



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/07021/2019 (P)

**THE IMMIGRATION ACTS**

Decided without a hearing under rule 34  
On 9 September 2020

Decision & Reasons Promulgated  
On 14 September 2020

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

S O K  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Ms S Saunders, instructed by ABSA Legal Limited (written submissions)  
For the Respondent: No representative or submissions

**DETERMINATION AND REASONS**

1. This appeal is subject to an anonymity order made by the First-tier Tribunal pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. Neither party invited me to rescind the order and I continue it pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

## **Introduction**

2. The appellant is a citizen of Iraq who was born on 1 January 1998. He is of Kurdish ethnicity and a Sunni Muslim who comes from Baquirte, close to the town of Makhmur in the Nineveh governorate.
3. The appellant arrived clandestinely in the United Kingdom on 22 December 2016. He was arrested by the police and claimed asylum on that day.
4. On 11 July 2019, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the European Convention on Human Rights.
5. The appellant appealed to the First-tier Tribunal. In a determination sent on 5 February 2022 the First-tier Tribunal (Judge Kelly) dismissed the appellant's appeal on all grounds.
6. The appellant sought permission to appeal to the Upper Tribunal ("the UT") which was granted by the First-tier Tribunal (Judge O'Brien) on 10 March 2020.
7. On 29 April 2020, the UT sent out directions in the light of the Covid-19 crisis indicating its provisional view that the issue of whether the First-tier Tribunal's decision involved the making of an error of law and, if it did, whether the decision should be set aside could be decided without a hearing. The parties were invited to make representations both in respect of the substantive error of law issue and on the issue of whether it was necessary for there to be a hearing.
8. In response to those directions, on 14 May 2020 submissions were lodged with the UT on behalf of the appellant. In those submissions, the appellant indicated that he was content that the appeal be determined on the papers. Submissions were made on the substantive error of law issue and inviting the UT both to find an error of law and, in the light of that error of law, to substitute its own decision allowing the appellant's appeal.
9. No submissions were received from the respondent and no rule 24 reply was filed in response to the initial grant of permission to appeal.
10. In the light of the submissions made and the issues raised, I am satisfied that it is in the interests of justice to determine the appeal without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended).

## **The Judge's Decision**

11. Before Judge Kelly, the appellant claimed that he was at risk on return to Iraq of being targeted by Daesh because his father and uncle had been members of the Peshmerga.
12. At para 33, the judge accepted the "primary facts" of the appellant's claim. He found the appellant to be a credible witness and that there was "at least a reasonable degree of likelihood that his account of the primary facts (events) is true".

13. However, at para 34 the judge went on to find that, despite accepting the appellant's account, he was not satisfied that the appellant would be at real risk on return. He observed that the appellant had left Iraq nearly five years earlier and the current situation of his father and uncle was unknown. The judge also noted that it was not part of the appellant's case that he had ever individually been targeted by Daesh in the past and, although accepting that the appellant's sister had been killed, there was no known reason for that. Further, he took into account an expert report that "Daesh continue to be active in the appellant's area, they are no longer in overall control of it". As a result the judge concluded ([34]):

"There is thus no reason to suppose that they would know of the appellant's return to Iraq or of his familial connections to the Peshmerga (to which he does not claim any personal affiliation) and therefore impute him with its political opinions. ... Moreover, ... I am not satisfied that there is a real risk of the appellant being individually targeted by Hazhb Al Shaabi or other Shia militia."

14. That finding is not challenged by the appellant either in the grounds of appeal or in the subsequent submissions.
15. Judge Kelly went on to consider whether the appellant, although not at risk based on his account, would nevertheless be at risk under Art 15(c). Having considered the country guidance decision in SMO and Others (Art 15(c); identity documents) CG [2019] UKUT 0400 (IAC), at paras 35-43 of his determination the judge went on to find that the appellant did not qualify for protection under Art 15(c).
16. That finding is also not challenged by the appellant in the grounds of appeal or subsequent submissions.
17. The judge then went on to consider the final issue which he described (at para 43) as:
- "whether there is a real risk of him suffering serious harm due to destitution and inability to travel to his home due to lack of documentation".
18. At paras 44-46, the judge concluded that the appellant did not have an Iraqi passport, a laissez passer or a Civil Status Identity Document ("CSID") and would not, in practical terms, be able to obtain them. At para 44 the judge said this:

"It is the appellant's case which I accept, that he has never been issued with an Iraqi passport or a Laissez Passer [see his reply to question 1.8 of his Screening Interview]. It is also his case, which I have already accepted, that he does not know if he has ever been issued with a CSID. It is not therefore reasonably likely that he would know the registration details that it will be necessary for him to provide in order to obtain a replacement. Finally, I have also already accepted that he has no means of communication with his close family members in Iraq and does not therefore know whether any of them have survived. He would thus be unable to call upon them for assistance in obtaining his original card (if it exists) or its replacement pending the outcome of the inquiries as instituted through the Red Cross. I am moreover satisfied that the appellant would face insuperable difficulties in obtaining either a CSID or a travel document. This is because he would struggle to obtain one such document without the other. I am thus satisfied that returning the appellant to Iraq is not currently feasible. I am

however satisfied that there would be a real risk of him becoming destitute or suffering some other form of serious harm should his return ultimately prove possible. I have reached the latter conclusion for the following reasons.”

Then, at paras 45 to 46 the judge set out his reasons and conclusion as follows:

“45. Given that the appellant is not a former resident of the IKR, his hypothetical return to Iraq would be via Baghdad. He would thus be at real risk of serious harm were he to attempt to travel over land to his home area and would in any event be unable to cross the intervening checkpoints. Furthermore, he would be unable to take an internal flight to Erbil without a CSID.

46. For all the above reasons, I am satisfied that the appellant’s hypothetical return to Baghdad would breach his rights under Article 15(b) of the Qualification Directive and Article 3 of the Human Rights Convention.”

19. Thus far, it would seem, the judge was inclined to allow the appellant’s appeal under Art 15(b) of the Qualification Directive and Art 3 of the ECHR because, without a CSID, he would be at real risk of serious harm either because he would be destitute without that essential document or because he would be at risk of physical harm in seeking to travel from Baghdad to his home area or the IKR.

20. However, in para 47 the judge went on to dismiss the appellant’s appeal. The judge said this:

“However, in the light of the Court of Appeal’s judgment in HF (Iraq) and Others v SSHD [2013] EWCA Civ 1276 (highlighted at Section B of the headnote to SMO) a person’s Protection Claim cannot succeed where (as I have found is the case here) that person’s return is not currently feasible on account of a lack of both a travel document and a Civil Status Identity Document. It seems to me that the very same logic must also necessarily apply when considering whether the appellant would face ‘very significant obstacles’ to his integration under paragraph 276ADE of the Immigration Rules and under Article 8 of the Human Rights Convention (there being no evidence to suggest that he has any significant social or family links to the UK). I thus appear to be left with no alternative but to dismiss his appeal in circumstances where I would otherwise have allowed it on general humanitarian grounds.”

## **Discussion**

21. The appellant’s challenge is a straightforward one. He contends that the judge has confused a CSID (which is an identity document) with a passport or laissez passer (which are travel documents). Applying the relevant country guidance decision in SMO an individual who does not have an CSID, nor is likely to obtain one within a reasonable period of time in Iraq, is likely to be at serious risk of harm, either destitution or physical harm seeking to travel from Baghdad to their home area. That, it is said, should have led the judge to allow the appellant’s appeal on humanitarian protection grounds under Art 15(b). The judge, in seeking to apply the Court of Appeal’s decision in HF (Iraq), misunderstood the relevance to an individual of lacking a travel document which makes his or her return to Iraq not

feasible. All the Court of Appeal decided, it is contended, is that an individual cannot succeed in their international protection claim where they lack a travel document which makes their return to Iraq not currently feasible where, it is said, that they would be at risk in Iraq if they lacked that travel document. The CSID is not a travel document and does not fall within the approach of the Court of Appeal in HF (Iraq).

22. I accept those submissions. It is clear that the judge would have allowed the appellant's appeal under Art 15(b) of the Qualification Directive and Art 3 of the ECHR on the basis that he was at risk of serious harm falling within those provisions if he were returned to Iraq without a CSID. In SMO and Others, the Upper Tribunal expressed the following view in relation to a person who lacked a CSID or the more recent Iraqi National Identity Card as summarised at paragraph 11 of the headnote:

“As a general matter, it is necessary for an individual to have one of these two documents in order to live and travel within Iraq without encountering treatment or conditions which are contrary to Art 3 ECHR. Many of the checkpoints in the country are manned by Shia militia who are not controlled by the GOI and are unlikely to permit an individual without a CSID or an INID to pass.”

23. Given the judge's unchallenged factual findings in paras 44 – 45, his conclusion in para 46 that without the CSID the appellant would be at risk of serious harm contrary to Art 15(b) of the Qualification Directive Art 3 of the ECHR is entirely sustainable.
24. That claim succeeded, on that basis, even if the appellant could not presently be returned to Iraq – his return was not “feasible” – because he lacked an Iraqi passport or laissez passer. The decision in HF (Iraq) was concerned with a claim based upon a risk on return which would arise from the absence of one of those travel documents and not because of the absence of a CSID which, unlike the travel documents, is not an identity document (see headnote para 12 of SMO and Others). A CSID does not make return not feasible.
25. The relevant issue in HF (Iraq) is identified in paras [86]–[105]. At [86], Elias LJ (with whom Maurice Kay and Fulford LJ agreed) noted the substance of the appellant's claim in that case:

“There was some evidence before the Tribunal that when the individuals had been returned to Baghdad International Airport without the appropriate documentation, they were detained in a nearby prison pending a determination of their identity, in extremely poor conditions which at least arguably involved a breach of Art 3”.

26. In that case the appellant argued that even though he could not be returned, the Tribunal was required to consider what risk, if any, he would face if hypothetically he were returned. The impediment to return, because the travel documentation was not available, did not prevent a claim succeeding (see [95]). By contrast, the Secretary of State contended that the Tribunal was only required to assess the risk to the appellant on return if return was feasible, in other words, if they would be

returned with the relevant travel documents when they would not be at risk (see [98] and [100]).

27. The Court of Appeal rejected the appellant's submissions and accepted those of the Secretary of State. At [101], Elias LJ said this:

"I accept ... that it would be necessary for the court to consider whether the appellants would be at risk on return if their return was feasible, but I do not accept that the Tribunal has to ask itself the hypothetical question what would happen on return if that is simply not possible for one reason or another."

28. The point is, of course, that once an individual's return becomes feasible – because they have either an Iraqi passport or laissez passer – the circumstances which, in HF (Iraq) gave rise to the risk, no longer exist. Without such documents, return is not feasible and the Tribunal is not required to consider the hypothetical situation (and risk) based on return without those documents.

29. That this is the proper understanding of HF (Iraq) was made clear by the Upper Tribunal in SMO and Others. At para 9 of the headnote, the UT summarised the position as follows:

"In the light of the Court of Appeal's judgment in HF (Iraq) and Others v Secretary of State for the Home Department [2013] EWCA Civ 1276, an international protection claim made by P cannot succeed by reference to any alleged risk of harm arising from an absence of a current or expired Iraqi passport or a Laissez passer, if the Tribunal finds that P's return is not currently feasible on account of a lack of any of those documents."

30. In this appeal, the appellant lacked both the travel documents and, on the judge's findings, a CSID which he would not be able to reasonably obtain. Had the appellant claimed that he would be at risk on return to Iraq because he lacked a passport or laissez passer then, applying HF (Iraq), he could not have succeeded. However, he claimed that he was at risk because he lacked a CSID. Nothing in HF (Iraq) prohibited the judge from considering (and reaching a finding on) the risk to the appellant on return to Iraq if he lacked a CSID.

31. Following SMO and Others, which applied earlier country guidance decisions, the lack of a CSID was a matter which created a risk of serious harm to the appellant on return (see above). The Secretary of State has not sought to challenge in a rule 24 reply the judge's findings that the appellant lacked (and could not obtain) a CSID (para 44) and that, as a result, the appellant established a real risk of serious harm on return (paras 45 and 46). Those findings, therefore, stand unchallenged. On the basis of those findings, there was only one proper outcome to the appeal: the judge should have allowed the appeal under Art 15(b) of the Qualification Directive and Art 3 of the ECHR. The judge was wrong to conclude that in HF (Iraq) precluded him from reaching that decision.

32. For these reasons, therefore, the judge erred in law in dismissing the appellant's appeal on humanitarian protection grounds and under Art 3 of the ECHR. That decision cannot stand and is set aside.

### Re-Making the Decision

33. I have considered whether the decision can be re-made without further proceedings. The Secretary of State has not filed a rule 24 response or submissions in reply to the UT's earlier directions. The outcome of the appeal is inevitable. Once the erroneous reasoning in para 47 is removed, the judge's unchallenged findings, as I have already said, should have led to the appeal being allowed on humanitarian protection grounds (Art 15(b)) and under Art 3 of the ECHR. I am satisfied that, not only should the decision of the First-tier Tribunal be set aside because of an error of law, but also that I should remake the decision consistently with the judge's conclusion in para 46 and allow the appellant's appeal on humanitarian protection grounds and under Art 3 of the ECHR.

### Decision

34. Accordingly, the decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law and I set that decision aside.
35. I re-make the decision. I preserve the judge's conclusion that the appeal is dismissed on asylum grounds. However, I substitute a decision allowing the appeal on humanitarian protection grounds and under Art 3 of the ECHR.

Signed

*Andrew Grubb*

Judge of the Upper Tribunal  
9 September 2020