



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/01178/2018

**THE IMMIGRATION ACTS**

Heard at Cardiff Civil Justice Centre  
On 20 June 2019

Decision & Reasons Promulgated  
On 23 July 2019

Before

**DR H H STOREY  
JUDGE OF THE UPPER TRIBUNAL**

Between

**BSH  
(ANONYMITY DIRECTION MADE)**

Appellant

and

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Joseph, Counsel, instructed by Turpin & Miller LLP  
For the Respondent: Miss S Rushforth, Home Office Presenting Officer

**DECISION AND REASONS**

1. The decision under challenge in this case is that of Judges Murray and Dorrington of the First-tier Tribunal sent on 1 October. They considered the appeal of the appellant, a national of Iraq, against the decision made by the respondent on 10 July 2018 to refuse his asylum, humanitarian protection and human rights claim. They dismissed his appeal on asylum and humanitarian protection grounds but allowed it under Article 3 ECHR. Their decision comes under attack from two directions: the appellant challenges their refusal to allow the appeal on humanitarian protection

grounds; the respondent taking issue with the judges' decision to allow it on Article 3 grounds. The judges refused the appellant's appeal on humanitarian protection grounds because they considered he fell to be excluded as a result of his commission of a serious crime, namely burglary, for which he was sentenced in October 2009 to two years eight months' imprisonment. They allowed his Article 3 claim because they considered he would not be able to obtain a CSID.

2. It is important to note that one of the issues before the judges was whether the respondent was entitled to certify the appellant's asylum claim under s72 of the NIAA 2002. The judges first of all found that "the presumption contained in s72(2) that the crime is a particularly serious one is made out". They stated at paragraph 35 that:

"35. The presumption that the Appellant is a danger to the community is rebuttable by the Appellant (s72 (6)). We consider, firstly that the presumption contained in s72 (2) that the crime is a particularly serious one is made out. The sentencing remarks of the Judge are in the Respondent's bundle. The Appellant committed a burglary in a dwelling house and assaulted the householder who suffered some physical injuries namely cuts and bruises. His wife was also there. The judge noted that the Appellant had only one caution and was a young man of good character and the burglary was opportunistic rather than planned. Because force was used against householders who were present during a night-time burglary these were aggravating features. Further, he was a young man according to the pre-sentence report who appeared to have little insight into the seriousness of the situation. Consequently, he was sentenced to 4 years in a young offender's institution reduced on his plea of guilty to 32 months".

3. In the first sentence of paragraph 36 they added that: "[t]he seriousness of the offence is reflected in the length of sentence and the sentencing remarks of the judge". Secondly, however, they considered that the s72 certificate was not made out because the appellant had rebutted the s72(6) presumption that he is a danger to the community. At paragraphs 39-40 they concluded:

"39. The Respondent relies on section 72 in the refusal letter dated January 2018 which is the subject of the current appeal. The Respondent also relies on the two previous determinations of the First-tier and Upper Tier Tribunal. It is clear from the Upper Tribunal decision that the Upper Tribunal found that the First-tier Tribunal's approach to section 72 was procedurally flawed but concluded that in view of the fact that this was not material when looking at the decision as a whole the decision of the First-tier Tribunal could stand. It is now some nine years since the Appellant's conviction and some 5½ years since he was released from immigration detention.

40. In that time there has been no suggestion that he has committed a further offence or indeed that his behaviour has in any way constituted a danger to the community. There has been no repetition of his behaviour and there is no current evidence which would tend to show that he posed a risk to the community. We consider that the effluxion of time and the absence of any repetition of the offending behaviour show that the Appellant does not

demonstrate a real and present danger to the community. It follows that we do not uphold the section 72 certificate”.

Neither of these findings are disputed by the parties.

### **The Appellant’s Grounds of Appeal**

4. The thrust of the appellant’s grounds of appeal are that the judges’ treatment of the exclusion issue was marred by two errors: firstly, that they failed to apply the correct threshold (or standard of proof) set out in paragraph 339D(i), namely “serious reasons for considering”; and secondly, that they had deviated from higher court guidance which required the court to carry out a close examination of all the circumstances surrounding an appellant’s offending, including an assessment of the individual’s responsibility (they cited in support **AH (Algeria) v SSHD** [2012] EWCA Civ 395). The focus of both limbs of this ground is what the judges said at paragraph 54:

“54. It is not in dispute that the Appellant has committed a serious crime having been sentenced for an offence to over 12 months. In **LP (St Lucia) v Secretary of State for the Home Department** [2010] EWCA Civ 493, the Court confirmed that paragraph 339 D was not subject to the rebuttal provisions in the Nationality, Immigration and Asylum Act 2002 in the humanitarian protection context as it was in the asylum context. The rule in paragraph 339D(i) was without qualification. We conclude therefore that the Appellant is excluded from humanitarian protection”.

I am not persuaded by either limb of the appellant’s grounds.

5. Dealing with the second limb first, it is clear that in deciding that the appellant had committed a serious crime the judges had carried out a close examination of all the circumstances surrounding the appellant’s offending including an assessment of his personal responsibility. They had done that at paragraph 35 when considering whether the presumption that the appellant had committed a particularly serious crime was made out. Their examination in that paragraph of the issue of whether there was a “particularly serious crime” clearly applied a fortiori to whether the same crime was “serious”.
6. Turning to the first limb, I would accept that the judges’ treatment of the issue in paragraph 54 fails to identify that the question for them was not whether there was a serious crime but whether there were serious reasons for considering a serious crime had been committed. However, in the preceding paragraph they had set out the full text of paragraph 339D. Given their emphatic finding that the appellant had committed a serious crime, their reasoning can safely be taken to incorporate a finding that for so considering the crime as serious there were serious reasons. Further, as I observed earlier, the appellant’s grounds do not challenge the judges’ conclusion that the appellant had committed a particularly serious crime and the legal effect of that finding was that they were satisfied there were serious reasons for considering the appellant had committed a particularly serious crime. A particularly serious crime is a serious crime. I see no error in the judges’ invocation of **LP (St**

**Lucia)** [2010] EWCA Civ 493 at paragraph 26, since Laws LJ clearly thought that where there was no doubt that there had been commission of a serious crime, paragraph 339D(iv) was made out. Just like the judges in this case, Laws LJ clearly considered this threshold was plainly met where the commission of a serious crime was not in doubt.

### The Respondent's Grounds Challenging the Judges' Allowance of the Appeal on Article 3 Grounds

7. The gravamen of the respondent's grounds was that the judges had failed to give clear reasons (particularly bearing in mind his lack of credibility) as to why the appellant would be unable to locate family and friends in Iraq who could then assist him obtain a replacement CSID. The grounds maintain that the judges should have recognised that the appellant had failed to show he had exhausted all possibilities of obtaining a replacement document.
8. I would add that the appellant's grounds appeared to argue (at paragraph 12) that the fact that the appellant had been found not to any longer be a danger to the community (although he had been so found by a Tribunal in October 2012) should have been seen by the judges as relevant to the issue of whether there were serious reasons for considering that he had committed a serious crime. With respect, that contention is misconceived. The test set out in paragraph 339D(iv) is an historic one and post-commission behaviour is irrelevant to whether when committed it was serious.
9. In my judgment these grounds in their other aspects amount to a mere disagreement with the judges' findings on this issue. The judges carefully directed themselves as to the contents of the applicable country guidance **AAH (Iraqi Kurds - internal relocation)** Iraq CG UKUT 00212, with reference to the Court of Appeal decision in **AA (Iraq)** [2017] EWCA Civ 944 (which modified the country guidance given in **AA (Article 15c)** Iraq CG [2015] UKUT 544 (IAC). . They noted at paragraph 62 that there had been a finding in the previous Tribunal decision that he had at least one relative, his maternal uncle, in his home area (Kirkuk). At paragraph 63 they found that the appellant had no passport or CSID. There was no evidence he had family in Erbil. Then at paragraph 64 they stated:

“64. Notwithstanding the previous adverse credibility findings in relation to the core of the Appellant's account which we have adopted, no previous findings have been made that the Appellant remains in touch with his family in Iraq and he has remained consistent in respect of this part of his account. He was only 15 when he arrived in the UK and has now been here for 13 years. Further, we find that it is not seen within the context of events in Kirkuk, implausible that he has lost contact since 2008. The recent history of Kirkuk was summarized in **AAH** and, even if there are now cogent reasons to depart from the country guidance in **AA** that it is a contested area for the purposes of Article 15 (c) (which we do not determine at this point), it has until recently been such”.

10. They concluded at paragraph 65 that:

“65. Given the Appellant has been consistent in his account to have lost all contact with his relatives and the plausibility of this given the internal displacement and the fact that it has been a contested area, we accept that he has no contact with family members”.

They went on to find at paragraph 66 that he had no relatives or friends in Baghdad:

“66. The Appellant would be returned to Baghdad and is expected to find his way to Kirkuk/the IKR by himself. We accept, and the contrary has not been suggested, that the Appellant has no relatives or friends in Baghdad. We have therefore considered whether he would be able to obtain a CSID because in the absence of such a document he is likely to face significant difficulties in accessing housing, employment, healthcare and other services which are likely to amount to a breach of Article 3. In coming to our conclusions, we have had regard to the findings of the Upper Tribunal at paragraphs 100 to 107 of **AAH**. On the basis of our factual findings regarding the absence of any friends or relatives in Iraq, we find that the Appellant does not have the required documentation to obtain a CSID through the consular section of the Iraqi Embassy in London nor is he able to obtain a power of attorney allowing someone in Iraq to obtain the CSID from the Civil Status Affairs Office in his own governorate”.

At paragraph 67 they concluded:

“67. Taking the factors in **AAH** into account, the Appellant has no documentation which would be of assistance in tracing his family records; no male family member who would be willing to attend the civil registry (which in any event would be in Kirkuk) and it is unclear whether the civil registry office in Kirkuk is operational as it is an area formerly held by ISIL”.

11. Having further analysed at paragraphs 70–73 whether the appellant could obtain a CSID in Baghdad or the IKR, the Tribunal concluded at paragraph 74:

“74. In view of those conclusions, and the Respondent’s concession set out above that a person who is unable replace their CSID and obtain support from family members or others is likely to face significant difficulties in accessing services and humanitarian conditions which are likely to result in destitution sufficient to amount to a breach of Article 3 of the ECHR, we find that the Appellant is likely to be at risk of treatment amounting to a breach of Article 3 if he remains in Baghdad or tries to return to Kirkuk via land. In those circumstances, we do not need to determine if Kirkuk remains a contested area or whether the Appellant’s deportation would breach his rights under Article 8 ECHR”.

12. Several observations are in order regarding the judges’ treatment of the CSID issue. It was extremely methodical and detailed. It closely adhered to Tribunal and Court of Appeal guidance on this very issue. When considering the factual issue of whether the appellant had family or friends in Iraq, the judges took fully into account that he had been found to lack credibility in other material respects. They supported their finding with background country information regarding Kirkuk. Palpably there was no failure to give clear reasons.

13. It is true that the judge did not specifically address the issue of whether the appellant had “exhausted all possibilities” of obtaining a replacement document. But (leaving aside that “exhaustion of all possibilities” constitutes far too high a standard of proof) on the basis of the country guidance, someone in the position of the appellant could not obtain a CSID by approaching the Iraqi Consulate in London. Paragraph 117 of AA refers to the fact that appellants can give power of attorney to friends/relatives in Iraq, but that presupposes there are such identifiable persons. The country guidance does not contain any qualifications making its application dependent on the making of attempts via the Red Cross or Red Crescent to try and locate family. I do not consider that the judges’ treatment of this issue fell into any legal error.

14. For the above reasons, I conclude:

The appellant’s grounds assailing the judges’ exclusion of the appellant from humanitarian protection are rejected.

The respondent’s grounds taking issue with the judges’ allowance of the appellant’s appeal on Article 3 grounds are also rejected.

Accordingly, the decision of the FtT shall stand.

15. An anonymity direction is made.

**Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 10 July 2019



Dr H H Storey  
Judge of the Upper Tribunal