Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06583/2017

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 23 May 2019	**On 13 June 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAH
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr C Howells, Senior Home Office Presenting Officer
For the Respondent: Mr H Dieu instructed by Sutovic & Hartigan, Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the respondent (SAH). A failure to comply with this direction could lead to Contempt of Court proceedings.

2. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

Introduction

3. The appellant is a citizen of Iraq who was born on 1 January 1989. He is Kurdish and comes from Erbil in the IKR.

4. The appellant arrived in the United Kingdom illegally on 5 February 2004 and claimed asylum. That claim was refused by the Secretary of State on 1 April 2004. The appellant's subsequent appeal was dismissed on 30 June 2004 and he became appeal rights exhausted on 12 November 2004. On 8 October 2004, the appellant was recorded as an absconder as he had failed to report correctly. On 6 December 2007, he applied for Assisted Voluntary Return through the Home Office and that application was initially accepted but on 3 April 2008 the application was withdrawn by the Home Office.

5. On 9 October 2009, the appellant was convicted at the Wolverhampton Crown Court of two counts of making false representation and one count of possession of an improperly obtained identification card. On 30 October 2009, the appellant was sentenced to twelve months' imprisonment concurrently on each count.

6. On 30 November 2009, the appellant was served with notice of liability to be deported. On 19 January 2010, the appellant made a further claim for asylum which was again refused on 27 July 2010.

7. On 27 July 2010, a deportation order was signed against the appellant. The appellant appealed against that decision on 5 August 2010 and on 10 January 2011 his appeal was dismissed.

8. On 4 April 2007, the appellant was detained with a view to facilitating his obtaining a travel document from the Iraqi Government. He was subsequently issued with a laissez passer.

9. On 19 April 2007, the appellant was served with a notice under s.120 of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002"). On 2 May 2017, further representations were made seeking to revoke the deportation order on humanitarian protection grounds. That application was refused on 30 May 2017 and the appellant's human rights claim refused and certified under s.94B of the NIA Act 2002.

10. On 6 June 2017, further representations were made seeking to revoke the deportation order on humanitarian protection and asylum grounds and challenging the decision to certify the appellant's claims under s.94B.

11. In the light of that, the Secretary of State withdrew his decision dated 30 May 2017 and made a new decision dated 26 June 2017. In that decision, the Secretary of State refused the appellant's asylum, humanitarian protection and human rights claims. As a result, the application to revoke the deportation order was refused. On this occasion, the Secretary of State did not certify under s.94B. As a consequence, the appellant had an in-country right of appeal against the decisions to refuse his asylum, humanitarian protection and human rights claims.

The Appeal

12. The appellant appealed to the First-tier Tribunal. Judge Suffield-Thompson allowed the appellant's appeal, in particular on asylum grounds and under Arts 3 and 8 of the ECHR.

13. Judge Suffield-Thompson found that the appellant would be unable safely to travel to the IKR. She based that conclusion on a number of matters but, in particular, that the appellant did not have the correct documents. First, his laissez passer wrongly identified his place of origin as Kirkuk and not Erbil. Secondly, the appellant did not have, and could not obtain, a Civil Status ID (CSID) card. As a consequence, the judge found that the appellant would have to remain in Baghdad where he would have no family support and a combination of factors, including that he is a Kurd and has been outside of Iraq for fourteen years so had become westernised, increased his risk as a target. Without a CSID, and having regard to his circumstances including that he had no family to support him, he would face destitution so as to breach Art 3 of the ECHR.

14. As regards Art 8, the judge found that the decision was a disproportionate interference with his private and family life, in particular she found that it was "overwhelmingly in the best interests of [his son] that his father remain in the UK and that their relationship be allowed to continue and develop and for him to have his father with him to help him overcome any difficulties that lie ahead of him" (at [98]).

The Appeal to the Upper Tribunal

15. The Secretary of State sought permission to appeal to the Upper Tribunal. The grounds challenge the judge's conclusion, based upon her findings in relation to the documents, that the appellant would be unable to obtain a CSID with the help of family in Iraq. Secondly, the judge's assessment of Art 8 was flawed as she had failed to apply the correct approach set out in s.117C of the NIA Act 2002, in particular whether the effect of the appellant's deportation would be "unduly harsh" upon his son, L.

16. Permission to appeal was initially refused by the First-tier Tribunal but on 7 February 2019, the Upper Tribunal (UTJ McWilliam) granted the Secretary of State permission to appeal.

17. On 19 March 2019, the appellant filed a short rule 24 response seeking to uphold the judge's decision.

The Submissions

18. On behalf of the Secretary of State, Mr Howells made a number of focused submissions. First, he submitted that the judge's reliance on the fact that the appellant had a laissez passer wrongly identifying his home area as Kirkuk was not relevant. He submitted that this was a "technical issue" to be resolved between the Secretary of State and the Iraqi authorities. He submitted that the feasibility of the appellant's return to Iraq could not give rise to a claim. In any event, Mr Howells pointed out that the laissez passer referred to by the judge (at pages A6–A9 of the

appellant's bundle) had expired on 10 June 2017 and so was not the laissez passer upon which the appellant would, in fact, be returned to Iraq.

19. Secondly, Mr Howells submitted that the judge had been wrong in law to conclude that the appellant would return to Iraq without a CSID. He accepted that on the basis of the country guidance decisions in AA (Article 15(c)) Iraq CG [2015] UKUT 544 and AAH (Iraqi Kurds – internal relocation) Iraq CG [2018] UKUT 00212 (IAC), it was important to the appellant's claim to determine whether he would have a valid CSID before he returned to Iraq or could obtain one shortly thereafter. That, Mr Howells submitted, required the judge to consider whether the appellant's family (particularly his male family) in Iraq could assist him in obtaining the relevant page of the family registration book or, through using a power of attorney, themselves obtain a CSID in his home governorate.

20. Mr Howells submitted that the judge had failed to approach this issue correctly, not least because she had made two inconsistent findings in paras [54] and [62] of her determination. In para [54], Mr Howells submitted, the judge had rejected as credible the appellant's claim that he had no contact with his mother and siblings since he had left Iraq. Mr Howells pointed out that the appellant's own evidence was that he had a brother and sister in Iraq (see his witness statement at the second supplementary bundle, page 1 and the independent social worker's report at the second supplementary bundle, page 36, para 3.1). Mr Howells submitted that, having identified the relevant issue as to whether the appellant had a male family member to assist him in obtaining the CSID, the judge at para [62] had reached a factual finding wholly inconsistent with her finding in para [54] when she said: "I have already found that the appellant has no male family members who can assist him on his return". Mr Howells submitted that if the appellant had male family members who could obtain the relevant information in Iraq and provide it to him in the UK, he could obtain a CSID from the Iraqi Embassy or, through a power of attorney, the family members could obtain the CSID in Iraq. On the basis of AAH, if that was the case, he could safely return from Baghdad to the IKR.

21. In relation to Art 8, Mr Howells submitted that it was plain that the judge failed to approach the issue of proportionality in accordance with s.117C of the NIA Act 2002. Although she had considered the best interests of the appellant's son L, she had not considered whether the impact upon him would be "unduly harsh" such that Exception 2 in s.117C(5) applied. Mr Howells submitted that at paras [99] and [100], the judge considered s.117B and carried out a balancing exercise without reference to s.117C.

22. On behalf of the appellant, in relation to the judge's decision in respect of the international protection claim, Mr Dieu submitted that the judge was entitled to have regard to the difficulties with the appellant's laissez passer. He accepted that no-one before the judge had noticed that the particular laissez passer with which the judge was concerned, in fact, was invalid by the date of the hearing.

23. Mr Dieu, however, accepted that there was a "peculiarity" in the judge's decision at paras [54] and [62] where she had, on the face of it, made inconsistent factual findings. Mr Dieu accepted that if the appellant had contact with his brother then, on

the basis of AA and AAH, there were avenues through which the appellant might be able to obtain a CSID.

24. In respect of the judge's decision in relation to Art 8, Mr Dieu acknowledged that although the decision to grant permission to appeal only referred to the ground relating to the international protection claim, in the light of the decision in Safi and Ors (permission to appeal decisions) [2018] UKUT 388 (IAC), as there had been no specific refusal in relation to the Art 8 ground, the Secretary of State was entitled to rely upon those grounds.

25. Mr Dieu submitted that, although the judge had not specifically referred to s.117C and, in particular, the "undue harsh" requirement in s.117C(5) in reaching her findings, she had set out at length the relevant law, including s.117C at paras [73]–[75] and [77]–[79] and she must have had the correct approach in mind when reaching her subsequent findings. The judge had not, therefore, erred in law in finding that the appellant's deportation breached Art 8 of the ECHR.

Discussion

26. I will deal first with the judge's decision in relation to the appellant's international protection claim. It was common ground between the representatives that the effect of the country guidance decision in AA and AAH was that it was central to the issue of whether the appellant would be able to safely return to the IKR whether he would have a CSID. That was also relevant if it was contended that he could internally relocate by living in Baghdad. The former is set out in paras 3–5 of the head note in AAH as follows:

> "...
>
> 3. For an Iraqi national returnee (P) of Kurdish origin in possession of a valid CSID or Iraqi passport, the journey from Baghdad to the IKR, whether by air or land, is affordable and practical and can be made without a real risk of P suffering persecution, serious harm, Article 3 ill-treatment nor would any difficulties on the journey make relocation unduly harsh.
>
> 4. P is unable to board a domestic flight between Baghdad and the IKR without either a CSID or a valid passport.
>
> 5. P will face considerable difficulties in making the journey between Baghdad and the IKR by land without a CSID or valid passport. There are numerous checkpoints en route, including two checkpoints in the immediate vicinity of the airport. If P has neither a CSID nor a valid passport there is a real risk of P being detained at a checkpoint until such time as the security personnel are able to verify P's identity. It is not reasonable to require P to travel between Baghdad and IKR by land absent the ability of P to verify his identity at a checkpoint. This normally requires the attendance of a male family member and production of P's identity documents but may also be achieved by calling upon 'connections' higher up in the chain of command".

27. The relevance, and importance, of a CSID if an individual is to internally relocate to Baghdad is set out in the head note at paras 9–11 and 14–15. Without possessing a CSID, or being able to obtain one reasonably soon after arrival, an individual would

be faced with problems of accessing financial assistance from the authorities, employment, education, housing and medical treatment. Without other family members to provide support, an individual is generally likely to face a real risk of destitution contrary to Art 3 of the ECHR.

28. In AAH at para 1 of the head note, the Upper Tribunal set out the position concerning obtaining a new CSID as follows:

> "1. Whilst it remains possible for an Iraqi national returnee (P) to obtain a new CSID whether P is able to do so, or do so within a reasonable time frame, will depend on the individual circumstances. Factors to be considered include:
>
> i) Whether P has any other form of documentation, or information about the location of his entry in the civil register. An INC, passport, birth/marriage certificates or an expired CSID would all be of substantial assistance. For someone in possession of one or more of these documents the process should be straightforward. A laissez-passer should not be counted for these purposes: these can be issued without any other form of ID being available, are not of any assistance in 'tracing back' to the family record and are confiscated upon arrival at Baghdad;
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> ii) The location of the relevant civil registry office. If it is in an area held, or formerly held, by ISIL, is it operational?
>
> iii) Are there male family members who would be able and willing to attend the civil registry with P? Because the registration system is patrilineal it will be relevant to consider whether the relative is from the mother or father's side. A maternal uncle in possess of his CSID would be able to assist in locating the original place of registration of the individual's mother, and from there the trail would need to be followed to the place that her records were transferred upon marriage. It must also be borne in mind that a significant number of IDPs in Iraq are themselves undocumented; if that is the case it is unlikely that they could be of assistance. A woman without a male relative to assist with the process of redocumentation would face very significant obstacles in that officials may refuse to deal with her case at all".

29. The judge quoted, in part, from para 1(iii) of the head note in AAH at [61] of her determination. Having done so, she found that the appellant would not be able to obtain a CSID as, in para [62] she went on to find: "I have already found that the appellant has no male family members who can assist him on return".

30. That finding is, as Mr Howells submitted, wholly inconsistent with her finding in para [54] that she did not accept that the appellant had no contact with his mother and siblings (a brother and sister) in Iraq. The inconsistency is plain and obvious. Having found that the appellant was in contact with his family, in particular with his brother, the judge should have gone on to examine whether his brother would be able to assist him either in obtaining a CSID through a power of attorney in his home governorate, namely in the IKR (Erbil) or could obtain the relevant page, etc., in the

family registration book in Erbil so that the appellant could be provided with the relevant information in order to obtain a CSID from the Iraqi Embassy in the UK.

31. The judge's finding, therefore, that the appellant would not have a CSID on return to Iraq (or the ability to obtain one shortly thereafter in Iraq) is flawed and unsustainable. That issue was central to the judge's assessment of whether the appellant could safely return to the IKR or could reasonably be expected to internally relocate to Baghdad where he might, otherwise, face destitution and a potential breach of Art 3 of the ECHR.

32. That, in itself, requires that the judge's findings in respect of the appellant's asylum claim and under Art 3 of the ECHR must be set aside and the decision re-made.

33. The other issue concerned the judge's treatment of the appellant's laissez passer. As became clear at the hearing before me, the judge approached this issue on the false premise that he would be returned on the laissez passer contained in the appellant's bundle at pages A6–A9. That was a false premise because it is invalid, having expired on 10 June 2017. The appellant would, therefore, require a new laissez passer in order to be returned to Iraq. That was a fundamental mistake of fact which, in my judgment, amounts to an error of law applying E & R v SSHD [2004] EWCA Civ 49 at [38].

34. In any event, the relevance of a laissez passer was, in truth, whether the appellant's return at present was feasible. However, the feasibility of the appellant's return to Iraq could not, in itself, give rise to a claim for international protection (see AA at para 7 of the head note). It is difficult to see upon what basis the laissez passer referred to by the judge could put the appellant at risk on return. As paras [55]–[57], the judge appears to have taken it into account on the basis that the misstatement of the appellant's home area as Kirkuk "complicates matters as Kirkuk is a contested area and therefore there is an Article 15(c) risk". Of course, the appellant knows that he does not come from Kirkuk: he comes from the IKR. That is the place by reference to which any risk to him in his home area is to be assessed and, whether he can return there. The absence or otherwise of a laissez passer – accurately or not disclosing his home area – was not relevant to those issues. The crucial issue was whether he would have on return, or shortly thereafter, a CSID. As I have already concluded, the judge's finding on that issue cannot stand.

35. Consequently, the judge materially erred in law in allowing the appellant's asylum claim and under Art 3 of the ECHR.

36. I now turn to Art 8. Whilst Mr Dieu was undoubtedly correct to point out that the judge had set out at length the relevant law relating to Art 8 and its application in a deportation case, it is clear on reading the judge's reasons and findings that she did not apply that correct approach. In this appeal, the appellant could only succeed under Art 8 by establishing either Exception 1 or Exception 2 in s.117C(4) and (5) respectively, or that there were "very compelling circumstances over and above those described in Exception 1 and 2" (see s.117C(6)). In essence, the appellant's claim was focused upon the impact of his deportation upon his son, L. That was a matter which properly fell within Exception 2 on the basis that he had a "genuine

and subsisting relationship" with his son who is a "qualifying child" and that the effect of the appellant's deportation on L would be "unduly harsh" (see s.117C(5)). In those circumstances, if established, the public interest did not require the appellant's deportation (see s.117C(3)).

37. Having set out the relevant law and considered the relevant evidence, at paras [98]–[100] the judge reached her conclusion that the appeal should be allowed on the basis that there would be a breach of Art 8 if the appellant were deported as follows:

> "98. Looking at all the evidence before me I find it is overwhelmingly in the best interests of [L] that his father remain in the UK and that their relationship be allowed to continue and develop and for him to have his father with him to help him overcome any difficulties that lie ahead of him.
>
> 99. Looking at this case through the lens of section 117B, the Appellant speaks fluent English, he has worked here when he was allowed to and is anxious to work again so he will not be a burden to the UK economy and will pay tax. He has the one conviction and has not reoffended in 9 years. He has I accept and I do not to minimize this, been in the UK for many years without status and I give little weight to any private life he has built here.
>
> 100. After careful consideration, I find that in removing the Appellant from the UK there would be a significant breach in the Family life rights of him, Miss Hill and primarily of [L]. In this case, although I cannot and do not underestimate the importance of Immigration control and the protection of the UK's economic wealth, I find in his case the Article 8 rights of the Appellant and his family weigh more in the balance and that it would be a disproportionate breach of those rights if he were to be removed from the UK and made to return to Iraq. The appeal is allowed".

38. Whilst, of course, L's best interests were a "primary consideration" (see ZH (Tanzania) v SSHD [2011] UKSC 4), the crucial legal issue was whether, having regard to those best interests, the impact upon L was "unduly harsh" (see KO (Nigeria) and Ors v SSHD [2018] UKSC 53). That requires a "degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent" (see KO at [23]).

39. In KO, the Supreme Court approved the approach of the Upper Tribunal in MK [2015] UKUT 223 (IAC) at [46]:

> "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated risk. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher".

40. Nowhere in paras [79]–[100] when reaching her findings does the judge seek to assess the evidence by reference to the need to show the impact upon L would be "unduly harsh" as understood in MK and as approved by the Supreme Court in KO. Further, it is clear that in paras [99]–[100] the judge reached her conclusion, as the judge put it, "through the lens of section 117B". In para [100], she carried out the balancing exercise, without reference to s.117C and the relevant public interest

engaged in deportation cases. There, instead, she refers to the "importance of Immigration control and the protection of the UK's economic wealth". That is not reflective of the public interest in deporting foreign criminals with which s.117C is concerned. I do not accept Mr Dieu's submission that the judge had already reached her conclusion in relation to proportionality before paras [99] and [100]. It is plain that she did not.

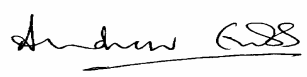
41. For these reasons, the judge erred in law in allowing the appellant's appeal under Art 8 because she failed to consider the correct legal framework engaged in a deportation case by virtue of s.117C, in particular she failed to consider whether the appellant could succeed under Exception 2 on the basis that the impact upon L would be "unduly harsh" or, if it was not, whether there were nevertheless "very compelling circumstances" over and above that such that the public interest did not require his deportation.

Decision

42. For the above reasons, the First-tier Tribunal's decision to allow the appellant's appeal involved the making of a material error of law. That decision is, as a consequence, set aside.

43. The proper disposal of this appeal, having regard to the nature and scope of fact-finding required and para 7.2 of the Senior President's Practice Statement, is that the appeal be remitted to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge Suffield-Thompson.

Signed



A Grubb
Judge of the Upper Tribunal

11 June 2019