



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: PA/03245/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 17 December 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

BARHAM AZIZ FARS
(No Anonymity Order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Johnrose, instructed by Broudie Jackson & Canter
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 29 November 2023

DECISION AND REASONS

1. Following an Order of the Court of Appeal issued on 16 May 2022 granting permission to appeal to the Court of Appeal against the decision of the Upper Tribunal dismissing the appellant's appeal against the respondent's refusal of his protection and human rights claim, and in a Consent Order sealed in the Court of Appeal on 14 July 2022, this case has been remitted to the Upper Tribunal for the decision in the appellant's appeal to be re-made.

2. The appellant is a national of Iraq of Kurdish nationality, originating from Kirkuk, whose date of birth is 17 May 1997. He entered the UK clandestinely on 23 July 2018,

having fled Iraq in March 2018 and travelled through various countries en route to the UK. He claimed asylum on 24 July 2018 and his claim was refused on 27 March 2019.

3. The appellant's claim was based upon a fear of being killed by ISIS. He claimed to have run a barber shop in Kirkuk and to have bought ten boxes of hair gel from AJ, from whom he regularly purchased stock for his shop, but to have found that one box contained a bomb. He notified the police who attended and diffused the bomb and he attended at the police station and told them about AJ who was then arrested three days later. The police told him that AJ was a member of an ISIS sleeper cell. The appellant then received threatening calls as a result of having told the police about AJ and he decided to leave Iraq for his safety. He left with his mother in March 2018 and they travelled together to Turkey with an agent, where they became separated. The appellant continued on his journey to the UK, arriving clandestinely on 23 July 2018.

4. When interviewed about his claim, the appellant said that he had had a CSID Iraqi national certificate in Iraq and had kept it together with other documents in his mother's bag when they left the country. He did not know his mother's whereabouts since being separated from her in Turkey. He had tried to trace her through the British Red Cross but had not been able to find her.

5. The respondent, in her refusal letter of 27 March 2019, rejected the appellant's claim as lacking in credibility owing to inconsistencies in his account. The respondent considered that the appellant did not have a genuine subjective fear of returning to Iraq and considered that he could safely relocate to areas of the IKR in any event. The respondent considered that the appellant could obtain a replacement CSID.

6. The appellant appealed against that decision. His appeal was heard for the first time on 10 May 2019 by First-tier Tribunal Judge Alis who, in a decision promulgated on 13 May 2019, allowed the appeal. Judge Alis did not find the appellant's claim to be credible, but considered that he would not be able to obtain a CSID at the Iraqi embassy in the UK owing to a lack of any documentation, and that he would not be able to obtain a CSID from a designated registry as he came from a contested area. The judge considered that the appellant would not be able to travel from Baghdad to the IKR without a CSID and that even if he did manage to get to the IKR he would experience problems there and would find it difficult to find employment. Judge Alis concluded that the appellant would not be able to obtain a CSID without there being a breach of Article 3 of the ECHR or Article 15(c) of the Qualification Directive and he allowed the appeal on humanitarian protection and Article 3 grounds.

7. Judge Alis's decision was, however, set aside by Upper Tribunal Judge Chalkley in a decision promulgated on 16 August 2019, on the grounds of a flawed approach to the question of whether the appellant had family in Iraq who could assist him in providing documentation to enable him to obtain a CSID card, a failure to make findings on whether the appellant had any family members in Iraq and a failure to consider the issue of obtaining a replacement CSID card rather than a new one. Upper Tribunal Judge Chalkley remitted the case to the First-tier Tribunal to be heard afresh.

8. The appellant's appeal was then heard *de novo* by First-tier Tribunal Judge Foudy on 16 January 2020. Judge Foudy dismissed the appeal in a decision promulgated on 30 January 2020, finding that the appellant's account of his involvement with the person AJ was not credible. Judge Foudy also found it incredible that the appellant had no identity documents and that he had lost contact with his mother and did not accept the appellant's account of his mother having kept his documents for him. Judge Foudy found that the appellant had access to identity documents which would allow him to

travel to his home area of Kirkuk where he would be safe. She dismissed the appeal on all grounds.

9. Judge Foudy's decision was, in turn, set aside by Upper Tribunal Judge Coker without a hearing, following a consideration on the papers on 1 June 2020. Upper Tribunal Judge Coker noted that the appellant had not sought to challenge Judge Foudy's rejection of his account of events in Iraq or the rejection of his claim to have lost contact with his mother. Judge Coker found that Judge Foudy had, however, erred by finding that the appellant had kept possession of his ID card without considering that, if that were the case, the document would have been retained by the respondent when he claimed asylum, and further that the respondent had not relied upon the appellant having retained his CSID but upon him being able to obtain a replacement CSID. Judge Coker directed that the decision be re-made in the Upper Tribunal on the sole issue of the availability of a CSID or other ID documentation.

10. The case then came before Upper Tribunal Judge Hanson on 13 July 2021 for the decision to be re-made on the limited basis directed by Upper Tribunal Judge Coker. Judge Hanson noted the preserved finding that it was not accepted that the appellant had been honest in his claim about his mother having kept his documents when they separated in Turkey and he observed that it followed from the First-tier Tribunal Judge's findings that the appellant remained in contact with his mother and was not at risk for the reasons claimed in his home area. Judge Hanson did not find the appellant's evidence concerning his CSID to be credible, considering that the country guidance case of SMO highlighted the importance of the document and finding that the appellant's claim, that he only took his CSID out from where it was kept in his home occasionally when needed, was contrary to the country evidence. Judge Hanson rejected the appellant's claim that he kept his CSID in a plastic bag with his mother and found it more likely that he retained it on his person. He noted that the appellant and his mother had mobile telephones and found that it was not implausible that the appellant would have had contact details for family members or his mother on his telephone including his mother's telephone number. Judge Hanson found there to be no evidence that the appellant handed over his identity documents in the United Kingdom, that his CSID was not available to him through family members in Iraq, or that family members would not be able to assist him with the re-documenting process. Judge Hanson accepted that the appellant would not be able to get a replacement CSID in the United Kingdom from the Iraqi Embassy, but considered that the appellant had failed to establish that he would not be able to obtain a registration document (1957) through his mother or other family members. He found that the appellant had failed to provide sufficient evidence to establish that his mother or family members were not in Iraq or could not be contacted by him or on his behalf. Judge Hanson concluded that it had not been made out that the appellant could not travel from Baghdad to his home area to obtain a new or replacement IND using a registration document 1957, which he could obtain with the assistance of family members and he accordingly found there to be no risk to the appellant. He accordingly dismissed the appellant's appeal.

11. The appellant then sought permission to appeal to the Court of Appeal against Upper Tribunal Judge Hanson's decision on three main grounds, as identified in an order from Rt. Hon. Lady Justice Laing issued on 16 May 2022, in which she granted permission on the papers. The grounds were that: the Upper Tribunal had inverted the burden of proof and had failed to explain who were the family members to whom he had referred in his decision; the Upper Tribunal had failed to make clear findings about the whereabouts of the appellant's CSID; and the Upper Tribunal had departed from country guidance without explaining why.

12. In an Order issued on 14 July 2022, the appellant's appeal was allowed by consent and the matter remitted to the Upper Tribunal for re-determination, limited to the issue of the availability of a CSID or other ID documentation.

Appeal in the Upper Tribunal

13. The appeal then came before me on 29 November 2023. The appellant produced a composite bundle which contained the various Tribunal decisions and Court of Appeal orders, together with the bundles previously before the First-tier Tribunal and the additional statement submitted by the appellant further to the directions of Upper Tribunal Judge Coker.

14. In that statement, dated 7 July 2020, the appellant stated that he rarely used his CSID in Iraq and that his mother would keep all of their documents in a bag, as she did when they left Iraq. He stated that they did not need to show their ID cards on their journey from Iraq as they were hidden in the back of lorries and avoided checkpoints. He had had an Iraqi passport, issued in 2014, but had never used it to travel. He was arrested on arrival in the UK and was searched by officials and had no documents on him, as his mother had all the documents. He had lost contact with his mother and had had no news about her from the Red Cross.

15. The appellant adopted his statement as his evidence before me and was then cross-examined by Mr Tan. He confirmed that he had had to show his identity card when he attended at the police station on the occasions referred to in his statement but he said that he did not have to show his identity card when passing through checkpoints. He had never been asked for his identity card at a checkpoint. He had never faced a situation where he had been asked by security forces to prove his identity and he did not carry his identity card on his person on a regular basis. The appellant said that he did not have a mobile telephone in Iraq and he received telephone calls from the police on his mother's mobile telephone. The appellant said that when he left his home he kept his documents in a small bag which was with his mother, but he was separated from his mother in Istanbul. The separation had not been planned but the smuggler separated them. The smuggler put the men and women in different vehicles and he was told that he would arrive half an hour before his mother, and they had not known that they would be permanently separated.

16. Both parties made submissions before me.

17. Mr Tan submitted that the appellant's current account of rarely needing his identity documents in Kirkuk was at odds with the country evidence. His account of leaving his documents with his mother was far-fetched. Even if he was found not to be in possession of his identity documents when searched by immigration officers, that did not mean that he had no access to his documents. If he was in contact with his mother, that was a reasonable avenue to obtain his documents. There was scant evidence of attempts to regain contact with his mother. He could therefore obtain his identity documents through his mother who he was able to contact.

18. Mrs Johnrose submitted that the respondent's position has always been that the appellant did not have access to his original CSID and could obtain a replacement card. However SMO, KSP & IM (Article 15(c); identity documents) CG Iraq [2019] UKUT 400 ("SMO 1") and SMO and KSP (Civil status documentation, article 15) (CG) Iraq [2022] UKUT 110 ("SMO 2") made it clear that it was not possible to re-document in the UK. The respondent's submission being made now, that the appellant could access

his document, was a massive shift from what was originally considered to be the case. The respondent had had plenty of opportunity to check the appellant's file to see if any documents were retrieved from him when he arrived in the UK and it was therefore to be concluded that he did not have any documents with him on arrival. The conclusion to be reached, therefore, was that the appellant's documents were with his mother and that he had no contact with her. It was therefore not possible for him to be redocumented and, as such, he could not safely reach his home area from Baghdad and he would be exposed to an Article 3 risk. The appeal should therefore be allowed on Article 3 grounds.

Consideration and findings

19. This matter has been remitted to the Upper Tribunal to re-determine the issue of the availability of a CSID or other ID documentation. The matter is complicated by the fact that there have been decisions made by various judges as to the whereabouts of the appellant's CSID based on unclear findings of fact. Judge Alis's decision was set aside because he made no clear finding as to whether the appellant had relatives in Iraq who could assist him in obtaining his CSID or other identity documents, but his decision was set aside in its entirety with no findings preserved. Judge Foudy's decision, however, was not set aside in its entirety but with the preserved finding, as identified by Upper Tribunal Judge Coker, at [5] of her decision, that the appellant had not lost contact with his mother. The error Judge Foudy was found to have made was that, in finding that the appellant retained possession of his identity documents, she did not consider why the documents were not found on him by the respondent when he claimed asylum. Upper Tribunal Judge Hanson, in turn, identified the preserved finding of Judge Foudy that the appellant remained in contact with his mother and did not find the appellant's claim to have been separated from his mother and his documents credible, concluding that his CSID was available to him. The Court of Appeal found his conclusions as to how the document was available to him, and where it was, to be unclear.

20. The difficulty that has consistently arisen in this case is that successive Tribunals have found the appellant to be an unreliable witness whose evidence in general could not be believed, but have not been able properly to formulate how that translated into a finding on the whereabouts of his original CSID card. It has always been the appellant's case that he did not have the document and that he became separated from his mother who held the document and therefore had no access to it. That was not challenged by the respondent in the original refusal decision, but rather the focus in that decision was on re-documentation, with the respondent's position being at that time that the appellant could be re-documented in the UK as opposed to him having retained his original identity documents. That was indeed the starting point in Mrs Johnrose's submissions, with particular reference to paragraphs 53 to 63 of the refusal letter in that regard.

21. Since that time, however, the country guidance has developed and it is currently the position, following SMO 1 and SMO 2, that it would not be possible for a person such as the appellant to obtain a replacement identity document, either in the UK or on return to Iraq. Mrs Johnrose's skeleton, at [21] and [22], refers to the Home Office's CPIN for June 2020, confirming the former and referring instead to the need to apply for a registration document (1957) which, as confirmed at [21] of the headnote to SMO 2, was not "*a recognised identity document for the purposes of air or land travel within Iraq.*" The appellant, it is accepted, would be returned to Baghdad and, as such, would not be able to travel from Baghdad to Kirkuk without encountering difficulties which were found in SMO to reach the Article 3 threshold. As for the ability of the

appellant to re-document himself in Iraq, the Tribunal referred, in SMO 1, to the fact that the CSID had been replaced by the INID which could only be obtained in person from the CSA office in Kirkuk, and found that:

“431. In any event, as we have noted, matters have moved on as the CSID is being phased out and replaced by the INID. If, as appears to be the case, the judge in the FtT concluded that the appellant would be able to use a proxy to obtain a replacement CSID from the CSA office in Kirkuk, we cannot be sure that this represents the position in 2019. It is likely, to our mind, that the CSA office in Kirkuk has an INID terminal and that it would not be willing to issue a CSID to the appellant through a proxy. In the circumstances, we consider that there must be further findings made regarding this appellant’s access to or ability to obtain a CSID card. In the event that he does not have access to an existing CSID card and is unable to obtain a replacement whilst he is in the UK, we think it likely that his return to Iraq would be in breach of Article 3 ECHR. As we have explained, we do not consider that he would be able to obtain either a CSID or an INID in Baghdad because he is not from that city. “

22. Accordingly, the basis upon which the respondent originally refused the appellant’s claim is no longer sustainable. There has never been any suggestion in the evidence that the appellant retains family links in Kirkuk who could assist him in re-documenting himself. Given that Kirkuk was a contested area which has undergone substantial fighting and unrest, it is entirely plausible that the appellant’s family has been displaced and that he no longer retains family contacts in his home area. I accept that that is the case.

23. Although the respondent’s position has since changed, with Mr McVeety, for the respondent, submitting before Upper Tribunal Judge Chalkley (as recorded at [17] of Judge Chalkley’s decision) that the appellant had his original CSID when he came to the UK, it was clear from Judge Coker’s decision setting aside Judge Foudy’s decision that no consideration had been given to the fact that the document would have been retained by the respondent when the appellant claimed asylum if he had it on him when he arrived in the UK. As Mrs Johnrose submitted, the respondent’s position was that they had not had access to the full file at that time to check if the document had been retained, but that was three years ago, with nothing from the respondent in the meantime to suggest that the document was retrieved from the appellant. The assumption being, therefore, that the appellant had arrived in the UK without any documentation.

24. The only remaining basis, therefore, for finding that the appellant would have access to his own ID documents, would be if it was accepted that his mother had held on to the documents during the journey from Iraq and that, contrary to his claim, they had not become separated en route to the UK and remained in contact in the UK or that they had become separated but had reunited or otherwise remained in contact, and that his mother had retained the relevant documents which he was then able to obtain from her. Judge Foudy did not accept that the appellant had lost contact with his mother and that finding was preserved by Upper Tribunal Judge Coker when setting aside Judge Foudy’s decision. Upper Tribunal Judge Hanson noted the preserved finding but did not accept the appellant’s claim in regard the appellant’s mother having retained all his documentation. The evidence relied upon by the appellant to support his claim to have lost contact with his mother is certainly not the most reliable, consisting of Red Cross tracing requests making no mention of his mother’s name, together with his own evidence. Having heard from the appellant myself, I did not find him to be a particularly persuasive or reliable witness. His claim to have only rarely carried his identity documents on him when in Kirkuk and not to have needed those documents when moving around and conducting his life in his home area

appears to be contrary to the country evidence. His claim not to have owned his own mobile telephone in Kirkuk but to have received calls from the police on his mother's mobile telephone was equally lacking in credibility. As Mr Tan submitted, the appellant appeared deliberately to be attempting to distance himself from any suggestion that he carried identity documents with him and that he would have been able to contact his mother.

25. The question, therefore, is whether that is sufficient for me to find that the appellant currently has access to his original identity documents. Without some considerable hesitation I have to conclude, when applying the lower standard of proof, that it is not. As mentioned above, the appellant has consistently claimed to have become separated from his mother in Turkey and to have lost contact with her. Even if I am bound to take as a starting point the preserved finding of Judge Foudy that the appellant had not lost contact with his mother at the time of her decision, it seems to me, applying the lower standard of proof, that it is reasonably likely that the appellant's CSID document is no longer available. I am mindful that the country guidance concludes that if the appellant was returned to Iraq without having identification documents he would face an Article 3 risk of harm attempting to return to his home area. As such, I am cautious to make an adverse decision based on what is in reality little more than speculation, namely that the appellant, despite his consistent denial, remains in contact with his mother, that his mother has retained his original CSID card and that he is able to obtain the document from her.

26. In the circumstances I accept that the appellant has no identity documents and that he is not able to obtain any such documents, such that he would not be able to live and travel within Iraq without encountering treatment or conditions contrary to Article 3 ECHR and so that his removal to that country would be in breach of Article 3. For all those reasons the appellant's appeal has to be allowed on Article 3 human rights grounds.

Notice of Decision

27. The making of the decision of the First-tier Tribunal involved an error on a point of law and has been set aside. I re-make the decision by allowing the appeal on Article 3 human rights grounds.

Anonymity

For the reasons given in the order of the Rt. Hon. Lady Justice Laing of 16 May 2022, and in the absence of any further application being made as she required, the anonymity order previously granted by the Upper Tribunal is hereby discharged.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 December 2023