



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

**Case No: UI-2023-001020**  
**First-tier Tribunal No:**  
**PA/02500/2020**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 14 June 2024**

**Before**

**UPPER TRIBUNAL JUDGE STEPHEN SMITH**

**Between**

**Secretary of State for the Home Department**

**and**

**MM**

**(ANONYMITY DIRECTION IN FORCE)**

Applicant

Respondent

**Representation:**

For the Appellant: Mr A. Mullen, Senior Home Office Presenting Officer  
For the Respondent: Mr S. McTaggart, Counsel instructed by R P Crawford & Co Solicitors

**Heard at Royal Courts of Justice (Belfast) on 16 May 2024**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

1. The central issue in these proceedings is whether it was unfair for First-tier Tribunal Judge Farrelly (“the judge”) to refuse an application for an adjournment made by the Secretary of State’s presenting officer at the hearing of the appeal against the Secretary of State’s decision to refuse the appellant’s claim for

asylum and humanitarian protection, dated 28 February 2020. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”).

2. The issue arose because the appellant’s legal team had not served the appellant’s bundle on the Secretary of State, or the First-tier Tribunal, in accordance with case management directions that had previously been given. The bundle was served out of hours the night before the hearing. That meant it was not until the morning of the hearing that the presenting officer was able to review the appellant’s bundle, which included his witness statement, and two medical reports. The judge gave the presenting officer an hour’s reading time on the morning of the hearing, and refused the presenting officer’s application to adjourn the proceedings until a later date. The judge went on to allow the appellant’s appeal on grounds to which I will return.
3. The Secretary of State now appeals against the decision of the First-tier Tribunal on the basis that it was unfair for the judge to have proceeded in the circumstances, and that he failed to provide sufficient reasons for refusing the adjournment application.
4. Permission to appeal was granted by First-tier Tribunal Judge Hamilton.
5. For ease of reference, I will refer to the parties as they were before the First-tier Tribunal.

### **Factual background**

6. The appellant is a Kurdish citizen of Iraq. He was born in 1996. He entered Ireland clandestinely in late 2019, having paid a smuggler to transport him across Turkey and then Europe. He was arrested by immigration officers in Belfast *en route* to Scotland. He claimed asylum. The basis of his claim was that he was at risk from ISIS in his home area. They suspected him of spying for the Peshmerga and had beaten him. Since there were ISIS informers in his home village, he decided to flee. He enlisted the assistance of an agent who helped him to travel across Europe.
7. In his asylum interview, the appellant said that he did not have his Civil Status Identity Document (“CSID”) because he had left it at the family home, and he had since found out that the family home had been destroyed.
8. The Secretary of State refused the appellant’s claim; the appellant had been inconsistent, and the claim itself was internally inconsistent. He had travelled through a number of safe countries on his journey to the United Kingdom and had not claimed asylum there, thereby harming his credibility. In relation to documentation, the Secretary of State concluded that the appellant’s family, who were still in Iraq, would be able to help him obtain a replacement CSID while he was in the UK. He would not have to wait until he returned to Iraq in order to obtain a further document. His family would be able to provide him with the necessary details to be able to obtain a document remotely.

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

9. The judge dealt with the Secretary of State’s application for an adjournment in the following way, at para. 1:

“At the start of the hearing the presenting officer applied for an adjournment as he had received papers for the appellant at a late stage. The appellant’s counsel advised that there had been an issue

arising when the staff member dealing with the appeal in the solicitors office left the firm. Having regard to the content of the papers it was my conclusion the appeal could still proceed and allowed the presenting officer our [*sic*] to read the additional papers.”

10. The judge’s operative analysis commenced at para. 25. He accepted that elements of the appellant’s account were plausible (para. 28) but concluded that the appellant’s activities were at a “very low scale” and that, with the passage of time, it was “unlikely he would be of any ongoing interest” to ISIS. The appellant had engaged in a number of *sur place* activities in the United Kingdom, but they were not place him at risk, the judge found (para. 29). The judge also found at para. 31 that the appellant would not be associated with ISIS by the Peshmerga.
11. In relation to the CSID issue, the judge said the following, at paras 33 and 34:

“33. The appellant at interview said he remained in contact with his family. At one stage he suggested they might be able to help him with documentation. However, he said that the family are no longer in what was their home, and their documentation has been destroyed. Bearing in mind the difficulties the country has experienced, particularly in the contested areas, this is credible. The appellant said he has a limited education and I have no reason to doubt this. In the circumstance whilst the family book would be important, I accept it is possible he will not know the details.

34. The logistics of his return would be problematic. The only place he can be returned to is Baghdad. Baghdad itself would not be a suitable place for him to relocate to. This is because of his religion and ethnicity. It is difficult to see how he could leave Baghdad airport. In particular he could not travel from Baghdad to his home region without documentation. Country information now indicates the CSID document is being replaced with a new electronic form. However, to obtain this apparently he must attend in person at the local office. This appears to be impossible.”
12. The judge’s operative conclusion was at para. 35. The judge accepted that the appellant’s “basic account” was established to the lower standard. He said:

“in the ever-changing situation there is the possibility he faces a real risk and return because of his history. It is my conclusion therefore that the appellant does face a real risk of persecution or alternatively a 15C [humanitarian protection] risk if he were returned. The risk is based upon his accepted history and the difficulty with documentation.”
13. The judge allowed the appeal on Refugee Convention and humanitarian protection grounds.

### **Issues on appeal to the Upper Tribunal**

14. Expanding on the grounds of appeal, Mr Mullen submitted that an hour (it was common ground that “*our*” in para. 1 of the judge’s decision meant “*hour*”) was simply not enough time for the presenting officer properly to respond to the substantial late disclosure at the door of the court. The Secretary of State would not be permitted to disclose such extensive materials at such a late stage, Mr Mullen submitted, and it followed that the appellant in these proceedings should have been held to similar standards. Very fairly, Mr Mullen accepted that the judge’s findings concerning the appellant’s persecution narrative were favourable

to the Secretary of State. Nevertheless, however, the overall hearing was unfair because the presenting officer was ambushed by the late disclosure, and the judge should have granted an adjournment. His reasons for doing so were also insufficient.

15. Mr McTaggart, who also appeared below, submitted that the bulk of the late disclosure, in particular the medical reports, resulted in the judge finding against the appellant in relation to the substantive persecution narrative. Very little additional material had been disclosed on the day of the hearing itself that affected the operative basis upon which the judge allowed the appeal, when compared to the materials that were already in the possession of the Secretary of State. The hearing before the judge had been fair.
16. I queried with the parties whether the judge's findings at para. 35, namely that the appellant's account had been made out to the "lower standard", were inconsistent with the judge's earlier findings in which he dismissed the appellant's claim persecution narrative. I also queried whether, although it had not been raised as a ground of appeal, it had been an error of law for the judge to have purported to allow the appeal on Refugee Convention *and* humanitarian protection grounds. Both parties agree that the judge's findings meant that the appeal should have been allowed on Article 3 ECHR grounds, not under the Refugee Convention, or humanitarian protection in the alternative.

### **The law**

17. The leading authority on the fairness of the trial is *Serafin v Malkiewicz* [2020] UKSC 23. See the discussion at para. 40 and following. One facet of the fairness of a trial is the ability of a party to the proceedings fully to participate in the process, and to be able to put their case to the other side - and to the court or the tribunal.
18. In *Nwaigwe (adjournment: fairness)* [2014] UKUT 00418 (IAC), McCloskey J (as he then was) held that the central question pertaining to whether an adjournment should be granted was whether it was necessary to do so to ensure that the parties received a fair trial. The judicial headnote states:

"In practice, in most cases the question will be whether the refusal deprived the affected party of his right to a fair hearing. Where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the FtT acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing?"

### **No evidence that the hearing was unfair**

19. As I observed at the hearing, there was no evidence from the presenting officer before the First-tier Tribunal, Mr Buist, concerning the extent to which he felt hampered by the judge's decision to refuse the application for an adjournment. As the Secretary of State's representative before the judge below, Mr Buist was uniquely well-placed to address the issue of whether his conduct of the Secretary of State's case had been unfairly prejudiced by the judge's decision to refuse the application for an adjournment. The hearing before the judge had been conducted via CVP, with the result that a digital recording of the entire hearing should have been available. The Secretary of State had not applied for a direction that the recording should be made available or otherwise examined by the Upper Tribunal.

20. Consequently, it is necessary for this tribunal to form a view as to the fairness of the proceedings before the judge solely by reference to the contents of the judge's decision, and what may be gleaned from the grounds of appeal and the remaining case papers.
21. In my judgment, the Secretary of State has not established that the hearing before the judge was unfair. The operative findings reached by the judge concerning the appellant's protection claim were entirely in line with those sought by the Secretary of State, as set out in the refusal letter. It is clear from para. 29 of the decision that the presenting officer had cross-examined the appellant about his alleged *sur place* social media activities, thereby demonstrating his ability to have engaged effectively with the evidence included in the late disclosure. As Mr Mullen very fairly accepted at the hearing before me, the judge's findings and those issues were (to paraphrase) as favourable as the Secretary of State could reasonably have expected to obtain.
22. The basis upon which the judge allowed the appeal was that he accepted the appellant's evidence that his family were no longer in possession of his CSID card. The appellant's case in that regard cannot reasonably have taken the presenting officer by surprise. That had been the explanation the appellant had given that question 8 of his substantive asylum interview, which took place on 26 February 2020. The appellant was also asked about his CSID at questions 20 to 23 of that interview. The transcript of the interview was in the Secretary of State's bundle before the judge, and so would have been available to the presenting officer well in advance of the hearing. Para. 23 of the appellant's witness statement dated 18 January 2020 provided an account that was largely consistent with that account. The time available to prepare for cross-examination – namely, an hour – was amply sufficient.
23. On the basis of the materials before me, therefore, far from the judge having presided over an unfair hearing, he presided over a hearing in which the presenting officer was able to put the Secretary of State's case to the appellant in such a manner as to secure conclusions on the protection issue that were in line with the Secretary of State's case. There is no indication in the decision of the judge that the presenting officer struggled at the hearing, or had otherwise been unable to put the Secretary of State's case to the appellant, or to test his case.
24. In the absence of any additional details from the presenting officer before the judge, I conclude that the time provided to the presenting officer on the morning of the hearing before the First tier Tribunal was sufficient. There is no basis to conclude that the judge's findings in favour of the appellant on the CSID issue were due to the Secretary of State having insufficient time to prepare to participate in the hearing. The judge accepted the appellant's evidence on that point and made findings accordingly.
25. I therefore dismiss this appeal to the extent it is contended that the hearing before the judge was unfair.

### **Sufficient reasons given**

26. The final limb of the Secretary of State's grounds contends that the judge gave insufficient reasons for refusing the adjournment application. The Secretary of State has not provided this tribunal with the details of what the judge said at the hearing itself. It is clear that the judge provided an explanation of sorts to the parties, since he gave the presenting officer an additional hour to read the papers.

### **Sufficient reasons given**

27. Properly understood, the judge applied a test of fairness. So much is clear from the final sentence of para. 1 of his decision; the judge said that he had regard to the content of the late disclosure, and that it was his conclusion that “the appeal could still proceed”, having provided the presenting officer with an additional an hour to read the papers. That was plainly a reference to the amount of time that the judge considered would be necessary for the presenting officer to familiarise himself with papers of that complexity. The terminology used by the judge was a proxy for the fairness of expecting the presenting officer to proceed in those circumstances. Those reasons were sufficient.
28. Overall, on the basis of the materials before me, the hearing before the judge was fair, and he gave sufficient reasons for refusing to grant the Secretary of State’s application for an adjournment.

### **No basis to allow appeal under the Refugee Convention**

29. There has been no cross-appeal by means of a rule 24 notice by the appellant against the rejection of his protection claim. To the extent the judge later found that that claim had been made out (notwithstanding his earlier findings), that was plainly a slip of the pen. It follows that it was not open to the judge to allow the appeal under the Refugee Convention or on humanitarian protection grounds. The only basis for appeal to be allowed in light of the findings reached by the judge was under Article 3 of the ECHR.
30. Mr McTaggart agreed that it was an error for the judge to allow the appeal on that basis, and agreed with me that the solution was for me to set aside the decision of the judge, retaining all operative findings of fact, and remake the decision by dismissing the appeal on asylum and humanitarian protection grounds, and allowing it on article 3 grounds. Although the Secretary of State did not challenge the decision on that basis, I consider that it is a “*Robinson* obvious” error, and in order to preserve the integrity of the Refugee Convention by not conferring refugee status, or otherwise recognising as refugees, those who do not meet the criteria under the Convention, it is necessary for me to proceed in this way.

### **Conclusion**

31. The hearing before the judge has not been demonstrated to have been unfair. There has been no challenge to the findings reached by the judge rejecting the appellant’s protection narrative. In light of those findings, it was not open to the judge to allow the appeal under the Refugee Convention or humanitarian protection in the alternative, and the only conclusion rationally available to the First-tier Tribunal was to allow the appeal on Article 3 grounds.

### **Anonymity**

32. The First-tier Tribunal made an order for the appellant’s anonymity. I maintain that order in light of the nature of the appellant’s claim lest, upon his return after acquiring the correct documentation, he is exposed to a risk in Iraq by virtue of the publication of this decision that he would not otherwise face.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law to the extent it purported to allow the appellant’s appeal on Refugee Convention and humanitarian protection grounds.

I set aside the decision of the first-tier Tribunal, and remake it acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. I dismiss the appeal on asylum and humanitarian protection grounds, and allow the appeal on Article 3 ECHR grounds.

**Stephen H Smith**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**21 May 2024**