IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001354

First-tier Tribunal No:
PA/00485/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

5th December 2024

Before
UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE LOKE

Between
S N M
[ANONYMITY DIRECTION MADE]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Alban, Legal Representative, Seren Legal Practice
For the Respondent: Ms C Newton, Senior Home Office Presenting Officer

Heard at Field House on Monday 11 November 2024 via CVP

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant (S N M) 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

BACKGROUND

1. The Appellant appeals against the decision of First-tier Tribunal Judge Mathews promulgated 1 February 2024 ("the Decision") dismissing the Appellant's appeal against the Respondent's decision dated 12 May 2023 refusing the Appellant's protection and human rights claims. The refusal on this occasion follows an earlier refusal decision which the Appellant appealed. That appeal was dismissed by First-tier Tribunal Judge Atkinson in a decision promulgated on 20 February 2019 ("the First Appeal Decision").

2. The Appellant is a national of Iraq of Kurdish ethnicity. He claimed to be at risk from the family of a girl with whom he entered into a relationship. That was the claim which was roundly rejected by the First Appeal Decision. As well as repeating that claim on this occasion, the Appellant also now claims to be the subject of an arrest warrant ("the Warrant"). He claims to have obtained the Warrant from his sister who remains in Iraq. He relies on a report from Dr A Giustozzi dated 3 October 2023 ("the Giustozzi Report"). In that report, Dr Giustozzi records his instruction given to a researcher in Iraq who conducted enquiries and reported back via Dr Giustozzi that the Warrant is genuine.

3. The Appellant also relies on his sur place activities which he says place him at risk on return. There is no issue in this case about returnability of the Appellant. His CSID is accessible to him via his sister.

4. The Judge found that the Giustozzi Report was not an expert report as the Appellant claimed and that it suffered from evidential deficiencies because there was no statement from the researcher who is said to have verified the Warrant ([§23-25] of the Decision). This point was taken by the Respondent's representative on the morning of the hearing. The Judge refused the Appellant an adjournment to obtain a statement from the researcher ([§6-8] of the Decision). In addition, the Judge doubted the Warrant based on inconsistencies on the face of the Warrant and its provenance which the Judge said were not addressed in evidence until the Appellant gave evidence at the hearing ([§26-28] of the Decision).

5. The Judge was also provided with some limited medical evidence which it was said tended to support the Appellant's claim that he had previously suffered injury on account of being attacked by the family of the girl with whom he had a relationship. He found that the evidence did not amount to an expert report and indicated only that the Appellant had suffered an injury and not how that was sustained ([§22] of the Decision).

6. The Judge also had evidence that the Judge in the First Appeal Decision had relied on the Appellant's answer to a question in his asylum interview which it later transpired had been mistranslated. This was

said to be fundamental to the previous Judge's findings that the Appellant's account of the relationship and risk arising therefrom was not credible. The Judge did not accept this submission ([§21] of the Decision).

7. For those reasons, the Judge found no reason to depart from the findings in the First Appeal Decision.

8. In relation to sur place activities, the Judge found at [§33-35] of the Decision that the Appellant's evidence about Facebook posts was inadequate, having regard to the guidance given by this Tribunal in XX (PJAK – sur place activities – Facebook) Iran CG [2022] UKUT 00023 (IAC) ("XX"). The Judge found in any event that there was no evidence that the Appellant's sur place activities would place him at risk on return.

9. The Judge therefore dismissed the appeal on protection and human rights grounds.

10. The Appellant appeals the Decision on six grounds which can be summarised as follows:

Ground 1: the Judge acted unfairly by refusing an adjournment to allow the Appellant to obtain a statement from the researcher referred to in the Giustozzi Report.
Ground 2: the Judge erred in not giving weight to the Giustozzi Report on the basis that it was not an expert report. It was also said that the Judge failed to have regard to the Appellant's evidence about how he had obtained the Warrant and dealing with the inconsistencies on the face of the Warrant.
Ground 3: the Judge erred in finding that the mistranslation which gave rise to one of the findings made in the First Appeal Decision was "of little impact". It is also said that the Judge failed to deal with other of the Appellant's evidence which was said to undermine other of the findings made.
Ground 4: the Judge failed to consider the medical evidence in the round.
Ground 5: the Judge erred by placing little weight on the Facebook evidence as the Appellant had provided a link to his account which the Judge could have accessed if he had concerns about the evidence.
Ground 6: the Judge erred in finding that the background evidence did not show that the Appellant would be at risk on account of his opposition to the authorities in the KRG.

11. Permission to appeal was granted by First-tier Tribunal Judge Boyes on 23 March 2024 for the following reasons so far as relevant:

> "..3. The grounds of appeal are clear and need no further elucidation from me. Amongst other matters, it is arguable but for the failure of the R to comply with directions there would be no adjournment. It is arguable that

> the Crown caused the appellant's invidious position which was amplified by the refusal to adjourn.
> 4. Permission is granted on all matters raised.

12. The appeal comes before us in order to decide whether there is an error of law. If we determine that the Decision does contain an error of law, we then need to decide whether to set aside the Decision in consequence. If we set the Decision aside, we must then either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

13. We had before us a bundle running to 372 pages (pdf) ([B/xx]) containing the documents relevant to the appeal before us, and the Appellant's and Respondent's bundles before the First-tier Tribunal. There has been no Rule 24 Reply from the Respondent.

14. Having heard from Ms Alban and Ms Newton, we indicated that we would reserve our decision and provide that in writing which we now turn to do.

DISCUSSION

15. We begin with grounds three to six which we find for reasons which follow have no merit.

Ground three

16. The reasons given for the adverse credibility finding against the Appellant in the First Appeal Decision in relation to his core claim (concerning the relationship in Iraq) appear at [§37-43] of that decision ([B/240-241]). At [§37-38] of the First Appeal Decision, the Judge said this:

> "37. I find that there is a fundamental contradiction in the appellant's account which goes to the core issue of whether or not he has had a relationship with [R] as claimed. A core component of his claim is that he and [R] slept together. The claimed purpose of so doing was that [R], having lost her virginity, would thereby not be able to marry anyone else, and as a result, [R]'s parents would be forced to agree to their marriage.
> 38. However, this account is inconsistent in a number of respects. First, in his substantive interview, at question 83, the appellant said that having sex before marriage was not frowned upon in his society. In my view such a statement wholly undermines the appellant's claimed plan, which was based on [R] losing her virginity through pre-marital sex and in consequence, her family would feel compelled to give consent to their marriage because of societal disapproval of what had taken place."

17. The Judge went on to refer to a second reason linked to an inconsistency with background evidence on honour crimes – in essence, that had [R] engaged in extra-marital sex as the Appellant claimed, she would have been killed by her father. He then set out factual inconsistencies in the Appellant's account which led him to the

conclusion at [§43] of the First Appeal Decision that the core claim was not credible.

18. We accept as did Judge Mathews that the answer to the question in the substantive interview had been wrongly recorded in writing. Judge Mathews dealt with the findings in the First Appeal Decision on the core claim as follows:

> "18. At the core of the appellant's claim is his relationship outside of marriage with a former partner. Before me the appellant has adduced evidence indicating that during his substantive asylum interview there was an incident of mistranslation. In the previous refusal of the appellant's claim, the Judge referred to question 83 in the asylum interview which read as follows, 'is sex before marriage frowned upon? Answer: - No'. The evidence before me is that in fact, the appellant having obtained a further translation of the recorded interview, the question asked was, whether sex before marriage was normal (my summary), to which the answer given was no.
> 19. I note the certified translation of the relevant section set out at page 10 of the appellant's bundle and on the balance of probabilities I find that the specific translation advanced by the appellant is more reliable, the appellant's recorded answer of 'no' makes very little sense if the original translation is adopted given the nature of his claim for protection.
> 20. I do find therefore that the more recent translation evidence before me provides clarification that the appellant's answer to question 83 in his substantive interview was not in fact a matter that contradicted his claim as suggested in the previous decision.
> 21. The appellant's account of his pre-marital relationship has not otherwise changed in his evidence to me. It is suggested that the previous misunderstanding as to question 83 undermines the credibility findings of the previous immigration Judge. I have read the previous decision in full, paragraph 38 addressed question 83 of the interview. But in the following paragraphs the judge gave a series of observations and findings that were found to be inconsistent. The appellant has satisfied me that the finding in relation to question 83 must be reconsidered in the light of more recent translation evidence. However the previous judge's other findings on the topic, set out in paragraph 38 onwards, are not in my judgement affected by the translation point in any material way. The evidence of the mis-translation does not in my judgement undermine those other conclusions. The appellant has of course repeated his account to me but in my judgement he has not advanced any further evidence that justifies a departure from the findings and approach of the previous judge beyond the reservation above."

19. The Appellant's third ground argues that the Judge "errs at [38] in finding that the accepted mistranslation of the appellant's substantive interview was 'of little impact' given the other inconsistencies previously relied upon by Judge Atkinson". That of course wrongly refers to a paragraph of the First Appeal Decision on credibility rather than to a paragraph of the Decision. We can find no reference made by Judge Mathews to the mistranslation being "of little impact". What he found was that the mistranslation did not undermine the other findings. That was a matter of weight which it was for the Judge to determine.

20. Further, the ground as pleaded also wrongly records what was said in the First Appeal Decision. Judge Atkinson did not say that the mistranslated answer was a "fundamental contradiction" going to the core of the Appellant's claim. That was said at [§37] of the First Appeal Decision before first relying on the mistranslation but then also relying on an inconsistency between the claim and the background evidence about honour crimes.

21. As already noted, and as recorded by Judge Mathews, the First Appeal Decision also gives several other reasons for finding the core claim not to be credible. It is suggested that at [§21] of the Decision, the Judge has failed to engage with the Appellant's evidence about the core claim set out in his statement. It is said that this evidence is more than simply repetition as asserted at [§21] of the Decision. Whilst we accept that the Appellant's statement at [§14-18] ([B/31] seeks to address the findings in the First Appeal Decision, other than in relation to the mistranslation, none of what is there said changes any of his account. It merely records a disagreement with the findings in the First Appeal Decision.

22. For the foregoing reasons, there is no misapplication of the "Devaseelan" guidance in relation to the adverse credibility findings. Those were taken as a starting point by Judge Mathews who considered the further evidence (in the form of the mistranslation) when assessing whether he should depart from those findings. The reasoning and conclusion at [§18-21] of the Decision were open to the Judge for the reasons given.

23. There is no error of law disclosed by the third ground.

Ground four

24. The Appellant relied in the appeal before Judge Mathews on medical evidence in the form of medical records and a letter from Sheffield Orthopaedics Ltd. Those documents appear at [B/69-72]. The documents show that the Appellant had suffered a fracture to his lumbar spine whilst in Iraq which had been fixed with a metal plate. It stands to reason since these documents all emanate from the UK that the timing of that injury and the cause of it rely entirely on the Appellant's account. We observe (although Judge Mathews did not note this) that the letter from Sheffield Orthopaedics at [B/69] does not entirely accord with the Appellant's account in any event since it records that he says that he was attacked "in December 2019" whilst also stating that he suffered a fracture in Iraq in 2016 "with metalwork failure" in 2019. By 2019, the Appellant was in the UK and so cannot have been attacked in 2019, but this shows why the medical evidence is of little assistance.

25. Judge Mathews dealt with this evidence at [22] of the Decision as follows:

> "I have had regard to the appellant's medical records and the letter from Sheffield Orthopaedics ltd. I note that I do not have a full medical report with appropriate declarations, the signatory of the letter appears to have relied upon the appellant as a credible and reliable witness of fact. I accept that the medical evidence demonstrates that previously the appellant has sustained injury but I am not persuaded that the letter represents an expert report. The records and letter allow me to find that the appellant has sustained an injury but do not offer any significant support beyond that fact. The letter and records do not satisfy me that the injury was in fact sustained in the manner suggested to me by the appellant."

26. The ground suggests that the Judge "places the burden too high in expecting such evidence to prove injury attribution as a matter of fact rather than considering the appellant's evidence as a whole and in the round".

27. Any experienced practitioner in the immigration field and Immigration Judge familiar with medical reports in this jurisdiction are well aware that, although a medical expert cannot of course state as a matter of fact that a particular injury has been caused in a particular way, such an expert can state whether the injury as seen is either consistent, highly consistent or inconsistent with the attribution claimed. As the Supreme Court pointed out in KV (Sri Lanka) v Secretary of State for the Home Department [2019] UKSC 10, "one of the functions of a medical report in relation to scars [and we would say any other physical injury] was to offer a clear statement in relation to their consistency with the history given".

28. In this case, the author of the letter does not profess to offer any opinion about whether the original fracture was consistent with the history which the Appellant put forward (which is as we have noted also apparently wrongly recorded in one place). The purpose of the letter is apparent on its face as being to advise the Appellant on possible treatment for the pain which he continues to suffer from the injury.

29. Ms Alban suggested that the evidence was "consistent with the Appellant's account". However, beyond recording what was the Appellant's account, we cannot see how the evidence adds anything at all to the Appellant's case beyond indicating that he suffered a back fracture whilst in Iraq. The Judge considered the evidence and gave it no weight as he was entitled to do.

30. There is no error of law disclosed by the fourth ground.

Ground Five

31. The Appellant in this second appeal advances a sur place claim which he did not put forward in his first appeal. He says that his online Facebook activity will bring him to the adverse interest of the authorities on return.

32. The Appellant's fifth ground challenges the Judge's consideration of the Appellant's evidence in this regard which is at [§34-36] of the Decision as follows:

> "34. During cross-examination the appellant conceded that the download of his Facebook account did not include a full copy of his profile such as the 'download your info' function that is available to Facebook users. His explanation for that lack of a full download was that previously he had had an account closed and so he didn't want to share such information again. I do not find that to be a good reason for failing to provide a full download in support of his asserted activity.
> 35. I have had regard to the authority of **XX [2022] UKUT 00023.** In my judgement the appellant has failed to provide a full download as would be available to him, this significantly undermines the weight that I can attach to the information that is before me. I am not satisfied that it is the appellant who is the operator and poster of the information that is before me given the incomplete disclosure of his Facebook account, in any event he has not demonstrated any good reason that would prevent him from closing any such account in the event of a return.
> 36. I do not find that the appellant has demonstrated any online activity that would place him at risk in the event of a return, I have considered lent [sic] those sections of the refusal setting out in any event the fact that simple opposition to the authorities is unlikely to be a matter that requires protection."

33. It is suggested by the Appellant that the Judge erred by materially misdirecting himself in accordance with the guidance given in "XX". XX is mainly directed to the situation in relation to Iran but offers the following guidance in relation to social media evidence more generally:

> "7) Social media evidence is often limited to production of printed photographs, without full disclosure in electronic format. Production of a small part of a Facebook or social media account, for example, photocopied photographs, may be of very limited evidential value in a protection claim, when such a wealth of wider information, including a person's locations of access to Facebook and full timeline of social media activities, readily available on the 'Download Your Information' function of Facebook in a matter of moments, has not been disclosed.
> 8) It is easy for an apparent printout or electronic excerpt of an internet page to be manipulated by changing the page source data. For the same reason, where a decision maker does not have access to an actual account, purported printouts from such an account may also have very limited evidential value.
> 9) In deciding the issue of risk on return involving a Facebook account, a decision maker may legitimately consider whether a person will close a Facebook account and not volunteer the fact of a previously closed Facebook account, prior to application for an ETD: HJ (Iran) v SSHD [2011] AC 596. Decision makers are allowed to consider first, what a person will do to mitigate a risk of persecution, and second, the reason for their actions.
> It is difficult to see circumstances in which the deletion of a Facebook account could equate to persecution, as there is no fundamental right protected by the Refugee Convention to have access to a particular social media platform, as opposed to the right to political neutrality. Whether

such an inquiry is too speculative needs to be considered on a case-by-case basis."

34. We can discern no material misdirection made by the Judge when applying that guidance. The Judge observed that he did not have the "Download Your Information" printout. He noted the reason given but concluded that in the absence of that evidence, the weight he could give to the evidence was "significantly undermined". The printouts relied upon were not satisfactorily evidenced.

35. The complaint made under the fifth ground however goes beyond material misdirection and is in effect that it was not open to the Judge to give the evidence little weight as both he and the Respondent had been given access to the Appellant's Facebook account via a link.

36. We observe first that it is not for the Judge to make up for deficiencies in a party's evidence. Ms Alban was unable to offer any satisfactory explanation for the failure to follow the guidance in XX beyond what was said by the Appellant which the Judge was entitled to find was not a good reason. Even if it were, it is of course for the Appellant to decide whether to risk little weight being given to the evidence on which he relies for failure to produce it in the required manner.

37. As Ms Newton also pointed out, even if the Judge had been prepared to access the link given, that would not assist as that would show the state of the account only at the time when that account was accessed. It would not show whether posts on the account had been edited in the past.

38. For those reasons, the Judge was entitled to find that the Facebook posts (which appear at [B/73-114] in largely untranslated form) did not place the Appellant at risk on return.

39. There is no error disclosed by the fifth ground.

Ground Six

40. The sixth ground is directed to the Judge's finding at [§36] set out above that simple opposition to the authorities does not give rise to risk in any event.

41. The Judge relied in this regard on the Respondent's refusal letter which deals with this issue at [§26-27] ([B/318]) as follows:

> "26. Regarding your claim to have engaged in sur place political activity such that, upon any return to Iraq, you will likely be persecuted for your political opinion, paragraph 2.4.8 of '**Iraq: Opposition to the government in the Kurdistan Region of Iraq (KRI)' (June, 2021)** states that:
>
> > *'The evidence is not such that a person will be at real risk of serious harm or persecution simply by being an opponent of, or having played a low level part in protests against the KRG. Despite evidence that opponents of the KRG have been arrested, detained, assaulted and*

> *even killed by the Kurdistan authorities, there is no evidence to suggest that such mistreatment is systematic. In general, a person will not be at risk of serious harm or persecution on the basis of political activity within the KRI…'*
>
> 27. Paragraph 3.1.1 also states that:
>
> *'Article 38 of the Iraqi Constitution (which covers the Kurdistan Region of Iraq (KRI)) states:*
> *'The State shall guarantee in a way that does not violate public order and morality:*
> *'**First**. Freedom of expression using all means.*
> *'**Second**. Freedom of press, printing, advertisement, media and publication.*
> *'**Third**. Freedom of assembly and peaceful demonstration, and this shall be regulated by law*.'"

42. The Appellant asserts that the Judge relied on background evidence which was out of date by the time of the hearing. There is a Country Policy and Information Note dated July 2023 ("the July 2023 CPIN"). That does not appear in the index of the Appellant's bundle before the First-tier Tribunal. There is no reference to it in the Appellant's skeleton argument before Judge Mathews ([B/24-28]). The July 2023 CPIN is not part of the bundle before us. It has since been updated and we have been unable to find a published document which includes the reference cited at [§5.1] of the grounds. In any event, that citation ("any risk of mistreatment and possible persecution regarding political activity in the KRI is centred around protesting against the KRG more generally, rater than as a result of being a supporter, member or carrying out activities on behalf of a specific political party") makes clear that it refers only to protests in Iraqi Kurdistan and not in the UK.

43. Ms Alban did not press this ground once it was pointed out to her that the July 2023 CPIN was not in the bundle and not referred to in the Appellant's skeleton argument before Judge Mathews. In any event, she was unable to take us to any background evidence showing a risk to a general low-level critic of the Kurdish authorities based in the UK (even assuming that the Appellant's activities as such were accepted). Ms Newton for her part submitted (as appears to be the case) that there is no [§2.4.7] in the July 2023 CPIN as is said to be cited in the Appellant's grounds and in any event, the point made at [§3.1.1] of the July 2023 CPIN is that the authors of the report were "unable to find any evidence that substantiates a generalised real risk of mistreatment or risk relating to the support, membership or any activity on behalf of an individual political party in the Kurdistan Region of Iraq (KRI) in the sources consulted."

44. There is no error of law disclosed by the Appellant's ground six.

Grounds one and two

45. We take grounds one and two together since both focus on evidence that the Appellant is at risk on return due to the Warrant issued against

him and linked to his core claim. As we have already noted, the Appellant relied on the Giustozzi Report as corroboration of the Warrant. Ground two focusses on the weight given to the Giustozzi Report and ground one raises an assertion of procedural unfairness in the Judge's refusal to adjourn the hearing to allow the Appellant to remedy what the Judge found to be an evidential deficiency in relation to the Giustozzi Report.

46. The Judge dealt with the adjournment request at [§6-8] of the Decision as follows:

> "6. The hearing was recorded and that recording shall stand as the record of proceedings. At the outset Ms Alban made an application to adjourn. The appellants evidence includes an expert report from Dr A Giustozzi, dated 3rd October 2023. The report addresses the veracity of an arrest warrant relied upon in this case. The report states that scans of the documents in question were sent to an associate in Iraq. It is then stated that the associate undertook enquiries and records that the associate in question was told that the arrest warrant matched police records held in Iraq. Rather surprisingly there is no statement or witness evidence from the person said to have made the relevant enquiries in Iraq, or indeed any copy of any report by him to the report writer.
> 7. The appellant, on the morning of the hearing sought to adjourn in order to seek such a statement from the associate concerned. In my judgement the deficiency in the evidence was clear on the face of the report from October. The report had been served and read, and no further application made prior to the listed hearing. There was no notice of the application given in writing prior to the date of the hearing.
> 8. I declined to adjourn because in my judgement there had been every opportunity and plenty of time for such enquiries to have been made previously. The enquiries themselves are obvious. This case has already had significant delays and I did not find an appropriate basis upon which to adjourn the proceedings, the appellant having had every opportunity to advance all evidence upon which he seeks to put his claim."

47. Having refused the adjournment, the Judge dealt with the Warrant and the Giustozzi Report along with the Appellant's other evidence about the Warrant at [§23-29] of the Decision as follows:

> "23. The appellant says that an arrest warrant has been issued in this case and advances documentation said to represent the warrant. He states that his sister was able to get such documents to him. The appellant also advances an expert report from Dr A Giustozzi, dated 3rd October 2023, that I have read in full.
> 24. The report states that the expert contacted a third-party who in turn conducted enquiries seeking to address the question of whether or not the warrant relied upon by this appellant is a genuine document. The report sets out enquiries made by the third-party such as travel, attendance at police stations and conversations with local personnel. However there is no witness statement or other documentation from the third-party said to have been told that the document was genuine. In the essence the expert is passing on the opinion of a third-party as the basis for an assertion that the warrant is a genuine document.

> 25. The third party has made no expert declaration to me, has not provided any form of formal evidence and has certainly not been subject either to questions or to the discipline of providing a formal report. I am not able to attach any significant weight to the reported opinion of a third-party who has made no formal contribution to these proceedings. I do not find that the expert evidence as to the veracity of the warrant is of any significant evidential wait [sic] for those reasons.
> 26. I've also observed that though the appellant has copied an envelope said to have contained the warrant document from his sister, no such original documentation has been provided. The appellant has not given any detailed account of how his sister was able to obtain the documents in question.
> 27. It was put to the appellant that the name and date of birth on the purported warrant was not the same as the name and date of birth provided by the appellant at other times during these proceedings. In response he agreed, but indicated that having received the warrant from his sister, he did not read or open the correspondence from her hence being unaware of any such inconsistencies. I note with some surprise that having taken the time and made the effort to seek to obtain important documents from a family member in Iraq, the appellant seems to have been aware of what had been received, passing it to his solicitors, without opening the correspondence and indeed felt no need to read such important documents before passing them on to his representatives. In my judgement the appellant has not satisfactorily explained to me the inconsistency in his name and date of birth on the documents provided.
> 28. I note that the appellant referred generally to the fact that people are known by different names, I am willing to accept such a proposition, the concern in this case is that on a critical piece of documentation obtained the appellant states by his sister, he did not seek to address such a point before it was put to him in cross-examination.
> 29. I have kept in mind the present the principles set out in the decision of **Tanveer Ahmed** when assessing the arrest warrant documentation in this case. I find that the inconsistencies on its face in respect of the appellant's name and date of birth, the curious evidence as to the appellant not reading the document before submission in these proceedings and the absence of helpful expert evidence on this issue are matters that result in me placing no significant weight on the documentation said to reflect an original warrant having been issued."

48. The complaint made in the second ground is first that the Judge was wrong to require a statement from Dr Giustozzi's researcher in order to give weight to the Giustozzi Report and wrong to conclude that the expert was relying on the opinion of a third party.

49. At the start of the hearing, we drew Ms Alban's attention to a judgment of the High Court (the Honourable Mr Justice Pepperall) in R (oao MS) v Kent County Council) [2024] EWHC 2661 (Admin) ("MS") which had come to our attention from another area of Tribunal practice (in relation to age assessments). Although the judgment in MS does not arise directly from an immigration or asylum appeal or judicial review the Judge's conclusions have a direct read across to the Giustozzi Report relied upon. The Judge sets out the contents of a report of Dr Giustozzi relied upon in that case at [§15] of the judgment.

That is in almost identical terms to the relevant part of the Giustozzi Report relied upon by the Appellant (see [§5-7] at [B/36]).

50. The Judge in MS dealt with categorisation of this report as an expert report in those proceedings (which was relevant in that case due to the rules of evidence in the High Court) at [§16-17] of the judgment. As he there said, "the only opinion offered by Dr Giustozzi is that his agent has apparently performed satisfactorily and reliably in the past" (which is not an opinion offered by Dr Giustozzi in this case). The Judge in MS went on to conclude that "this is not expert evidence at all. Rather it is hearsay evidence as to what is recorded in the official records…". Since those records were not themselves in evidence, even a statement from the researcher would have been hearsay but since there was not even a statement from that researcher the evidence was multiple hearsay.

51. We gave both parties time to read the judgment in MS. Ms Alban pointed out that the judgment was not before Judge Mathews. What is said by the Judge in MS however is a matter of law. Further, it supports the view taken by Judge Mathews. We agree with both what is said by Judge Mathews and by the Judge in MS about the Giustozzi Report. It is not an expert report. It is a report from Dr Giustozzi recording investigations made by a researcher to whom he sent a scanned copy of the Warrant. The report of the researcher's findings is not evidenced by a statement from the researcher himself. Judge Mathews was therefore entitled not to attach significant weight to the Giustozzi Report absent that statement. We will return to the adjournment point after dealing with the remainder of the second ground.

52. The remainder of the second ground focusses on what is said about the provenance of the Warrant and what appear to be inconsistencies on the face of the Warrant.

53. As recorded at [§26] of the Decision, the Appellant is said to have obtained the Warrant from his sister in Iraq. It is said that the Appellant had not given any detailed account of how his sister obtained the document. We accept that the Judge has apparently overlooked the letter from the Appellant's sister which appears in translation at [B/52] which says that she was given the Warrant by a police officer who came to her house. Ms Alban said that the Appellant was not asked to produce the original envelope. However, the Respondent had taken issue with the Warrant in the decision under appeal and the Appellant could have been expected therefore to provide the original.

54. In terms of inconsistencies on the face of the Warrant, the Judge records what those are at [§27]. Although Ms Alban made submissions about evidence which supported the Appellant's explanation, we do not need to deal with that because the Judge accepted that the Appellant's explanation for the inconsistencies might be plausible.

55. The Judge's concern arose from the fact that the inconsistencies were not explained until raised at the hearing. Ms Alban said that was incorrect as they were dealt with at [§6] of the Appellant's witness statement ([B/29-30]). As Ms Newton pointed out, however, that statement is dated 29 November 2023 and in response to the Respondent's decision under appeal. The point made by the Judge is that the inconsistencies were not addressed on receipt of the Warrant and before the Respondent had raised the issue (albeit we accept the Judge was incorrect to say that the explanation was raised for the first time in cross-examination). We were unimpressed by Ms Alban's attempt to explain that the Appellant would not have raised the explanation when the Warrant was received as her firm encouraged clients to pass on documents unopened to ensure a chain of evidence. Even if that might be good practice, the Appellant's solicitors would have taken instructions before making further submissions to the Respondent.

56. We turn finally to the first ground. Had it not been for this ground, we would have been inclined to find that any minor errors in relation to Judge's findings about the Warrant were inconsequential and not material to the Judge's conclusion about that, particularly in light of the Judge's conclusions about the Giustozzi Report which he was entitled to reach.

57. However, the first ground concerns procedural fairness. As is made clear in Nwaigwe (adjournment; fairness) [2014] UKUT 418 (IAC), "[w]here an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing?". We apply that guidance here.

58. As Ms Alban pointed out, by directions given by the First-tier Tribunal on 20 November 2023 ([B/305-306]), the Respondent was required to provide to the Appellant and Tribunal "any further evidence or response, considered to be necessary, having regard to the documents served on behalf of the Appellant". That direction appears to have been given in the main because the Appellant was seeking to adduce further evidence about the mistranslation and medical evidence, but we accept is sufficient to encompass also a requirement to address documents already served. We do not accept that the directions go so far as to require the Respondent to provide a review of all documents provided in the Appellant's bundle. It is merely said that a review "would be of assistance". We do not for that reason accept that there was any material non-compliance with directions by the Respondent.

59. We accept however that the Giustozzi Report was not provided until after the Respondent's decision under appeal and therefore the Respondent's view taken of that report does not feature in the decision under appeal. Moreover, the Respondent did provide a review on the

day prior to the hearing ([B/363-372]). That review takes no issue with and does not deal with the Giustozzi Report.

60. As Ms Newton fairly accepts it was not until the morning of the hearing when the Respondent, represented by Counsel, raised the point about the value of the Giustozzi Report. We accept as the Judge said that this point should perhaps have been recognised by the Appellant's representatives. However, absent a challenge to that report and bearing in mind that there are not the same strict evidential rules in this Tribunal as exist in High Court proceedings, we also accept that the need for a statement from Dr Giustozzi's researcher might not have occurred to the representatives.

61. If there had been other cogent reasons for the Judge finding that the Warrant could not be relied upon, we might have been inclined to conclude that the proceedings overall were fair notwithstanding the late stage at which the Respondent raised the point about the Giustozzi Report. As it is, however, it is clear from [§29] of the Decision that this was one of the central reasons for not giving the Warrant weight and, for the reasons we give above, there were also some more minor errors made when dealing with the other evidence about the Warrant.

62. For that reason, we accept that ground one taken with the minor errors identified in the second ground (but not in relation to the Giustozzi Report) are made out.

63. As to disposal, both parties agreed that if we were to find that there had been procedural unfairness, as we have, then the appropriate course would be to remit the appeal to the First-tier Tribunal. We have considered whether the findings in relation to sur place activities could stand as those are not impacted by the procedural unfairness which relates only to the core claim. However, the findings as to risk in relation to the core claim may impact on risk arising from sur place activities and in any event whether there is a risk on return has to be determined as a whole at date of hearing.

CONCLUSION

64. For the reasons set out above, the Decision contains an error of law for the reasons set out at ground one and part of ground two. We set the Decision aside in its entirety and remit the appeal to the First-tier Tribunal for a full de novo hearing.

NOTICE OF DECISION

The Decision of First-tier Tribunal Judge Mathews promulgated on 1 February 2024 involves the making of an error of law. We set aside the Decision in its entirety. We remit the appeal to the First-tier Tribunal for rehearing.

L K Smith
Upper Tribunal Judge Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber

26 November 2024