidence adduced before the second FTT judge in *AL (Albania)* could with reasonable diligence have been obtained at the time of the hearing before the first FTT judge was not specifically addressed at any stage of the proceedings whether in the FTT, the UT or this court. Arguably it could have been since the evidence relating to the uncle's travels was provided without difficulty once the UK authorities asked for it. The request was not made until

after the brother's appeal. There is no reason to suppose that it could not have been made earlier. The reality is that this court in *AL (Albania)* properly applied the principle set out in *Ocampo* i.e. it concentrated on the nature of the new evidence and its materiality to securing a just outcome.

37. In her submissions in this appeal the SSHD submits that the guiding principles can be expressed as follows:

    (i) Where there are different parties but with a material overlap of evidence, the *Devaseelan* principles of fairness apply with appropriate modification.

    (ii) What fairness requires will depend on the particular facts of the case. The findings at an earlier FTT hearing will be an important starting point but the second FTT judge cannot avoid the obligation to address the merits of the case on the evidence then available.

    (iii) The second FTT judge necessarily will look for a very good reason to depart from the earlier findings. Whether the evidence could have been adduced at the previous hearing may be relevant to that issue. Equally, a very good reason may be that the new evidence is so cogent and compelling as to justify a different finding.

38. I agree that those principles accurately reflect the approach in *Ocampo* and *AL (Albania)*. Applying them to this case, I am satisfied that Judge Cockrill erred. He found that there was no proper explanation for the failure to adduce the evidence of deception at the hearing before Judge Hodgkinson. That constituted his reason for not departing from Judge Hodgkinson's findings. He did not consider the substance of the evidential bundle concerning the ETS tests taken by the appellant. Without doing that he was not in a position properly to determine whether there was a very good reason for departing from the previous findings. When Judge Cockrill said that "nothing has been added before me which would enable a different conclusion to be reached properly", that was a clear error. He now had the evidential bundle which had not been before Judge Hodgkinson. I do not know whether an overall assessment of fairness would have led Judge Cockrill nonetheless to maintain the findings of Judge Hodgkinson. What can be said is that Judge Cockrill did not engage in any assessment of the substance of the new evidence when such an assessment was essential in assessing whether there was "a very good reason" to depart from the previous findings.

17. A reading of the determination under challenge shows that Judge Fowell did not take the original determination has being determinative of the issues in the appeal but did take that decision as the starting point as per the Devaseelan guidance. It is clear that what the Judge then did was to consider the evidence that had been provided by the appellant to ascertain whether fairness required him to depart from those earlier findings, i.e. whether there was new evidence that was so compelling and cogent as to justify a different finding. Having undertaken that exercise the Judge concluded the appellant was not entitled to a grant of international protection for which adequate

reasons have been given. That finding has not been shown to be infected by material legal error.

18. The Judge made his own assessment of the credibility of the claim which the Judge was fully entitled to do.

19. The fact the appellant disagrees with the conclusions of the Judge on the evidence presented does not mean the Judge failed to apply the wrong legal test or failed to consider the evidence.

20. It is argued on the appellant's behalf that if the uncle could not assist the appellant he will be unable to document himself and should succeed with the appeal. The finding of the Judge at [40] of the determination is that it was not found there was any real risk from the appellant's uncle from which the appellant needed protection and nor did he need to relocate away from his uncle. That is a finding that is properly reasoned and undermines the claim that the appellant would not be able to seek assistance from his uncle on return. That is a finding open to the Judge on the evidence.

21. In relation to documentation, the Judge finds that the appellant should be able to obtain a CSID in the UK, but it is known that they are no longer being issued. The evidence from Dr Fattah is that the appellant's local CSA office issues IDID.

22. It was argued the Judge failed to make clear findings on what would happen on return to Iraq in light of the more recent decision in SMO and KSP (Civil status documentation, article 15)(CG) [2022] UKUT 00110 which post dates the decision under challenge.

23. On behalf of the Secretary of State Mr Williams accepted that the reference to the appellant obtaining a CSID in the United Kingdom is legally incorrect but submitted the error was not material.

24. The Secretary of State's current position is that enforced returns are now to any airport in Iraqi including to the KRI/IRK. It was not made out that as an Iraqi Kurd from the IKR the appellant will be unable to obtain the laissez passer from the Iraqi Embassy in the United Kingdom which he can use to fly to Sulaimaniya.

25. It was not made out the appellant does not have contact with his family in Iraq, that he would be without support on return, or that family could not meet him at the airport.

26. There is no evidence the appellant will be detained by the authorities in the IKR or that he will not be able to pass through the airport. There is insufficient evidence the appellant would have to pass through any regional borders or checkpoints outside the IKR. There is insufficient evidence to show, especially with family assistance, that he would not be able to travel to his home area and local CSA office to obtain an INID.

27. Ms Masih's point in re-examination about how the appellant could prove who he is is noted, but the appellant would have to satisfy the Iraqi authorities he is who he is to enable him to obtain the laissez passer. His identity and nationality have not been in dispute, and he has documents issued by the Home Office that he could use the system if required. It was also found he has no credible fear of his

uncle and it was not made out family will not be able to assist him in providing the required details from the Family Book, if required.

28. Having considered the issues that arise in this appeal very carefully I conclude it has not been shown the Judge erred in law in a manner material to dismiss the appeal.

29. The Judge clearly considered all the evidence with the required degree of anxious scrutiny, has given adequate reasons in support of the findings made which have not been shown to be irrational in terms of those not infected by legal error, or that any legal error that has occurred has not been shown to be material in light of the position appertaining at the date of this hearing. The dismissal of the appeal on all grounds has not been shown to be outside the range of findings reasonably open to the Judge on the evidence. I accept the appellant disagrees with the Judge's conclusions and would prefer to stay in the United Kingdom, but in light of the appellant's failure to identify material legal error permission to appeal has to be refused.

Decision

30. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

31. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Signed……
Upper Tribunal Judge Hanson

Dated 28 July 2022