IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006260

First-tier Tribunal No: PA/51507/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 August 2023

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

MSH
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms C Warren of Counsel, instructed by Primus Solicitors
For the Respondent: Ms A Everett, Home Office Senior Presenting Officer

Heard by remote video at Field House on 24 July 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, an Iraqi national of Kurdish ethnicity, has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Williams) promulgated 7.1.22 dismissing his appeal against the respondent's decision of 5.1.21 to refuse his claim for international protection made in 2014. The claim was the subject of a previous First-tier Tribunal decision

dismissing his appeal on 4.6.15 (Judger Zucker). The appellant then made further submissions on 7.11.19, rejected by the respondent on 8.9.20.

2. Ms Everett referred to the respondent's Rule 24 reply, which Ms Warren had seen, but I had not. The document does not appear in the electronic case file. For that reason, following the helpful submissions of both legal representatives, I reserved my decision and reasons to be provided in writing, which I now do, having seen and considered.

3. The appellant's claim was based on an alleged blood feud that had arisen between two sections of the family and that his half-brother, N, had killed the appellant's mother and twice attempted to kill him. The further submissions included additional evidence in the form of an arrest warrant, issued on 3.9.14 but which was said not to be available to produce to the First-tier Tribunal in 2015, the appellant being unaware of it until much later. The appellant's case was that the warrant was good evidence that his half-brother's side of the family had the power and influence to seek to have him detained to prevent from leaving the country, in order to exact revenge by killing him.

4. In summary, the grounds argue that the First-tier Tribunal (i) failed to make a finding on whether an arrest warrant had been issued for the appellant by the court; and (ii) misapplied the Devaseelan principle.

5. In granting permission in February 2022, the First-tier Tribunal Judge considered it arguable that Judge Williams was not entitled to discount the arrest warrant for, *inter alia*, the omission of the full date of birth, where an expert had authenticated of the warrant and confirmed that a warrant with the same identifying features had been issued by the Investigating Court of Erbil.

6. In relation to the second ground, unarguably, the judge was obliged to follow the Devaseelan guidance, the relevant part of which is set out below:

> *"39. In our view the second Adjudicator should treat such matters in the following way.*
>
> *(1) The first Adjudicator's determination should always be the starting-point. It is the authoritative assessment of the Appellant's status at the time it was made. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this.*
>
> *(2) Facts happening since the first Adjudicator's determination can always be taken into account by the second Adjudicator. If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent.*
>
> *(3) Facts happening before the first Adjudicator's determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator. The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them."*
>
> *(4) Facts personal to the Appellant that were not brought to the attention of the first Adjudicator, although they were relevant to the issues before him, should be treated by the second Adjudicator with the greatest circumspection. An Appellant who seeks, in a later appeal, to add to the available facts in an effort to obtain a more favourable outcome is properly regarded with suspicion from the point of view of credibility. (Although considerations of credibility will not be relevant in cases where the existence of the additional fact is beyond dispute.) It must also be borne in mind that*

the first Adjudicator's determination was made at a time closer to the events alleged and in terms of both fact-finding and general credibility assessment would tend to have the advantage. For this reason, the adduction of such facts should not usually lead to any reconsideration of the conclusions reached by the first Adjudicator.

(5) Evidence of other facts – for example country evidence – may not suffer from the same concerns as to credibility, but should be treated with caution. The reason is different from that in (4). Evidence dating from before the determination of the first Adjudicator might well have been relevant if it had been tendered to him: but it was not, and he made his determination without it. The situation in the Appellant's own country at the time of that determination is very unlikely to be relevant in deciding whether the Appellant's removal at the time of the second Adjudicator's determination would breach his human rights. Those representing the Appellant would be better advised to assemble up-to-date evidence than to rely on material that is (ex hypothesi) now rather dated.

(6) If before the second Adjudicator the Appellant relies on facts that are not materially different from those put to the first Adjudicator, and proposes to support the claim by what is in essence the same evidence as that available to the Appellant at that time, the second Adjudicator should regard the issues as settled by the first Adjudicator's determination and make his findings in line with that determination rather than allowing the matter to be re-litigated. We draw attention to the phrase 'the same evidence as that available to the Appellant' at the time of the first determination. We have chosen this phrase not only in order to accommodate guidelines (4) and (5) above, but also because, in respect of evidence that was available to the Appellant, he must be taken to have made his choices about how it should be presented. An Appellant cannot be expected to present evidence of which he has no knowledge: but if (for example) he chooses not to give oral evidence in his first appeal, that does not mean that the issues or the available evidence in the second appeal are rendered any different by his proposal to give oral evidence (of the same facts) on this occasion."

7. In the present case, the appellant stated that he was unaware of the arrest warrant at the time of the 2015 appeal, and not until 2019. If that is correct, it follows that the document, its translation, and the expert evidence in relation to it could not have been put before Judge Zucker in 2015. It is effectively new evidence and fell to be considered as such so that Judge Williams was obliged to consider whether it, taking with the other evidence justified departing from the previous adverse credibility findings.

8. The judge addressed the warrant from [62] of the decision and accurately summarised the expert evidence of Dr Ghobadi at [63]. At [64] the judge considered the explanation for the late production of the warrant, which the judge considered to be unusual. The judge was also concerned that whilst the appellant's year of birth appeared on the document, the rest of the date of birth was not present, the absence of which the judge found strange. At [64] the judge acknowledged that whilst the warrant appeared genuine, its origin and how the appellant came to be in possession of it was far less clear. The judge went on to address the purported provenance from a police officer, Ali Salim, from whom there is a handwritten letter, but it is not known how Mr Salim obtained the document. The judge was also doubtful as to why the warrant was not produced for such a long period after the appellant's claim was refused in 2015. The judge doubted the explanation proffered by the appellant. These were all relevant considerations and open to the judge on the evidence.

9. At [65] of the decision, the judge made a correct self-direction as to how to deal with such documentary evidence in the light of the Tanveer Ahmed principles of reliability. Unarguably the judge considered all the evidence in the round, including the expert evidence, before concluding that "*Whilst the arrest warrant on its face appears genuine, the lack of detail on the face of the document and the vagueness of its origin and how the appellant came to be in possession of the document are both matters which undermine the weight that can be attached to the document.*" It is clear from the decision, however, that it was not just the absence of the full date of birth that concerned the judge. I take Ms Warren's point made in submissions that the translated warrant provides not for a date of birth but rather age. However, as the entry is '1990' and not an age, that does not render the judge's concern any less relevant.

10. I have looked at both the translated warrant and the expert report when considering the judge's observations about the expert evidence at [63] of the decision. The report even when taken with the supplementary report leaves much to be desired. The expert opinion is in fact based on third-hand information, taken first from a Phd student who in turn contacted a lawyer "*who works at the Investigating Court of Erbil*," who was said to have confirmed that the warrant had been issued by that court. Originally, this person asked for anonymity but later agreed to being identified, producing a membership card, indicating that they are a practitioner member of the Erbil Bar. Whilst this person may appear at or before the court, there is nothing to indicate that they are employed by or an official of the court so as to have any authority to verify the warrant. Neither is there any explanation as to how the verification was made other than by checking the number and date, but apparently not the appellant's name.

11. I accept that these are my own observations and not those of Judge Williams, who stated only that checks of the document had been made with a lawyer at the Investigation Court of Erbil. However, Judge Williams did note that the report does no more than state that the document "appears to be genuine." More significantly, as Judge Williams noted, the expert repeatedly stated that documents without security features are "relatively easy to counterfeit.", My own observations do not bear directly on the First-tier Tribunal's assessment of the evidence and are only relevant as to the implicit assertion that the warrant is unquestionably genuine so as to render the concerns raised by the judge as minor or immaterial. I am not satisfied that the evidence was beyond question or determinative and am satisfied that the judge was entitled to raise concerns. Its reliability was for the judge to assess in the context of the evidence as a whole.

12. Whilst there was expert evidence in support of the claimed authenticity of the warrant, the judge was entitled to consider the evidence in the round, including the starting point of the previous findings of fact and the concerns about the provenance and content of the warrant, as highlighted by the judge. These concerns included that the expert (who was not a forensic expert) was largely relying on others to verify the document and could say little more than it appeared genuine. Unarguably, the judge made a nuanced assessment, taking full account of the evidence, the expert opinion, and the appellant's account of its origin. I am satisfied that the judge was entitled to treat the warrant evidence with caution and ultimately to determine to accord limited weight to it in the overall context of the evidence. The judge then went on to address other aspects of the 'new' evidence relied on by the appellant, including the story of its origin. Specific consideration was also given to a death certificate, a newspaper article, and photographs.

13. The judge did and was entitled to consider the evidence in the round before determining what weight to accord to it. It is well-established law that the weight

to be given to any particular factor in an appeal is a matter for the judge and will rarely give rise to an error of law, see Green (Article 8 -new rules) [2013] UKUT 254. As the Court of Appeal explained in Herrera v SSHD [2018] EWCA Civ 412, it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence, as the judge in this case did.

14. One of the relevant factors in the overall assessment was the inconsistency identified in the appellant's case. In relation to that issue, Mr Karnick had apparently suggested in submissions at the First-tier Tribunal that Judge Zucker's record of the appellant's account in the 2015 appeal was unreliable. However, as Judge Williams noted, neither the further submissions nor the grounds had challenged Judge Zucker's record and there was no proper basis to do so at the First-tier Tribunal appeal hearing before Judge Williams. I do not accept Ms Warren's submissions to me in the same vein, to the effect that the judge should have given preference to the appellant's later witness statement rather than the evidence given to Judge Zucker at a time when there was no witness statement, and the appellant was unrepresented. It follows that Judge Williams was entitled and obliged to take Judge Zucker's account of the evidence given to the Tribunal as accurate. Unarguably, the judge was correct at [70] when noting that the account now advanced by the appellant was materially inconsistent with that provided in 2015, for the reasons set out earlier in the decision and again at [73]. The judge was also accurate in stating at [79] that the new evidence from the further submissions was put forward to substantiate the same general account as advanced by the appellant in 2015. The judge accepted that the new evidence provided "*some limited corroboration*" of the appellant's claim but, as stated above, found that it was in part contradictory to the 2015 account, as detailed in the First-tier Tribunal decision. I am satisfied the judge was entitled to take these inconsistencies into account. I reject Ms Warren's submissions that the judge erred by focusing on what she termed as minor inconsistencies rather than the totality of the evidence. The judge was entitled to conclude at [73] that the appellant's account had altered, giving rise to substantial inconsistencies on a central part of his claim. I am also satisfied that the judge did focus on the totality of the evidence, as is clear from what is set out at [78] when the judge made a further self-direction as to the standard of proof to be applied when "*drawing all these matters together*."

15. The judge identified several issues that gave real concern as to the reliability of the appellant's factual claim. Weighing the evidence in the round, as the judge was obliged to do so, he reached the conclusion that the evidence considered as a whole failed to reach the standard of proof, low as it was. I am satisfied that in all the circumstances it was not necessary for the judge to make a specific adverse findings on the warrant, accepting that it "*appeared genuine*," and provided some limited corroboration to the appellant account. That and all the other evidence was taken into account as far as it reasonably could in the overall assessment of the case.

16. Taking a step back to consider the impugned decision as a whole, I am satisfied that Judge Williams proceeded from a proper starting point before making a careful assessment as to whether all of the evidence, old and new, was sufficient to depart from the previous adverse findings. Unarguably, Judge Williams did not close his eyes to the new evidence. Nor do I accept that he placed himself in a straitjacket by taking the findings of Judge Zucker as the starting point. It cannot be said that the findings and conclusion of the First-tier Tribunal were irrational or otherwise not open on the evidence.

17. In the circumstances, and for the reasons outlined above, I find no material error of law.

Notice of Decision

The appellant's appeal to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands as made.

I make no order for costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24 July 2023