IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002673

First-tier Tribunal No: PA/51380/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 6th of November 2024

Before

UPPER TRIBUNAL JUDGE RASTOGI

Between

SA
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A. Khan, Counsel instructed by Barnes Harrild & Dyer
For the Respondent: Mrs R. Arif, Senior Home Office Presenting Officer

Heard at Field House on 7 October 2024

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. The appellant appeals, with permission, the decision of First-tier Tribunal Judge Freer ("the judge") who dismissed the appellant's protection and human rights claim by way of a decision dated 15 March 2024 ("the decision").
2. The background to the appellant's protection claim is that he is an Iraqi Kurd who left the Kurdistan Region of Iraq ("KRI") in 2017 having undergone a

conversion to Zoroastrianism. Given that he was born Muslim, this necessarily meant he was an apostate. He fled in December 2017 and arrived in the United Kingdom ("UK") on 11 January 2018.

3. His first asylum claim was dismissed by First-tier Tribunal Judge Meyler on 5 December 2018 on the basis that, although she was satisfied to the lower standard that the appellant converted to Zoroastrianism [see para. 20], she was not satisfied the appellant was threatened by his family as a result, nor that he continued to practice his faith, nor that members of that religion are persecuted in general in the KRI. In any event Judge Meyler found the appellant could relocate within the KRI and that he would be able to re-document as he had a copy of his CSID card.

4. The appellant supplied further submissions to the respondent on 12 May 2021 reiterating his fear of his family arising from his conversion. He submitted some additional documents to support that part of his claim. He also submitted he would not be able to redocument in the KRI nor internally relocate. He reasserted his claim for international protection.

5. The respondent refused the appellant's claim on 9 February 2023, mainly on the basis that the core issues had already been decided by Judge Meyler. After an extensive recitation of Judge Meyler's findings, and consideration of the new material the appellant had submitted, the respondent said:

> "52. When assessing your evidence in the round, and having mind to the previous immigration judges findings, it is again accepted to the lowest standard that you may have converted to Zoroastrianism religion, however it is not accepted that you are at risk from your family or either state authorities or general society within Iraq or the KRI region due to this factor.
>
> 53. It is also not accepted that you provided any satisfactory evidence of any significant continuing interest in pursuing Zoroastrianism since in the UK."

6. The respondent also decided that the appellant remained in possession of his CSID card (or that he could secure an original one using the copy in his possession with assistance from his family), and that he could safely travel and internally relocate without being exposed to the risk of Article 3 harm or treatment.

7. The appellant appealed that decision to the First-tier Tribunal pursuant to section 82 (1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). By the time of that hearing, the appellant had also received an arrest warrant in his name dated 21 December 2017 (2 days before his departure), issued on the basis of a complaint from his father against him following his conversion from Islam and his refusal to re-join Islam. The appellant was not aware of this development until 2023 and he said he obtained the documents through the Zaradashti Organisation via a friend of his.

8. The appellant had also commissioned a country expert report from Professor Christoph Bluth for the hearing before the judge. The country expert considered the appellant's account and his situation on return. In broad terms, the expert said the appellant's account and fears accorded with the general country situation for apostates and converts to Zoroastrianism in the KRI including in

relation to the attitude of family and, on return, the appellant would face a real risk of persecution against which there is not sufficient protection.

9. The judge rejected the reliability of the arrest warrant. He considered for himself the appellant's claim to have converted to Zoroastrianism and his on-going commitment to that religion. He considered the appellant's claim that his conversion had come to the attention of his family prior to his departure from the KRI. The judge dismissed the appeal as he did not find the appellant to be or to have been an apostate or a Zoroastrian, or at risk of persecution or serious harm as a result of either although he appeared to be satisfied there was insufficient protection against the risk and no internal relocation alternative had the core account been accepted [see paras. 69 and 70]. Neither did the judge find there to be very significant obstacles to the appellant's reintegration into the KRI, in part as he found the appellant would not be undocumented as he had a copy of his CSID card and he would be returned to Erbil within the KRI where he could redocument. Finally the judge did not find the respondent's decision to be a disproportionate interference with the appellant's Article 8 rights.

10. The appellant sought permission to appeal the decision to the Upper Tribunal pursuant to section 11 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act") to decide if there had been an error on a point of law.

11. The appellant relied on three grounds of appeal summarised as:

Ground 1: the judge erred in his assessment of the appellant's credibility by failing to take into account material evidence, making mistakes of fact and arriving at findings not supported by the evidence;
Ground 2: the judge wrongly treats the expert evidence as irrelevant; failed to take into account or understand material evidence particularly on the issue of the risk the appellant faces as an apostate and seemed to be departing from the previous findings contrary to the position of the respondent and without applying a principled and properly reasoned approach (R on the application of MW) v Secretary of State for the Home Department (Fast track appeal: Devaseelan guidelines) [2019] UKUT 411 (IAC)) ;
Ground 3: the judge failed to apply the country guidance in SMO & KSP (Civil status documentation; article 15) Iraq CG [2022] UKUT 00110 (IAC) and made mistakes of fact.

12. The grant of permission was not limited but First-tier Tribunal Judge Bibi summarised the grounds as "the judge materially erred in his findings, that the judge at paragraph 47 of his decision treats the expert evidence in respect of risk as irrelevant". She found the grounds arguable and material.

13. The error of law hearing took place via CVP. I had the benefit of a 336 page appeal bundle ("AB") plus some of the additional papers not contained therein but which were before the judge. I heard submissions from both parties which I will refer to where relevant below. At the end of the hearing I reserved my decision.

Discussion and Conclusions

14. I turn first to para. 16 of the grounds because, for reasons which will become clear, I find this paragraph to reveal an error of law which infects the safety of the whole decision. Para. 16 makes specific reference to para. 69 of the judge's

decision which in fact purports to deal with sufficiency of protection. It appears under the umbrella of Ground 2. The principal challenge in para. 16 is:

> "If the FTT is seeking to depart from the previous settled findings of his conversion, that was not the position of the SSHD, nor has the FTT properly applied a principled and properly reasoned approach R (on the application of MW) v Secretary of State for the Home Department (Fast track appeal: Devaseelan guidelines) [2019] UKUT 411 (IAC)".

15. At para. 69 the judge says:

> "The authorities could not protect a person a person from clerics or those trying to do what clerics want, or from his family if estranged. Honour matters may end in serious violence. However, the relevance of these risks has not been shown even to the low threshold. I understand the animosity of the family (based on alleged apostasy) is the main issue and the apostasy has not been shown as existent, to the low threshold. Taking the evidence, and the fact of the long journey from Iran to here which must have some cause, I cannot eliminate the low risk of some other estrangement outside the scope of the protection claims. Perhaps it was only an economic migration with no estrangement. These matters are necessarily difficult for judges".

16. Para. 16 is not the only part of the judge's decision in which he recorded that the appellant had failed to show that he was an apostate. In fact, the judge has made various findings along these lines but with increasing incredulity as the decision proceeds. At para. 57 the judge said "I find it improbable that the Appellant is a Zoroastrian and improbable that he is an apostate from Islam". At para. 62 he said "I doubt that he is religious today. If he is, it is not in such a prominent way that attracts persecution". At para. 63 "I find that the appellant likely never was an apostate and never was seen as such by any person". At para. 67 he said "there was almost certainly no apostasy or conversion, so the threshold is not attained. As a yardstick, I find the plausibility of apostasy is minute at best".

17. I treat para. 16 of the grounds as attaching to all findings the judge made about the appellant's conversion and apostasy as there is no logical reason for it to be read otherwise and as the judge himself recognised at para. 49, apostasy is a precursor to conversion.

18. On its face, the judge's findings that the appellant had not satisfied him that he was an apostate or had converted is contrary to the position the respondent took in the refusal letter (see [5] above). On its face that is likely to amount to procedural unfairness as that did not appear to feature as an issue between the parties.

19. At para. 4 the judge set out the issues to be decided and at [4(i)] he noted "to what extent are the findings of the First Immigration Judge to be preserved in accordance with the principles of Devaseelan*?". At para. 23 of the appellant's skeleton argument, having noted Judge Meyler's findings and rehearsed the principles set out in Devaseelan (second appeals – ECHR – Extra-Territorial Effect) Sri Lanka [2002] UKIAT 00702, the appellant argued the Tribunal could re-open the risk on return [AB23]. It was not the appellant's position that the judge should depart from the Judge Meyler's findings about conversion and neither was that

the respondent's position in the refusal letter. Whilst the respondent made a comment in the respondent's review about the appellant's ongoing commitment to his religion and whether or not that cast doubt on his conversion, that was not a clear withdrawal of a concession and in any event, the judge expressed at para. 49 that the comments in the review "misses the point … that the chief risk comes from apostasy, leaving his birth faith".

20. The law on concessions is found at Kalidas (agreed facts – best practice) [2012] UKUT 00327 (IAC) as follows:

> "35. Judges, unless in exceptional circumstances, do not look behind factual concessions. Such exceptional circumstances may arise where the concession is partial or unclear, and evidence develops in such a way that a judge considers that the extent and correctness of the concession must be revisited. If so, she must draw that immediately to attention of representatives so that they have an opportunity to ask such further questions, lead such further evidence and make such further submissions as required. An adjournment may become necessary."

21. I find that the judge fell into legal error in making findings contrary to the respondent's formal position in the refusal letter and without adopting the process set out above. I am satisfied the judge's findings on the issue of the appellant's conversion and apostasy are on their face procedurally unfair and an error of law.

22. As for materiality, not every case of procedural unfairness is fatal (Rahman and Anor v Secretary of State for the Home Department [2022] EWCA Civ 310), although if the hearing was rendered unfair as a result, it almost always would be.

23. The inevitable consequence in this appeal of the error identified is that the appellant was not aware he was having to satisfy the judge of a matter already decided and about which the respondent took no issue. In my judgment, there is no basis to conclude anything other than fairness requires the decision to be set aside due to the error and remitted to the First-tier Tribunal with no preserved findings. For this reason, I do not find it necessary to address any of the other grounds of appeal albeit that significant time was spent at the hearing dealing with them.

24. As a matter of general observation, unless the respondent seeks to withdraw her concession in the refusal letter, then the issue of the appellant's previous conversion (and therefore apostasy) is not a disputed issue within the appeal. Nevertheless, the nature of the appellant's religious beliefs and practice at the date of the hearing before the First-tier Tribunal and behaviour on return are clearly matters on which new findings can properly be made taking Judge Meyler's findings as a starting point together with findings based on the new evidence on which the appellant relied in his fresh submissions.

Notice of Decision

The decision of the First-tier Tribunal involves the making of an error on a point of law and is set aside with no preserved findings of fact.

The decision is to be remitted to the First-tier Tribunal to be heard by any judge except Judge Freer.

SJ Rastogi
Judge of the Upper Tribunal
Immigration and Asylum Chamber

4th November 2024