IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002594
First-tier Tribunal No: PA/00037/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 October 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

MMA
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARMENT

Respondent

Representation:
For the Appellant: Appellant in person
For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer.

Heard at Phoenix House (Bradford) on 20 October 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

Introduction

1. I preserve the anonymity direction previously made in this appeal.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Smith dated 29/04/2022, which dismissed the Appellant's appeal.

Background

3. The Appellant was born on 01/011/1995 and is a Kurdish Iraqi from IKR. The appellant entered the UK on 12/08/2019 and claimed asylum that day. On 29/10/2021 the respondent refused the appellant's protection claim.

The Judge's Decision

4. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Smith ("the Judge") dismissed the appeal against the Respondent's decision.

5. Grounds of appeal were lodged, and on 06/09/2022 Upper Tribunal Judge Blundell gave permission to appeal stating

> It is just arguable that the judge's reliance on his own view of the plausibility of the appellant's account was legally impermissible. Whilst the findings at [26](c) may well be thought to fall into the category foreshadowed by Keene LJ at [26] of J v SSHD [2006] EWCA Civ 1223, it is arguable that the finding at [26](g) could only be made after considering the background evidence on the feasibility of a person such as the appellant leaving the country on his own passport.

The Hearing

6. The appellant was present, but unrepresented. He was assisted by a Kurdish Sorani interpreter. I explained the procedure to the appellant and told him that, when he was represented, counsel drafted the following grounds of appeal:

> 2. The Appellant seeks permission to appeal on a single ground, namely, that the FTT has given undue weight to immaterial considerations. Specifically, the FTT has relied upon its independent, speculative view as to the inherent probability of the Appellant's claim.
>
> Giving undue weight to immaterial considerations: Plausibility
>
> 3. The legal position in respect of the safety of a First Tier Tribunal Judge relying upon their own speculative view as to the inherent probability of an Appellant's claim is well established. Whilst the plausibility of an Appellant's claim may form part of the Tribunal's assessment of whether that account is true, findings on credibility must be based on reasonably drawn inferences from background country evidence and not on

conjecture or speculation (see, for example **HK v SSHD [2006] EWCA Civ 1037**).

4. The Respondent's Asylum Policy Instruction on Assessing Credibility and Refugee Status recognises the position in law at 5.6.5:

> *Caseworkers must not base implausibility findings on their own assumptions, conjecture, or speculative ideas of what ought to have happened, what they might think "someone genuinely fleeing for their life" should have done, what ought to have been possible or not*
>
> *possible, or how "a genuine refugee" would have behaved, or how they think a third party would have acted in the circumstances. …*
>
> *… underlying factors may well lead to behaviour and responses on the part of the claimant which run counter to what would be expected.*
>
> *As to the actions of others, it is not inconceivable (for example) that a guard might allow*
>
> *a detainee to escape, or a sympathiser provide assistance, even at the risk of punishment. Again, it will be important to explore the details and context of the escape or release at interview.*

5. At [26] The FTT lists a number of matters that the FTT finds to be implausible.

6. At paragraphs 26 b and c, the Tribunal finds against the Appellant due to the Tribunal Judge's independent view as to how someone genuinely fleeing for their life would behave. The Tribunal Judge's view appears to be based entirely on the Tribunal Judge's independent, subjective view of what would be reasonable in the circumstances. This is an unsafe basis to find against the Appellant.

7. At 26 e, the Tribunal appears to find it to be inherently implausible that the Appellant could survive in an abandoned village for a year. This finding is made without reference to background evidence. There is simply nothing inherently implausible about someone living off the land on a farm for a period of one year.

8. At 26 g, the Tribunal appears to find that it is inherently implausible that the Appellant would be able to travel by air from Sulaymaniyah airport. This is made without reference to background evidence. It is the Appellant's account that he is wanted for extra-judicial punishment. There is no reason to suspect that the same state agents involved with the attack on the prison in which the Appellant was involved also controlled Sulaymaniyah airport.

9. At 26 h, the Tribunal finds that the Appellant's account is undermined by the fact that his relatives have not been threatened over the feud. The reason why Judge Smith concludes that this is the case is not disclosed on the face of the determination; there was no evidence as to the modus operandi of the Appellant's enemies before the Tribunal.

10. Cumulatively, these deficiencies in the FTT's reasoning are sufficient to amount to an error in law. As the FTT's findings were based substantially upon the FTT's independent view

> of the inherent probability of the Appellant's account, these errors contaminate all of the FTT's reasoning.

7. For the respondent, Mr McVeety, told me that the decision does not contain errors of law material or otherwise. Mr McVeety took me through the subparagraphs of [26] of the Judge's decision and told me that although there are plausibility findings, they must be viewed in the context of what is known about Iraq. He told me that the Judge's decision is rational and well-reasoned. He told me that the Judge's findings of fact are based on the appellant's own evidence. He rehearsed parts of the appellant's account and told me that in the light of the evidence the Judge's conclusions are well within the range of reasonable conclusions available to the Judge.

8. Mr McVeety asked me to dismiss the appeal.

9. The appellant asked me to take account of the fact that he is unrepresented. He exhibited documentary evidence that he has been assaulted by four men in the UK and had suffered injuries so severe that he required an operation and seven months convalescence. He exhibited photocopies of national identity cards for his maternal aunt, his uncle, and his mother.

Analysis

10. The Judge's findings of fact start at [22] of the decision. There, the Judge gives reasons for accepting that the appellant served with the 3rd Brigade of the Peshmerga from 2014.

11. At [23] the Judge explains why he finds part of the appellant's account of his service to be plausible. At [24] the Judge explains why the appellant establishes that it is reasonably likely that he is linked to the vehicle shown in photographs lodged in evidence. At [25] the Judge finds that the appellant's account of involvement in a blood feud arising out of an incident at a prison is consistent.

12. The focus in this appeal is on [26] of the Judge's decision. There, the Judge considers whether or not the appellant was involved in a gunfight with security forces. The pivotal point is [26(b)] where the Judge says

> I do not consider the appellant's account of what happened after the gunbattle to be plausible, which damages his credibility generally.

13. At [26 (c)(i) to (vi)] the Judge gives his reasons for finding the appellant's account of what happened after the gunbattle to be implausible.

14. In Y v Secretary of State for the Home Department [2006] EWCA Civ 1223, Keene LJ said at para. 25, the tribunal of fact should be cautious before finding an account to be inherently incredible, because there is a considerable risk that it will be over influenced by

its own views of what is or is not plausible, and those views will have inevitably been influenced by its own background in this country and by the customs and ways of our own society. It is therefore important that it should seek to view an appellant's account of events in the context of conditions in the country from which the appellant comes.

15. In SB (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 160, Green LJ said (at para.46)

> In cases (such as the present) where the credibility of the appellant is in issue courts adopt a variety of different evaluative techniques to assess the evidence. The court will for instance consider: (i) the consistency (or otherwise) of accounts given to investigators at different points in time; (ii) the consistency (or otherwise) of an appellant's narrative case for asylum with his actual conduct at earlier stages and periods in time; (iii) whether, on the facts found or agreed which are incontrovertible, the appellant is a person who can be categorised as a risk if returned, and, if so, as to the nature and extent of that risk (taking account of applicable Country Guidance); (iv) the adequacy (or by contrast paucity) of evidence on relevant issues that, logically, the appellant should be able to adduce in order to support his or her case; and (v), the overall plausibility of an appellant's account.

16. In Awala [2005] CSOH 73 (para. 24) Lord Brodie said that a tribunal of fact making an adverse finding on credibility must only do so on reasonably drawn inferences and not simply on conjecture or speculation. Inferences concerning the plausibility of evidence must have a basis in that evidence. An applicant's testimony should not be lightly or readily dismissed and when it is reasons must be given. Nevertheless, the tribunal of fact need not necessarily accept an applicant's account simply because it is not contradicted at the relevant hearing. The tribunal is entitled to make reasonable findings based on implausibilities, common sense and rationality, and may reject evidence if it is not consistent "with the probabilities affecting the case as a whole."

17. If the challenge in this appeal was simply to [26(c)] of the decision the appeal would not succeed because [26(c)] falls within a category discussed by Keene LJ at [26] in Y v SSHD [2006] EWCA Civ 1223. The problem with the decision is that the rest of [26] appears to be an expression of the Judge's opinion rather than the Judge's findings of fact drawn from a holistic consideration of each strand of evidence.

18. The grant of permission to appeal focuses on [26(g)] of the decision. There, the Judge finds that the appellant's ability to use his own passport to board a plane in Sulaymaniyah damages his credibility, but that finding is made without reference to objective material. The finding at [26(g)] is distinguished from the findings at [26(c)] because the Judge does not explain why he draws an adverse inference simply because the appellant has been able to use his own passport.

19. There is also a tension between [25] and [27] of the decision. At [25] the Judge finds that the appellant gives a consistent account of involvement in a blood feud. At [27] the Judge says

> For the above reasons, despite the low standard of proof, I am not satisfied that the appellant has proven that there is a blood feud between him and elements within the KRG. Accordingly, the appellant's claim for asylum fails.

20. The Judge relies on his view of plausibility to make credibility findings at [26(d) and (e)]. The Judge does not adequately explain why he finds the appellant's evidence implausible, incredible, or unreliable. It is not clear from a fair reading of [26] which parts of the evidence made the Judge reach the conclusion that the appellant's account was implausible.

21. Is clear that the Judge found that the appellant was not a credible witness. It is equally clear that the Judge thought the appellant was not credible because the Judge thought his account was implausible. The error of law is that the Judge did not set out adequate evidence-based reasons for finding that aspects of the appellant's case were implausible, nor did the Judge set out adequate evidence-based reasons for finding that the damage done to the appellant's credibility was fatal to the appeal.

22. The errors of law are material errors of law. I therefore set the decision aside.

Remittal to First-Tier Tribunal

23. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

24. I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re hearing is necessary.

25. I remit the matter to the First-tier Tribunal sitting at Bradford to be heard before any First-tier Judge other than Judge M. Smith.

Decision

The decision of the First-tier Tribunal is tainted by a material error of law.

The Judge's decision dated 29 April 2022 is set aside.

The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed *Paul Doyle* Date 25 October 2023
Deputy Upper Tribunal Judge Doyle