



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: AA/11890/2014

**THE IMMIGRATION ACTS**

Heard at Bennett House, Stoke-on-Trent  
On 4<sup>th</sup> April 2017

Decision & Reasons Promulgated  
On 10<sup>th</sup> May 2017

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

MR FAKIR HAMAIMA  
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr P Dracott (Counsel)

For the Respondent: Mr C Bates (Senior HOPO)

**DETERMINATION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Pooler, promulgated on 21<sup>st</sup> December 2016, following a hearing at Stoke-on-Trent on 14<sup>th</sup> December 2016. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

## **The Appellant**

2. The Appellant is a male, a citizen of Iraq, who was born on 29<sup>th</sup> October 1995. He appealed against the decision of the Respondent Secretary of State dated 8<sup>th</sup> November 2009 refusing his asylum claim and granting him discretionary leave as an unaccompanied minor until 17<sup>th</sup> November 2012.

## **The Appellant's Claim**

3. The Appellant's claim is that he has a well-founded fear of persecution in Iraq, that his parents were assassinated when he was approximately 5 or 6 years old, that following this his cousin took him away from Iraq to live in Spain and in Rome until he was about 11 years of age, and then he travelled through Belgium to come to the UK where he sought asylum. The relevant facts and documentary material are set out in the determination under appeal and I need not recite them here again.

## **The Judge's Findings**

4. The judge had regard to a previous decision by IJ Coates under the principles set out in **Devaseelan [2002] UKIAT 00702** (see paragraph 18). On the occasion before Judge Pooler also, Mr Dracott was in attendance as Counsel on behalf of the Appellant, and he referred to the report of Dr George which considered the report of Ms Guest, so as to enable him to submit that the findings of Judge Coates were not cogent and had now been overtaken by the evidence of Dr George (see paragraph 18). The judge also gave consideration to the inconsistency in the Appellant's evidence, about his father's death, about the manner in which he came to the UK, and about the Appellant's nationality. He went on to conclude that the fact that the Respondent had stated that removal was to be to Iraq did not preclude the Respondent from challenging nationality. Specifying Iraq as the removal destination did not amount to acceptance of the Appellant's claim (paragraph 23). He held that for this reason the Appellant had failed to discharge the burden of proving that he met the definition of a refugee. The same applied in relation to Article 3 (paragraph 28).
5. With regard to Article 8, the judge went on to conclude that Iraq was specified as the country of removal for the purposes of the immigration decision. However, the Appellant had failed to prove that he was a national of Iraq. That being so, he could not discharge the burden of proving the existence of significant obstacles to his integration into the country to which he would have to go (paragraph 30). The burden of proof rested in relation to statelessness on the Appellant.
6. It was not sufficient for him to assert that because he had been found not to be a national of Iraq then he must be stateless. (Paragraph 37). With regard to Section 117B of the 2002 Act, it was concluded that the balance of considerations fell against the Appellant. He spoke English but that was a neutral factor. He was living in shared accommodation and earning about £300 to £400 per week. He had not claimed benefits. He was financially independent. However this too was a factor that was neutral in this regard. The maintenance of effective immigration control under Section 117B(1) governed the situation (paragraph 43).

## Grounds of Application

7. The grounds of application state that the judge erred in concluding that the Appellant had not discharged the burden of proof given his young age at the time that he left his country of origin. He was a westernised Iraqi. He had no knowledge of his country of origin. He had no knowledge of the Iraqi language. He would be at risk of persecution from Jihadi Islamist groups in Iraq, as well as criminal gangs there. The grounds also assert that the judge erred in respect of determining the Appellant's nationality.
8. On 8<sup>th</sup> February 2017, permission to appeal was granted.
9. On 3<sup>rd</sup> February 2017 a Rule 24 response was entered, and this was followed by another Rule 24 response on 16<sup>th</sup> February 2017, the latter to the effect that the Tribunal had directed itself appropriately and properly dealt with the requirements of paragraph 276ADE(vi). The Article 8 assessment was open to the judge.

## Submissions

10. At the hearing before me on 4<sup>th</sup> April 2017, Mr Dracott, appearing on behalf of the Appellant, made detailed and lengthy submissions. He stated that he relied upon the grounds of application. He handed up a copy of the recent decision in **Kaur [2017] UKUT 00614**. He submitted that one must not lose sight of the fact that the Appellant left Iraq when he was 5 or 6 years of age, lost any knowledge of his Arabic language, as well as of Iraqi culture, living overseas in Spain until the age of 10 or 11, before coming to the UK, and Judge Pooler had failed to engage with this basic background fact.
11. Second, this was relevant because it went directly to the issue of the burden of proof on the Appellant in relation to his nationality. Given his age at the time, his state of mind, and the situation in which he found himself, he had surely succeeded in establishing his nationality. The expert report by Julia Guest and Dr Ali George had not been properly heeded. In a case where the Appellant was 5 or 6 years of age, the expert evidence really needed to be grappled with (see paragraphs 20 to 21), and the judge had failed to do so. Instead, what the judge said was that, "Dr George's reference to place names outside Iraq, as befits an independent expert whose duty is to the Tribunal, does nothing to assist the Appellant in terms of his home area or his nationality" (paragraph 20). Moreover, Judge Pooler noted that, "his evidence in this respect has not been put to Ms Guest" (paragraph 20). An inappropriate standard of proof had been applied.
12. Third, it was not insignificant that the Secretary of State had granted discretionary leave to remain to the Appellant. There was a lack of sufficient good reception centres in Iraq, and that is why the Appellant had been granted discretionary leave in the manner that he had, such that the Secretary of State plainly recognised his nationality in this respect. It was incorrect to say that "specifying Iraq as the removal destination does not amount to acceptance of the Appellant's claim" (paragraph 23).

13. Fourth, the judge had nevertheless concluded that, “the Appellant failed to prove that he was a national of Iraq” (paragraph 30). Nevertheless the removal directions were to Iraq. The fact remained that the Appellant could not return to the place to which the removal directions had been set.
14. Finally, there was the issue of Article 8. The Appellant had now lived for seven years and one month in the UK, but Judge Pooler’s assessment of this was that this matter was not relevant (see paragraphs 31 to 33) when it plainly was. The Appellant had been granted discretionary leave to remain. During that time he had made an in-time application for further leave to remain. On that basis, his present stay in the UK was not “precarious” as he was not in the country unlawfully. In fact, he had engaged in schooling in this country, had been living here from a young age, and these were matters that the judge needed to grapple with before reaching a view as to the proportionality of his removal. He was fluent in English and he was financially independent. These were firm conclusions that the judge came to. They may be neutral in themselves but they are not relevant to the balance of proportionality considerations.
15. Instead, IJ Pooler went too far (at paragraph 42) in stating that the Appellant’s private life has been established at a time “when his immigration status has been at best precarious” (paragraph 42). The case of Kaur [2017] UKUT 00614 now establishes that the fact sensitive nature of a stay in this country does not always operate in the same way in every case and a more heightened importance can be given to such a stay where a person has been in this country lawfully. The Secretary of State has not asserted any other nationality on the part of the Appellant. This too was relevant to the way in which the balance of considerations fell under Article 8. It was not the case that under Section 117B(1) the maintenance of effective immigration control operated against the Appellant.
16. For his part, Mr Bates submitted that the Appellant’s age had not been challenged. Nevertheless, the appeal could not succeed for the following reasons. First, even if the Appellant had left Iraq at the age of 5 or 6, the issue still remained whether he was an Iraqi national, and this had been rejected by the Tribunal in 2009 and in 2014 because the Appellant could not speak any Arabic and his knowledge was very sparse of his country. That was the starting point in respect of the decision of Judge Pooler presently. Second, there was nothing in the expert’s report that could be determinative of the issue of nationality. Third, if there were no reception facilities in Iraq, then, given that it was contested that the Appellant was an Iraqi national, this could not be of any assistance to the Appellant as such. Fourth, the Appellant had been rejected in his asylum claim on the basis of discrepancies in his answers during his cross-examination before Judge Pooler in the instant case (see paragraphs 16 to 17), so that it was not the case that Judge Pooler had simply confined himself to the position as determined at the time of the decision previously by Judge Coates. Fifth, the Appellant was now an adult and still failed to give credible answers. Finally, with respect to Article 8 the Appellant only had six years of discretionary leave to remain. He had three years of exceptional leave to remain from the ages of 14 to 17 years. He then reapplied but the decision was not made until he was 18. After three

years of exceptional leave to remain, he had Section 3C leave under the Immigration Act. His asylum application was dismissed and so was his Article 8 application. Even if he had been in the UK for seven years he was not going to get any extended period of leave unless there were compelling circumstances, especially since his stay in the UK had always been precarious. Section 117B was clear in that “little weight should be attached” to an Article 8 life that had been built up at a time when one’s stay was precarious. The recent decision in **Kaur [2017] UKUT 00614** did not appreciably change Judge Pooler’s evaluation of the facts before him. He was still entitled to conclude as he did. Even starting from the unchallenged position of the decision of Judge Coates, Judge Pooler was entitled to conclude as he did.

17. In reply, Mr Dracott submitted that at paragraph 57 of the refusal letter of 11<sup>th</sup> December 2014, it was expressly accepted by the Respondent that the Appellant had been moving around from a very young age. Second, what this meant was that Judge Pooler’s assessment of the Appellant’s claimed nationality had to start from the age of 4 to 5 when he left Iraq, rather than from the age of 11 or 12 when he left Spain to come to this country. His failure to do so meant that he had misdirected himself in this regard. Had he not done so his assessment of the Appellant’s nationality would have been more accurate. Third, if the Secretary of State was not clear about the Appellant’s nationality then she should have said so, and concluded that this country could not send the Appellant back to a country which was not his country of origin, but instead a view was expressed about the adequacy of reception centres in Iraq. There could be only one conclusion drawn from that, namely, that it was accepted that the Appellant was a citizen of Iraq.

### **No Error of Law**

18. I am satisfied that the making of the decision by the judge did not involve the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. In coming to this conclusion I have had regard to the bundle of authorities (including paragraph 351 of HC 395); Section 10 of the Respondent’s asylum process instructions on discretionary leave; the Respondent’s asylum policy guidance “nationality: doubtful, disputed and other cases” of 26<sup>th</sup> March 2013; excerpts from the Respondent’s asylum policy guidance “processing children’s asylum claims” of 12<sup>th</sup> July 2016; and the decision in **Milloja [2005] EWCA 2833**, that Mr Dracott drew regular attention to. My reasons for concluding that there is no error of law are as follows.
19. First and most important, there is the guidance provided in the case of **Milloja [2005] EWHC 2833**. Mr Justice Gibbs asks the potent question here, “what significance, if any should the court attach to the failure to treat the claimant as a child”? (At paragraph 33). There is then consideration of how “the claimant cannot establish a particular substantive issue which would have been differently decided had the proper procedure been adopted” (paragraph 34). In the present case, however, it is neither the case that the Appellant has not been treated as a child, and nor is it the case that proper procedure has not been adopted. But in any event, even if there was any basis to this suggestion, I am not satisfied that the outcome would have been any

different. In fact, Justice Gibbs makes it clear that, "I certainly do not go so far as to say that procedural errors in the form of breach of guidance would be fatal in all cases" (paragraph 35). This is a case where the decision with respect to the Appellant's nationality had been reached both in 2009 and in 2014. Judge Coates had also decided that the Appellant could not show that he was a person of Iraqi nationality. Expert reports were submitted before Judge Pooler on this occasion. It was stated that the findings of Judge Coates were not cogent and had been overtaken by the evidence of Dr George (see paragraph 18).

20. However, the judge did give consideration to precisely these matters and concluded (at paragraph 20) that matters were not taken any further. But in any event, and no less significantly, under cross-examination before Judge Pooler the Appellant failed to provide a cogent explanation for his inconsistencies and the judge was clear that, "the Appellant's replies to have been vague and evasive" (paragraph 17).
21. Second, it is said that the Appellant has been granted discretionary leave to remain and that this is indicative of the acceptance of his claimed nationality. However, in **MS [2015] UKUT 00539**, Mr Justice Dove confirmed that,

"The current discretionary leave policy (applicable since 24<sup>th</sup> June 2014) as well as his predecessor (the policy in place from at least November 2012) states that the RLR policy will apply unless exceptional circumstances justify divergence from the policy".

That was the position here. It still remained for the Appellant to establish his nationality notwithstanding the grant of discretionary leave to remain.

22. Third, in the circumstances, and in relation to the evaluation of Article 8 considerations, the judge's conclusions under Section 117B remained open to him and there is no error of law (at paragraphs 41 to 43).

### **Notice of Decision**

23. There is no material error of law in the original judge's decision. The determination shall stand.
24. No anonymity order is made.
25. This appeal is dismissed.

Signed

Dated

Deputy Upper Tribunal Judge Juss

8<sup>th</sup> May 2017