IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003547
First-tier Tribunal No: PA/00149/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 21 May 2023

Before

THE HON. MR JUSTICE DOVE, PRESIDENT
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)

Between

S M K

(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr Richards
For the Respondent: Mr McVeety, Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 23 March 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, [the appellant] (*and/or any member of his family, expert, witness or other person the Tribunal considers should not be identified*) is granted anonymity.

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 (*and/or other person*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant is a national of Iraq who was born on 1 July 1974. He came to the United Kingdom and applied for was refused asylum and humanitarian protection by virtue of a decision which was reached initially when he claimed on arrival on 26 September 2019. There was an appeal against that refusal and that appeal was refused on 29 January 2020. He therefore became appeal rights exhausted on 15 June 2020. Following that the appellant made further submissions on 8 September 2021 seeking a reconsideration of his case. He was afforded a right of appeal in relation to the refusal of those further submissions and that led to the decision which under challenge by virtue of the present appeal, which was promulgated by the First-tier Tribunal Judge on 30 June 2022.

2. Of course the starting point for the consideration of the appellant's case, based upon his further submissions, was the application of the principles set out in **Devaseelan [2002] UKIAT 00702*** It is unnecessary, as they are so well-known for me to set out the principles established in that case as to the approach to be taken to earlier determinations in the reconsideration of a person's case.

3. The judge identified the conclusions which were reached by a panel in connection with the earlier appeal and set out in detail the findings of that panel. The panel in summary were not satisfied that the appellant was a credible witness, relying upon inconsistencies in the responses which he had given on arrival in the UK and in his asylum interview. The panel agreed with the respondent's conclusion that the appellant had been a low-level member of the Peshmerga, and was unlikely to be targeted for the remarks which he had made, let alone contacted, in relation to the publication of material on Facebook. The panel therefore were not satisfied for these and other reasons that the appellant was at risk of persecution upon return. They had, however, to consider what the position would be in relation to return, bearing in mind the case law, which was pertinent at that time. The panel's conclusions in that connection were as follows:

> "62. However, it is necessary for us to consider the feasibility of the return of the Appellant and his family to their home region within the IKR bearing in mind that they claim that they have no identity documents which will facilitate their entry in to that region. As SMO, KSP & IM makes clear, it will not be necessary for the Appellant and his family to be returned to Baghdad because there are direct flights to Erbil. The head note to the latest country guidance suggests that, once at the IKR border (land or air) a returnee would normally be granted entry to the territory with no further legal impediments or requirements. We believe that the Appellant and his family could, in any event, obtain their CSID's, as opposed to the new INID, without difficulty if they are not actually, in possession of them. It is the Appellant's case that these identity documents were removed by those raiding his home before he left. As we are not satisfied that the Appellant has given a believable account of that occurrence then we are able to find that, with assistance from relatives, the Appellant should be able to obtain his CSID documents without difficulty. In that respect it is also our conclusion that the Appellant and his wife have several relatives remaining in the IKR who would be able to assist with this task. In any event the latest country guidance also shows that the CSID document

can be issued through the embassy or consulates in the United Kingdom with the provision of the necessary information. This can be provided by the Appellant's relatives if the Appellant does not, himself, remember the details of his CSID. We do not conclude that the return of the Appellant and his family to the IKR is not feasible on account of any lack of identity documentation."

4. The First-tier Tribunal Judge, reaching the determination of the appeal on the 30 June 2022, relied upon the panel's decision as to the starting point for the consideration of whether or not the appellant would have adequate and appropriate documentation were he to be returned to the IKR. The judge concluded as follows:

"65. As regards the identity document-related arguments to the appellant. I take paragraph 62 of The Panel's Decision as my starting point. That is, applying **Devaseelan**, I proceed from The Panel's findings that in January 2020 the appellant was, (contrary to his own claims) still in contact with relatives in Iraq. And that, with assistance from relatives, the appellant should be able to obtain his CSID documents without difficulty. … As at January 2020 the appellant and his wife had several relatives remaining in the IKR who would able to assist with that task. ….

66. I there accept Mr McBride's submission that the appellant must be taken to still be in contact with people in Iraq who could send him his CSID card - if he chose to have it sent to him. That means that the appellant cannot succeed on his claims that he would be at risk on return to Iraq simply because he does not have access to suitable identity document that he and his family members could use.

67. Given that the appellant and his family members originate from the IKR, it may even be possible for the respondent to arrange their return to Erbil or Sulimaniyah on *laissez passe* documents (whether the appellant takes steps to have the family's CSIDs sent to them by relatives or not).

68. What no longer goes against the appellant's case relating to identity documentation is what The Panel went on to say about the possibility of the appellant obtaining replacement CSID documentation through an Iraqi Embassy or Consulate in the UK. In that respect matters have moved on since January 2020 and the respondent now accepts that an Iraqi in the position of this appellant cannot obtain replacement CSID documentation in the UK.

69. What has also moved on since January 2020 is the respondent's policy on the route of return for failed Iraqi asylum-seekers. I accept Mr McBride's position that this is an appellant who can be returned (with his family members) direct to the IKR via Sulimaniyah Airport or Erbil Airport. That appears from at least paragraphs 2.6.3 of the May 2022 CPIN on internal relocation.

'2.6.3 Failed asylum seekers and foreign national offenders can now be returned to any airport in Federal Iraq and the KRI'."

5. The further submissions that have been made by the appellant included evidence related to his sur place activities in the UK since his arrival and the earlier adverse decision which had been made in his case. A number of photographs, Facebook entries and other documentation was presented to the First-tier Tribunal Judge and appears in the material which is before me. The judge's conclusions in relation to that evidence were extensive but need to be set out in full for the purposes of determining whether or not there is an error of law in his decision. Those conclusions were as follows:

> "73. I therefore proceed on the basis that in the UK the appellant has attended some 14, 15, 16 or 17 demonstrations … in opposition to the central Iraqi government and /or the IKR government – attendances on at least the 14 dates between 4 May 2021 and 20 April 2022 were specified in AS.13. The demonstrations in question were held in London, Manchester or Birmingham.
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> 74. There is no real suggestion that the appellant has taken a role in organising these demonstrations – although on 7 June he somewhat vaguely referred to the formation over the last two months by '*Kurdish activists'* of a not-yet formally-founded movement called *Council of Kurdish Activists in the UK*. And I do factor in the assertion that the appellant is *'always on the front-line shouting and carrying posters'.*
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> 75. The above said, unfortunately some of the appellant's *sur place claims* are not supported by the sort of evidence that could reasonably be expected. On that basis I am not able to accept as reasonably likely the appellant's claim to have been clearly visible in a video and pictures '*published by'*, a Kurdistan TV Station called *NRT TV*. The same is true of the appellant's claims that his picture has been published on various websites *'as one of the protestors against the KRG government'.*
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> 76. Whilst what I have said in my last paragraph is generally true, it is tempered – to a degree – by Ms Coen's point that the appellant's photograph does seem to have featured on two Facebook accounts that are not of his own – see pages 50 and 53. It is also true that at least pages 51 and 52 seem to show the appellant speaking into the microphone of an *NRT* interviewer but in that respect Ms Coen accepted that no transcript of any interview, nor any broadcast material (video or audio) has been put in evidence.
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> 77. Similarly, the evidence does not establish (even on the reasonable likelihood standard), that the appellant has received the threats that he claims to have received – see AS.13. If the appellant has received threats via social media, there is no good reason why (as Mr McBride submitted on 7 June) that evidence of those threats could not have put before the tribunal.
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> 78. In terms of any risk arising from having attended demonstrations in the UK, from the photographs adduced it seems clear that those pictured had no qualms about having their photographs taken at the events in question.

79. In terms of the appellant's social media / Facebook activities, the appellant claims that he *'regularly [posts] on Facebook about the corruption of the Kurdish government and the Iraqi government'* … But the 'Facebook evidence' adduced in this appeal suffers from the sort of deficiencies that the Upper Tribunal referred to in **XX**. That is, referring to the headnotes of **XX** that relate to *Facebook evidence* generally, in this case the '*Facebook evidence'* is not much more than a partial / selective set of 'snapshot prints'. Given the references in **XX** as to how easily manipulated 'Facebook evidence' is, the nature of that class of evidence adduced in this case is such that it has a low value / weight as support for the appellant's claims that he faces a risk of persecutory treatment on his return to Iraq.

80. Looking at all the material before me, including the January 2020 findings of The Panel, my assessment is that the appellant has engaged in 'critical' social media activities 'opportunistically" / in bad faith and not on account of any genuinely held beliefs. It follows (as per **XX**) that the appellant is someone who can reasonably be expected to close his account (which is very unlikely to have been subjected to monitoring) in good time for his return to his country of nationality.

81. In my judgement, the appellant's demonstration and social media activities, even taken cumulatively, do not create a real risk on return to northern Iraq for this appellant. Quite apart from anything else, there is a wholly overwhelming volume of 'chatter' on the Internet/social media. I do not accept that the authorities in Iraq would have any real interest in monitoring the Facebook posts of all their fellow nationals who are currently seeking asylum in the UK – especially when aspirants such as this appellant can properly be described as very small players, even if the appellant's account is taken at its highest."

6. The First-tier Tribunal's judgment was therefore that the appellant's political activities, by way of sur place activities, were not reasonably likely to excite interest on the part of any person in authority or power in Iraq, either whether considering Iraq generally or considering the IKR specifically. In the light of these conclusions, the judge reached the overall assessment, having considered other points which were raised, that the appeal fell to be dismissed. In his helpful, coherent and succinct submissions to me, Mr Richards advances two grounds.

7. The first ground is that the First-tier Tribunal Judge erred in law in relation to the appellant's sur place activity. It is submitted by Mr Richards that there was extensive evidence before the First-tier Tribunal Judge which the judge was not justified in concluding gave rise to no risk upon return. In particular, Mr Richards places emphasis upon the findings of the judge in paragraphs 73 and 74 that there was "no real suggestion" that the appellant had taken a role in organising these demonstrations, and in paragraph 75, that the appellant's case on sur place claims, was not supported by evidence in relation to being on a website or on a TV station. In the course of his submissions on these points, Mr Richards drew attention to page 72 of the bundle, in which, on that page and others there are Facebook entries in which the appellant is publicising rallies and protests against the authorities in the IKR and Iraq and in relation to the issue of being on the television and on websites, he draws attention to pages 57, 59 and 60, which

show the appellant being interviewed by a television presenter who is holding a microphone towards him along with entries from, it is said, external websites, showing that they have logged photographs of the appellant whilst he is protesting. On this basis it is submitted that the judge was in error in the findings that he reached, by virtue of leaving out of account evidence that was available to him. Secondly, therefore, his assessment of risk was infected by this failure to make a comprehensive assessment of the evidence.

8. Ground 2 is the contention that the appellant would be at risk as a person who is undocumented. He does not have, it is contended, a CSID card. This ground and ground 1 blur into one another at this point because it is submitted that part of the risks that he faces on return, as a person who has participated in demonstrations, is that he will be returned undocumented. As part of Ground 2, Mr Richards submits that his activities have made him persona non grata with his family, who have disowned him, and therefore the suggestion that they will assist in providing him with the necessary documentation is misconceived.

9. In response to these submissions Mr McVeety on behalf of the respondent raises a preliminary issue. He identifies that the ground of appeal in relation to sur place activity was not a pleaded ground of appeal placed before the First-tier Tribunal Judge, who granted permission to appeal. There was in the grounds but one ground and that was related to the absence of a CSID card placing the appellant at risk of persecution. Mr McVeety resists the consideration of the first ground on which Mr Richards advances the case on the basis that permission to appeal was not granted in relation to it. The position in relation to permission to appeal in this case is somewhat unsatisfactory. The document granting permission to appeal dated 18 July 2022 has, as part of its heading, the identification that "permission to appeal is granted". In paragraph 2 of the reasons, the judge granting permission observed as follows:

> "The grounds of appeal assert amongst other issues that the judge failed to properly consider the issues/impact of the appellant's inability to obtain a CSID or INID card. In my view the grounds disclose an arguable error of law. The grant of permission is not limited."

There is therefore an underlying ambiguity between the observation in the reasons in this grant of appeal that the grant of permission is "not limited" in circumstances where permission to appeal has been granted against grounds of appeal that raise but one issue namely the question of whether or not the absence of a CSID card would create difficulties for the appellant upon return to Iraq.

10. In the course of his submissions, Mr McVeety relied firstly on the case of **Nixon (permission to appeal: grounds) [2014] UKUT 368** in which the then president of UTIAC concluded that in the light of the clear terms of the then version of the Asylum and Immigration Tribunal (Procedure) Rules which were from 2005, the need to "identify the alleged error or errors of law in the decision" was determinative of when permission to appeal had been granted.

11. This decision was built upon by Upper Tribunal Judge Gill in her decision **Durueke (PTA; AZ applied, proper approach) [2019] UKUT 00197 (IAC)**. In that decision, the head note records that it is not permissible for appeal to be granted to the Upper Tribunal on a point that has not been raised by the parties (in particular the appellant) save in circumstances where that point is a

Robinson obvious point, and the **Robinson** obvious point is one which is properly arguable. Thus, it is submitted by Mr McVeety that these authorities made plain that it was not open to the judge to grant permission for ground 1, a claim based on sur place activity, since that was not part of the grounds of appeal that were before him. Moreover, that point is not a **Robinson** obvious point, even if it were arguable.

12. There is no doubt that there is a clear need for procedural rigour in the consideration of applications for grants of appeal to the Upper Tribunal. That is not simply because it is a specific provision of the relevant Procedure Rules, but also because it is part of the process of ensuring the achievement of the overriding objective, which is a fundamental principle underpinning the provisions of the Rules. It is most unsatisfactory that there is the underlying ambiguity in the present grant of permission. What a grant of permission being "not limited" may mean is entirely opaque. Were it to mean that an appellant were at liberty to come before the Upper Tribunal and argue any point that occurred to them, arising out of the original decision of the First-tier Tribunal, that would drive a coach and horses through the provisions of the Procedure Rules. Similarly, it is important that when the order provides that permission to appeal is granted, the reasons for that grant are crisp, clear and focussed and provide the parties with an understanding of what is the point upon which argument for the Upper Tribunal is being granted.

13. I have reached the conclusion that there is not permission to argue the sur place activity granted by the First-tier Tribunal in this case. I will nevertheless proceed to determine the point de bene esse and out of respect to the care with which Mr Richardson and Mr McVeety have prepared their cases and, as a tribute to the submissions which they have made, which it would be discourteous of the Tribunal to sweep to one side on the basis of the ambiguous order granted for granting permission to appeal.

14. Whilst dwelling upon the need for procedural rigour in grants of permission to appeal there are other ways in which the simple phrase "permission to appeal is granted" can cause difficulty. It is necessary if permission is being granted on a limited basis, and for identified grounds only for that to be specified in the heading, so that it is clear when it comes to an error of law hearing what the parties are preparing to argue. It is most unhelpful if that phrase is used and then the reasons for the decision undermine it by being unclear as to, for instance, in cases where there are several grounds of appeal, which of those grounds are being granted permission and which are not. Whilst sometimes it may be that a judge granting permission to appeal would provide some indication of their view as to the relative strength of grounds, strictly speaking, that is of no assistance at all. What the reasons for the decision need to focus upon, in a laser like fashion, is those grounds which are arguable and those which are not. To secure procedural rigour in the Upper Tribunal, and the efficient and effective use of Tribunal judge and party time in resolving the issues that are raised, it is necessary for the grant of permission to clearly set the agenda for the litigation for the future. It is to be hoped that these observations will be of assistance to those who have to consider these applications, and in exercising their powers to enable them to be of the greatest assistance possible, not only to the Upper Tribunal, but also to the parties who take time and trouble to prepare cases to be heard.

15. I turn then to the two grounds of appeal. I have set out the submissions made by Mr Richards in relation to ground 1. Mr McVeety responds by seeking to uphold the sur place findings that the judge reached and which I have set out at length above. In my judgment the reasons which the judge provided were clear and specifically addressed each of the points in the evidence which have been raised by the appellant and reached conclusions upon them. These were all conclusions which were not only open to the judge on the evidence but, as to the assessment of risk, flowed from the application of the relevant authorities, in particular, **XX** and **DA**. The judge set out and addressed the weight to be attached to each of the elements which had been presented to him.

16. Whilst Mr Richards focuses on two points in particular, I accept the submission made by Mr McVeety that when the judge referred to the evidence as containing no real suggestion that the appellant had taken on a role as an organiser, that was not erroneous or a conclusion reached in the teeth of the evidence or by overlooking aspects of the evidence. Those entries in the documentation, to which Mr Richards drew my attention and which I set out above, certainly show the appellant recycling or republishing information about protests and rallies, but they are not material which shows that the appellant was an organiser of those demonstrations. The quality and character of such an organising role would be very different.

17. In relation to paragraph 75, Mr Richards has submitted, as I have set out above, that there was evidence showing that the appellant was being interviewed on a TV station, but that was a matter which was contextualised by the judge specifically in paragraph 76 of his decision. He notes that material but contextualises it by the acceptance made on behalf of the appellant that there was no transcript of any interview or any video or audio of any material that was broadcast. Thus, in those circumstances, I am satisfied that the conclusion which the judge reached as to the risk to the appellant on the basis of the sur place evidence before him, was not such as to justify a favourable conclusion of the appellant's asylum claim.

18. Turning to ground 2, the essential difficulty in my judgment for the appellant in this connection is the conclusions that were reached in the earlier panel's decision. As I have set out above, paragraph 62 of that decision was clear. The judge in the case under appeal was entitled at paragraph 65 to place reliance on paragraph 62 as the starting point. That starting point was that the appellant did have family in Iraq who would be able to obtain the necessary documentation to facilitate his return, even if it is was not in their possession already. Similarly, findings were made as to the relatives who would be able to offer assistance.

19. Although Mr Richards makes his submission that the activities of the appellant have led his family to disown him, that is a submission which, with respect to Mr Richards, is not one open on the basis of the factual conclusions that the judge reached. As he explained, in paragraphs 66 to 69, there was ample evidence to enable the safe return of the appellant provided that the transport arrangements were as described in those paragraphs. For all of these reasons, and as I have said, notwithstanding the careful submissions of Mr Richards, for which I am grateful, this appeal must be dismissed.

20. I conclude by thanking all parties for their flexibility in enabling us to return to this case today, as for reasons by which it is necessary to go into, it was not possible to complete the hearing of this case on Monday, when we had

anticipated doing so and so for the parties to have completed the preparation and return to this hearing on Thursday, is beyond commendable and I am very grateful to everyone for their assistance in enabling us to complete this matter.

Ian Dove

President of the Upper Tribunal
Immigration and Asylum Chamber

16th May 2023