



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

**Case Nos:**  
**PA/05141/2019**

**THE IMMIGRATION ACTS**

**Decision & Reasons Promulgated**  
**On the 30 January 2023**

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**AHMED RAWAND**  
**(NO ANONYMITY ORDER MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr A Caskie, instructed by McGlashan McKay Solicitors

For the Respondent: Mr J Mullen, Senior Home Office Presenting Officer

**Heard at George House, Edinburgh on 29 November 2022**

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of Judge Deborah H Clapham who, in a decision promulgated on 5<sup>th</sup> November 2019, dismissed his appeal against the Secretary of State's decision to reject his protection and human rights application.

## **Background to the appeal**

2. The appellant's case, as made to the respondent, is that he had a well-founded fear of persecution on account of his sexuality. He is a citizen of Iraq of Kurdish origin from Diyala, which is outside the Kurdistan region of Iraq ("KRI").
3. The Secretary of State did not accept the appellant is gay nor did she accept that, although concluding that return to Diyala area might not be feasible as there would be a breach of his rights in respect of Article 15(c) of the Qualification Directive, he would be able to relocate to the KRI as he would have access to his CSID documents on return to Iraq. His claims in respect of Articles 2, 3 and 8 of the Human Rights Convention. were also rejected.

## **The Decision of the First-tier Tribunal**

4. The judge did not accept that the appellant was telling the truth about the reasons he had left Iraq and concluded [100] that the appellant had difficulties telling the truth and did not believe that he was gay as claimed. She did not accept that he was not in touch with his family or had made no effort to get in touch with them [101] although accepting that his maternal uncle helped him escape from Iraq was present in Iraq. The judge concluded:-

"The appellant argues that he is from a contested area. In fact, on 15 September, 2017, in judicial review proceedings R (on the application of Amin v SSHD) [2017] EWHC 2417 the judge decided that Kirkuk was no longer a contested area and that there was nothing to suggest that the claimant (there) could not obtain a CSID from Kirkuk's Civil Status Office. In any event, in terms of AAH, the appellant can obtain a laissez-passer from the embassy and I can see no reason why the appellant's uncle is unable to assist him in obtaining a CSID card. He will therefore not be returned undocumented. Further, even if he cannot return to his home area, he will go to the IKR. I understand that there are now direct flights there. While conditions may be harsh, AAH makes it clear that he will be given entry as an ethnic Kurd. I do not consider that conditions are such as to breach Article 3 and the test of insurmountable obstacles is relatively high. The appellant, in any event, has family in Iraq, his friend has apparently travelled to the IKR on holiday and I see no reason why he cannot obtain his identification documentation."

5. The appellant then sought permission to appeal, Judge Beach granting permission on 10 January 2020, on limited grounds relating to the possibility of obtaining a CSID card. It was averred also that the judge failed to give clear reasons why she concluded the appellant's uncle would be able to assist him in obtaining a CSID card and that on the basis of the country guidance case the appellant would not have access to the appropriate civil status affairs office as he originates from a contested area. Further, he had no contacts in Baghdad to assist, therefore no

means of obtaining a replacement CSID, this relying on AA (Iraq) [2017] EWCA Civ 944 at [39].

6. In a decision promulgated on 7 July 2020, Upper Tribunal Lindsley concluded, without having held a hearing, but on the basis of submissions from the appellant and the respondent that the decision of the First-tier Tribunal did involve in the making of an error on a point of law finding:

“10. I find however that at paragraph 102 of the decision that the First-tier Tribunal does determine the issue of whether the appellant can obtain a replacement CSID on the basis that this would be obtained from Kirkuk Civil Status Office by proxy or from the embassy in the UK with the assistance of his maternal uncle in Kirkuk, by his obtaining the relevant family registration details for the appellant from the office in Kirkuk. This is problematic for two reasons: Firstly the appellant is not from Kirkuk, and so his details would not be in the Civil Status Office in Kirkuk, and secondly the uncle is a maternal uncle and the system is patrilineal (see paragraphs 13 of the country guidance in **SMO**), so it is not apparent that his uncle would be in a position to obtain information on the appellant’s behalf. I find therefore that the issue of whether the appellant can obtain a replacement CSID card has not been determined with reference to the correct facts through no fault of the appellant, so this amounts to an error of law. The judge directed that the decision be remade on the basis that the findings at paragraph 102 of the decision are set aside with the other findings required to be remade. This includes the Article 3 appeal on the risk of serious harm resulting in the appellant not being able to access a CSID or INID on return to Iraq. This was also to be on the basis that he was a critical witness and that he has family including a father in Diyala with whom he has some contact.”

7. The appeal then came before Upper Tribunal Judge Macleman on 4 August 2021. For the reasons set out in his decision on 8 September 2021, he dismissed the appeal.
8. Although permission to appeal to the Inner House of the Court of Session was refused by Judge Macleman, it was granted on a renewed application. On 17 August 2022, the Inner House ordered that leave to appeal be granted, found that the Upper Tribunal erred in its law and that its decision be set aside to be heard again by a differently constituted Upper Tribunal for the reasons set out in the joint minute.
9. The joint minute provides, materially, as follows:

“10. The appellant is from Diyala and it is his position that he has no documentation. It is submitted that the judge has erred in law by failing to consider whether the appellant has no way of getting a replacement documentation if he is unable to safely travel there.

11. The place of origin is key in this aspect of the case as on the basis of the country guidance case, the appellant would not have

access to the appropriate Civil Status Affairs Office, given he originates from a contested area, and there is no evidence of an alternative office being set up in relation to the appellant's home governorate. The appellant further identifies that he has no contacts in Baghdad who could assist him, therefore it is submitted that the appellant has no means of obtaining a replacement CSID.

...

13. It is noted that since the determination was issued new country guidance case law has been promulgated, however it is submitted that as this case law was not issued at the time of the present hearing, the appropriate case law to be filed is set out above. If however the Tribunal considers that the new country guidance case law should be applied to this case, it is submitted that the client would continue to be at risk on return to Diyala, even if the principles are set out in the country guidance of SMO, KSP & IM (Article 15(c): identity documents) Iraq CG [2019] UKUT 400 are applied."

### **The Hearing**

10. After some discussion, it was agreed that the appeal would proceed on the basis that the decision was to be remade in light of Judge Lindsley's decision. It was agreed also that it would be necessary, as this is a remaking, to apply the up-to-date country guidance applicable at the date of hearing.
11. Mr Caskie sought permission to adduce a recent document from the UNHCR entitled relevant Country of Origin Information to Assist with the Application of UNHCR's Country Guidance on Iraq: Ability of Iraqis to Legal Access and Settle Durably in the Proposed Areas of Internal Relocation, November 2022. Mr Caskie, referring to the joint minutes at paragraph 6 submitted that there was no real prospect of being able to get documents from the local Civil Status Office, it being unclear as to what documents had survived in any event. He submitted that the conditions in Diyala were relevant as to whether relatives being able to help him get a CSID and/or a housing card, a document now said to be necessary. He submitted there was a real risk of going back with nothing and to nothing and a significant risk of harm. He submitted further relying on paragraphs 8 to 10 of the joint minute but it was agreed there would be difficulties in obtaining ID documents.
12. Mr Caskie submitted that accordingly, the appellant was entitled to humanitarian protection but in this case he was at risk in his home area returning where relevant records had been destroyed after an extended time and that the risk of ill-treatment on account of being a member of a particular social group.

13. Mr Mullen accepted he could not make any sensible arguments that the appellant' article 3 rights would not be breached given the processes involved in obtaining the necessary documentation and as the practical difficulties in this case would be insuperable. He did not, however, accept the appellant was a member of a particular social group.
14. Mr Caskie submitted that the appellant would form a member of a social group, and coming from a particular areas is an immutable characteristic.

## **Decision**

15. It is for the appellant to demonstrate he has a well-founded fear of persecution, to the lower standard.
16. In assessing the appellant's claim I have done so in the light of the background evidence, and in particular with regard to the most recent guidance SMO and KSP (Civil status documentation; article 15) Iraq CG [2022] UKUT 00110 bearing in mind the appellant's case is that he is at risk on account of his religion.
17. In light of Mr Mullen's concession, I am satisfied that the appellant is at risk of ill-treatment on return to Iraq of a sufficient severity given the particular circumstances and facts of his case, as would constitute ill-treatment for the purposes of Article 3 and, for that matter, Article 15(c).
18. The question then arises as to whether the risk of ill-treatment of sufficient severity to engage article 3 is on account of the appellant's membership of a particular social group.
19. Article 10 of the Qualification Directive reads:

### *Article 10*

#### **Reasons for persecution**

1. **Member States shall take the following elements into account when assessing the reasons for persecution:**

...

- (d) a group shall be considered to form a particular social group where **in particular**:
  - (i) members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, **and**
  - (ii) that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society

(roman numerals and emphasis added)

20. Article 10(1)(d)(i) is concerned with the protected characteristic of the individual, and Article 10(1)(d)(ii) with the social perception of the group to which he belongs. The Upper Tribunal has held both limbs must be satisfied in order for a group to be found, because the 'and' joining sub-sections (i) and (ii) should be given its natural meaning: SB (PSG - Protection Regulations - Reg 6) Moldova CG [2008] UKAIT 00002 [at §74]. The CJEU too has indicated that the requirements in Article 10 are to be read conjunctively,
21. Article 10 is a 'minimum standard'; state parties can take a more generous approach, reading the two requirements disjunctively, so that the 'and' at the end of (i) should be read as 'or' as is explained in DH (Particular Social Group: Mental Health) Afghanistan [2020] UKUT 223 (IAC) [at46-75], and as supported by the *obiter dicta* of four members of the Appellate Committee in Fornah (FC) v Secretary of State for the Home Department [2006] UKHL 46, who found the proposition that both elements must be satisfied to be inconsistent with international authority.
22. While I accept that the appellant is from Diyala, it is difficult to characterise that as an innate characteristic (unlike sex or blindness), although it may be a common background. In a country like Iraq, ones origin is recorded and it would appear cannot, easily if at all be officially altered. That said, a large number of people come from Diyala, or for that matter, other towns. But there is insufficient evidence to show that they form a group as such.
23. Dealing with the second element, I have not been taken to any material indicating that persons from the appellant's area, however it is defined, have a distinct identity or are perceived as different by the rest of society.
24. Accordingly, I am not satisfied that coming from Diyala constitutes a particular social group. It lacks cohesiveness.
25. Further, even if I am wrong, the reason that the appellant will be reduced to destitution is not because he is from Diyala but because like many others he has not got necessary documentation nor can he acquire it, owing to administrative and bureaucratic difficulties which apply to those who do not have documents and cannot acquire replacements. There is thus no sufficient nexus between the harm and the claimed social group. I therefore dismiss the appeal on asylum grounds.

## **Conclusions**

26. In light of the above findings, I am satisfied that the decision of the First-tier Tribunal involved the making of an error of law and I set it aside. I remake the decision on the limited basis outlined in Judge Lindsley's decision. I find that the appellant is at risk of Article 3 ill-treatment on return to Iraq and that accordingly he is entitled to humanitarian protection. I therefore allow the appeal on humanitarian protection and

human rights grounds. For the reasons set out above, I am not satisfied that the risk of ill-treatment to the appellant has a nexus with a Convention reason and therefore dismiss the appeal on asylum grounds.

**Notice of Decision**

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside
2. I remake the decision by:
  - (a) Dismissing the appeal on asylum grounds, but
  - (b) Allowing the appeal on humanitarian protection grounds and on human rights grounds.

No anonymity direction is made.

Signed

Date 12 January 2023

Jeremy K H Rintoul  
Upper Tribunal Judge Rintoul