



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003540

First-tier Tribunal No: PA/000017/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 28 September 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BA (IRAQ)
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr A. Basra, Senior Home Office Presenting Officer

For the Respondent: Mr H. Sadiq, solicitor, of Adam Solicitors

Heard at Field House on 4 September 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent is granted anonymity. No-one shall publish or reveal any information, including the name or address of the respondent, likely to lead members of the public to identify the respondent. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. The Respondent to this appeal, BA, is a citizen of Iraq of Kurdish ethnicity. He is from Sulaymaniyah in the Iraqi Kurdistan Region ("IKR"). On 30 March 2019, having arrived illegally in the UK, he made a protection claim, which the Appellant, the Secretary of State, refused in a decision dated 20 November 2020. BA appealed that decision to the First-tier Tribunal and, in a decision promulgated on 19 April 2022 ("the Decision"), First-Tier Tribunal Judge Bell ("the Judge")

allowed his appeal on human rights grounds. More specifically, he held that BA's removal to Iraq would violate Article 3 ECHR. He dismissed BA's appeal on asylum grounds. The Secretary of State now appeals the Decision to this Tribunal so far as it relates to the Article 3 ground, permission having been granted by Upper Tribunal Judge Hanson on 21 October 2022.

2. There is no cross-appeal in respect of the Decision in so far as it relates to the asylum claim. As explained further below, this is of some importance given certain of the findings that were made in relation to that claim.
3. The Judge below made an anonymity order. In light of the nature of the claims which BA has made, I consider it appropriate to continue that order in this Tribunal, in the terms set out above, notwithstanding the importance of the open justice principle.
4. The appeal proceeded by way of remote hearing. There were no technological difficulties and I was satisfied that the Tribunal and both representatives could hear and communicate with one another without difficulty.

The protection claim and the Decision

5. BA's protection claim was essentially two-fold.
6. First, he claimed that he was a former Peshmerga soldier who had been accused of stealing weapons and that this put him at risk from the authorities. As to this the Judge found that his evidence lacked credibility and that accordingly *"although I accept [BA] was in the Kurdish armed forces I do not accept [his] account of events in the IKR and do not accept that he was falsely accused of stealing weapons or that he came to the adverse attention of the authorities in the IKR or that he would be at risk of treatment amounting to persecution by the authorities in his home area of Iraq."* As there is no appeal in relation to this aspect of BA's protection claim, it is unnecessary to say anything more about it.
7. Second, the Appellant relied on a lack of identity documentation. It is well established in the Country Guidance caselaw (and not in issue) that, put broadly, not having such documentation in Iraq can put someone at real risk of ill-treatment sufficient to amount to persecution under the Refugee Convention and/or breach of Article 3 ECHR, unless, in effect, you are returned to your home area in which you can obtain a new document from the Civil Status Affairs office at which you are registered.
8. In relation to this, the Judge considered the asylum claim and the human rights claim separately. Before doing so, at para. 24 of the Decision, the Judge considered whether BA's factual claim that he no longer had a CSID or passport as they were "no longer in existence" was proved. As to this the Judge stated:

"24.... It is unclear why they would have ceased to exist if he left the[m] at home. It is unlikely he would not have had a CSID card when living in the IKR before his departure. I find it likely that he would be able, with the help of family members in the IKR, to obtain either his documents or replacement documents. He could choose to make a voluntary return directly to the IKR if he wanted to. The appellant's enforced removal would however, as Mr Wake [the Presenting Officer appearing for the Secretary of State] confirmed, be directly to Bagdad and not direct to the IKR."

9. In relation to the asylum claim, the Judge then found, applying SA (Removal destination; Iraq; undertakings) [2022] UKUT 37 (IAC), that, as BA could voluntarily return directly to the IKR, he was not a refugee within the meaning of the Refugee Convention. There is no challenge to this conclusion, nor the finding that he would be able to obtain his documents or replacements.
10. The Judge then proceeded to consider Article 3 ECHR, stating as follows:

“26. When considering whether his enforced removal would be unlawful under section 6 of the Human Rights Act 1998 his ability to return voluntarily is irrelevant. The respondent has confirmed that the appellant would be removed to Baghdad. I have therefore considered the safety of his enforced removal to Baghdad.

27. The appellant has no known connections in Baghdad. He would have to be removed on a laissez passer document as the respondent has no other document to return him on. It is likely that he would be returned without a CSID which would put him at risk of treatment that would breach Article 3 on return to Baghdad. The laissez passer would be confiscated on arrival. A CSID is necessary to live and travel within Iraq without encountering treatment or conditions which are contrary to Article 3 ECHR. The appellant cannot therefore be safely removed to Baghdad.

28. I conclude that the appellant’s removal would not breach the UK’s obligations under the Refugee Convention but that his enforced removal to Baghdad would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant’s Convention rights.”

Grounds of Appeal

11. The Grounds of Appeal as explained by Mr Basra at the hearing are essentially two-fold:
- a. First, it is said that the Judge erred in finding that BA would be returned to Baghdad;
 - b. Second, the Secretary of State contends that the Judge misdirected herself and made contradictory findings. In particular, the finding in para. 27 that it was likely that BA would be returned without a CSID to Baghdad is inconsistent with the earlier (and unchallenged) finding that BA would be able to obtain his identity documents from his family in the IKR.

Permission to appeal

12. Permission to appeal to the Upper Tribunal was initially refused by First-tier Tribunal Judge Cartin.
13. As Mr Sadiq adopted Judge Cartin’s reasons for refusing permission as part of his submissions in relation to the second ground, it is necessary to set it out:

“The determination quite correctly considers the authority of SA (Removal destination; Iraq; undertakings) Iraq [2022] UKUT 37 (IAC) and the fact there is a material difference between the Appellant’s position under the Refugee

Convention and under Article 3. It highlights the different scenarios which must be considered, namely whether a return would be voluntary or involuntary. The Judge found the Appellant to not be credible in his claimed need for protection. He therefore falls outside of the Refugee Protection because it is the case that he could safely return voluntarily to Iraq. It is in this context that the Judge considers the Appellant's position upon any involuntary return. It is understandable and not contradictory for the Judge to therefore find that the Appellant would 'likely' be without his CSID. On this basis, the lack of ID documents; notwithstanding the Appellant could obtain them if he wished, is what the Judge concludes places the Appellant at risk in Baghdad itself, whether he were to move on from there or not. That is not a contradiction but a separate finding made for a different scenario. It follows that I see no arguable error of law in these findings."

14. As noted, permission to appeal was then granted by the Upper Tribunal on 21 October 2022. Permission was granted on all grounds.
15. There was no rule 24 response to the grounds.

Error of law

Ground 1: Return to Baghdad

16. The specific airports to which enforced returnees to Iraq may be removed have varied in recent years. There was a period where enforced returns were only permitted to Baghdad. That is, as I understand it, no longer the case. However, the fact that it may be possible for a returnee to be removed to a particular place does not mean that they necessarily will be, and it is well established that the Tribunal is required to undertake its assessment of risk on the basis of the envisaged route of return: HH (Somalia) [2010] EWCA Civ 426; [2010] Imm AR 563. Indeed, as this Tribunal held in SMO and KSP (Civil status documentation, article 15) (CG) Iraq [2022] UKUT 110 (IAC) in Iraqi cases "*It is for the respondent to state whether she intends to remove to Baghdad, Erbil or Sulaymaniyah*" (see headnote para.29).
17. In light of the fact that the Presenting Officer specifically told the Judge that BA would be returned to Baghdad, as recorded at para. 24 of the Decision set out above, even assuming that other airports were available for the Appellant to be returned to, this was irrelevant and the Judge did not err in finding that BA would be returned to Baghdad, nor in conducting her assessment of risk on that basis. This ground is accordingly rejected.

Ground 2: Availability of CSID

18. If the Judge was correct to state that BA would be returned to Baghdad without a CSID it is uncontroversial that this would put him at a risk of ill-treatment in returning to the IKR sufficient to cross the Article 3 threshold. In light of the Judge's finding at para.24 however that "*he would be able, with the help of family members in the IKR, to obtain either his documents or replacement documents*", it is difficult to understand the basis on which the Judge considered that it would be likely that he would be returned without such a document. These are, on the face of it, inconsistent findings.

19. Although the Judge does not say so in terms, it may be that the reasoning process was that, although BA *could* obtain his CSID, he *would* not do so if being returned involuntarily, and that Article 3 had to be assessed on the basis of the factual situation in fact pertaining. If that is the process of logic adopted, it is in my judgment flawed and would appear to be based on a misreading of SA, cited above.
20. In that case, it was held in relation to Article 3 that the assessment must be undertaken in relation to an appellant's enforced removal, and the fact that an individual might return voluntarily was irrelevant to this. Importantly, in SA the appellant did not have a CSID or other form of ID, nor was there a suggestion that he might be able to obtain one. While he could therefore have voluntarily returned to the IKR directly, where he would not have been at risk by reason of the lack of identity documents, he could not get to the IKR from Baghdad without such a document without a risk of Article 3 ill-treatment. The Article 3 assessment therefore had to be undertaken on the basis that he would be returned to Baghdad without a CSID and his claim accordingly succeeded. In both scenarios (return to Sulaymaniyah and return to Baghdad respectively), he would have been returned without a CSID.
21. That is however distinguishable from the circumstances of this case, where BA has been found to have access to his CSID. In those circumstances, in my judgment the Secretary of State's second ground is made out. To the extent that the Judge considered that SA militated in favour of a finding that he would be returned without a CSID, that is a misreading of that case and an error of law. The facts in that case were that that appellant would be returned without a CSID, but there was no more general guidance given (indeed, SA is not Country Guidance) to the effect that all returnees to Baghdad would be returned without their CSID, or without the opportunity to obtain one from their family members, where applicable.
22. If that was not the Judge's reasoning, I am afraid I do not understand how the Judge came to the conclusion she reached and her reasons are in my judgment inadequate. There are in particular no reasons given for finding that on being returned, BA would not have a CSID to which he has, according to the Judge's earlier finding, he has access.
23. As noted above, Mr Sadiq, for BA, adopted Judge Cartin's reasoning in the refusal of permission to appeal as part of his submissions. However that reasoning fails to grapple with the inconsistency between the finding that BA could obtain his identity documents for the purposes of voluntary removal and the finding that he would not in fact do so. It does not therefore in my view assist.
24. In the above circumstances, ground 2 is made out. It follows that the Decision should be set aside in so far as it relates to Article 3 ECHR.
25. However, as there is no appeal against the Judge's conclusion on the asylum claim, nor to the her findings that BA's evidence in relation to his asylum claim was not credible and that he has his CSID available to him through his family connections, and as those findings are unaffected by the Secretary of State's success on ground 2, those findings (and the decision on asylum) should stand.

Remit or remake?

26. The question is then whether, in light of those preserved findings, I should redetermine the appeal now, or whether there needs to be a further hearing in relation to BA's Article 3 claim (and if so, whether that should be in the First-tier or Upper Tribunal).
27. Mr Sadiq urged me to direct that there be a further hearing, preferably remitted to the First-tier Tribunal. Although he accepted that he may well have already made all the submissions that could be made in relation to Article 3, he did not want to prevent his client from putting forward other arguments in due course. With respect that seems to me to be wholly speculative. Mr Sadiq has in my judgment put forward, and has done so skilfully, every conceivable argument as to why, on the basis of the preserved findings, his client nonetheless has a good Article 3 claim as part of his submissions on why there was no error of law. If there were further arguments to be deployed, Mr Sadiq would have been able to identify them, but he was unable to do so. There was also no suggestion that there was any further evidence that could be relevant to the Article 3 re-making that would need to be given at a further hearing. Mr Sadiq also confirmed that BA had no particular vulnerabilities that might give rise to difficulties in Baghdad. In those circumstances, it seems to me that as the only basis on which the Article 3 claim would be able to be put was on the basis of the lack of a CSID and that, given that I have the preserved findings and submissions on which properly to make that decision, I should remake the decision on BA's appeal myself. The reality is that a further hearing would add nothing and simply serve to increase costs. It would not be in accordance with the overriding objective.

Re-making

28. In re-making the Decision, I must apply the Country Guidance case of SMO [2022] UKUT 110 (IAC). I note, in particular, the following aspects:

"27. For an Iraqi national returnee (P) of Kurdish origin in possession of a valid CSID or Iraqi National Identity Card (INID), the journey from Baghdad to the IKR by land is affordable and practical and can be made without a real risk of P suffering persecution, serious harm, or Article 3 ill treatment nor would any difficulties on the journey make relocation unduly harsh.

28. P is unable to board a domestic flight between Baghdad and the IKR without either a CSID, an INID or a valid passport. If P has one of those documents, the journey from Baghdad to the IKR by air is affordable and practical and can be made without a real risk of P suffering persecution, serious harm, or Article 3 ill treatment nor would any difficulties on the journey make relocation unduly harsh.

...

30. Once at the IKR border (land or air) P would normally be granted entry to the territory. Subject to security screening, and registering presence with the local mukhtar, P would be permitted to enter and reside in the IKR with no further legal impediments or requirements. There are no sponsorship requirements for entry or residence in any of the three IKR Governorates for Kurds.

31. Whether P would be at particular risk of ill-treatment during the security screening process must be assessed on a case-by-case basis. Additional

factors that may increase risk include: (i) coming from a family with a known association with ISIL, (ii) coming from an area associated with ISIL and (iii) being a single male of fighting age. P is likely to be able to evidence the fact of recent arrival from the UK, which would dispel any suggestion of having arrived directly from ISIL territory.

32. If P has family members living in the IKR cultural norms would require that family to accommodate P. In such circumstances P would, in general, have sufficient assistance from the family so as to lead a 'relatively normal life', which would not be unduly harsh. It is nevertheless important for decision-makers to determine the extent of any assistance likely to be provided by P's family on a case by case basis. "

29. On the basis of the preserved findings and the Country Guidance, I find that BA could obtain his CSID from his family prior to his removal, and then travel with it from Baghdad to the IKR by land or air without suffering Article 3 ill-treatment. Once at the IKR border, he would be granted entry to the territory. There is no suggestion that he comes from a family with a known association with ISIL, nor that he comes from an area associated with ISIL. While he might be thought to be a single male of fighting age, in light of the fact that he will be a recent arrival from the UK, I do not consider that this is sufficient to give rise to a real risk of Article 3 ill-treatment. BA has family living in the IKR and I see no reason why, as held in SMO, he would not therefore be able to lead a relatively normal life that is not unduly harsh.
30. In those circumstances, I conclude that BA's appeal on Article 3 grounds fails.

Notice of Decision

The decision of the First-tier Tribunal discloses an error of law. It is therefore set aside to the extent that the First-tier Tribunal allowed the appeal on Article 3 grounds. The dismissal of the appeal on asylum and humanitarian protection grounds, and all findings related thereto are preserved.

I remake the appeal on Article 3 grounds by dismissing it.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 September 2023

