IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006558
First-tier Tribunal Nos:
PA/53425/2021
IA/09539/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 16 July 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

AMS
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Not represented
For the Respondent: Mr. E. Terrell, Senior Home Office Presenting Officer

Heard at Field House on 11 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant 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. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge French (the "Judge") dated 4 June 2022 in which he dismissed the Appellant's appeal against the Respondent's decision to refuse his protection claim. The Appellant is national of Iraq who claimed protection on the basis of his Kurdish ethnicity and his lack of documentation.

2. I have made an anonymity order continuing that made in the First-tier Tribunal as this is an asylum appeal.

3. Permission to appeal was granted by First-tier Tribunal Judge Austin on 29 September 2022 as follows:

> "The grounds assert that the Judge erred in law in a material way on 5 grounds;
>
> > i)The FTT J erred in law in his application of the Devaseelan principles, failing to take into account any updated country information
> > (ii)The FTT J erred in law by failing to consider or apply the country guidance case of SMO
> > (iii)The FTT J reached an irrational conclusion as to the risk to the appellant in his home area
> > (iv)The FTT J made no finding in respect of whether or not the appellant could obtain either a CSID or INID
> > (v)The FTT J failed to provide any or sufficient reasoning for conclusions that he reached
>
> The first ground discloses a possible material error of law, in that it is arguable that the guidance as to background information concerning Iraq and the Appellant's claimed home area was not considered when assessing the argument for revisiting the findings of the First Tribunal on Devaseelan principles."

The hearing

4. There was no attendance by or on behalf of the Appellant. The file indicated that notice of the time and place of the hearing had been sent to the Appellant's representatives. I considered that it was in the interests of justice to proceed with the hearing in the absence of the Appellant in accordance with rules 2 and 38 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

5. Mr. Terrell accepted that the decision involved the making of material errors of law, in particular in the Judge's approach to Devaseelan, and his failure to make findings as to whether or not the Appellant could obtain a CSID or INID. In his opinion, the appeal should be remitted to the First-tier Tribunal to be reheard de novo.

6. I was in full agreement with Mr. Terrell. I stated that I found the decision involved the making of material errors of law, and I set the decision aside. I set out my reasons below.

7. Later the same day the Tribunal received an e-mail from the Appellant's representatives which stated that they had received notice of the hearing but there had been human error in ensuring that it was passed to the correct case worker. However, given the concession made by Mr. Terrell, I remained of the opinion that it had been in the interests of justice to proceed with the hearing.

Error of law decision

8. Given the acceptance by Mr. Terrell that the decision involved the making of material errors of law, I do not intend to go through all of the grounds in detail.

9. I find that Ground 1 is made out and that the Judge materially erred in law in his application of the Devaseelan principles. He stated at [10(6)] and [10(7)]:

> "I am conscious on the basis of Devaseelan principles that the starting point for a second Adjudicator must be the determination of a First Adjudicator, where the facts

> relied upon are the same and the evidence in support is substantially the same. The issue is that the same issues should not be permitted to be litigated again.
>
> In my opinion the grounds put before me are exactly the same as those put before the previous First-Tier Tribunal Judge, namely that he would be persecuted upon return to Iraq because he is a Kurd, that he needs humanitarian protection and that a return would breach his rights under ECHR. On the face of therefore the only basis for my being able to revisit the same issues would be if there was new evidence. All that has been produced here is some documents to show that he attended at the Iraq embassy on 18/12/19 and he had been given an appointment with the Red Cross on 13/02/20. I do not consider that an attendance at the embassy was evidential of anything else, or that I should presume that he had done everything possible to obtain the necessary documentation to travel. There was evidence of only one actual appointment with the Red Cross and some limited correspondence in which the Red Cross talked of making enquiries in Germany. The Appellant made no mention of there being anything to suggest that he did have family in Germany. It follows that I am not convinced that there is sufficient "new" material to justify my making a determination, which was contrary to that of the previous First-Tier Tribunal Judge."

10. I find that the Judge has erred in considering only whether there is any new evidence from the Appellant rather than giving wider consideration to whether there is any other new material which would enable him to depart from the previous decision. The previous decision was dated 14 February 2017. The Judge was referred to the case of SMO, KSP and IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC). He noted at [9] that "When the Tribunal considered the application in 2017, the decision in SMO had not been made." He went on to record the submission that there had been a change in the Appellant's home area with reference to the case of SMO.

> "I was referred specifically to paragraph 79 in SMO in which it is commented that there had been an increase in sectarian violence, whereas it had previously been believed that things had settled down. It was asserted that there had been a rise in violence towards Kurds, in his home area."

11. Despite being referred to new evidence in the Country Guidance caselaw which was relevant to the Appellant's circumstances, the Judge did not take this into account when considering whether he could depart from the previous decision on Devaseeelan principles. I find that this is a material error or law.

12. While the Judge purported to consider the Appellant's case in the alternative on the basis that he was able to depart from the previous decision, nowhere in his findings at [9(9)] is there any consideration of the Country Guidance case of SMO when considering risk on return, as set out at Grounds 2 and 3. His consideration of risk is based solely on the Appellant's credibility without any reference to the Country Guidance caselaw. I find that this is a material error of law.

13. As specifically accepted by Mr. Terrell, I find that Ground 4 is made out. The Judge has failed to make a finding as to whether or not the Appellant could obtain a CSID or INID. The Appellant's claim for protection was based in part on his lack of documentation, as is acknowledged by the Judge when setting out the Respondent's decision at [3]. At [9] when setting out the Appellant's submissions, the Judge notes that the issue of documentation was raised. However, he makes no findings as to whether or not the Appellant can obtain a CSID or INID with reference to the Country Guidance case of SMO. I find that the Judge has failed to engage with a central part of the Appellant's claim, that he

will be at risk due to his lack of documentation. I find that this is a material error of law.

14. I have carefully considered whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade. I have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

> *"(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.*
>
> *(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal."*

15. I have carefully considered the exceptions in 7(2)(a) and 7(2)(b). Given the Judge's approach to the evidence in the Appellant's appeal there are no findings which can be preserved. I therefore consider that the extent of the fact-finding necessary means that it is appropriate to remit this appeal to be reheard in the First-tier Tribunal.

Decision

16. The decision of the First-tier Tribunal involves the making of material errors of law.

17. I set the decision aside. No findings are preserved.

18. The appeal is remitted to the First-tier Tribunal to be reheard de novo.

19. The appeal is not to be listed before Judge French.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
11 July 2023