Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00626/2020 (V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
Remotely by Skype for Business	**On 6 November 2020**
On 29 October 2020	

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

K J N
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr C Howells, Senior Home Office Presenting Officer
For the Respondent: Ms M Kelleher of B H D 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. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the respondent (KJN). This direction applies to both the appellant and to the respondent and 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: appellant (KJN); and respondent (Secretary of State).

Introduction

3. The appellant is a citizen of Iraq who comes from Kirkuk City.

4. The appellant arrived in the United Kingdom on 7 January 2016 illegally. On that day, he claimed asylum. On 1 July 2016, the Secretary of State refused the appellant's claim for asylum.

5. The appellant appealed to the First-tier Tribunal and, in a determination sent on 19 May 2017, Judge Ghani dismissed the appellant's appeal on all grounds. The appellant successfully appealed to the Upper Tribunal on the basis that Judge Ghani, although finding the appellant not to be credible and disbelieving his account and the basis for his asylum claim, had not properly considered the issue of internal relocation. That issue was also important because of the appellant's claim for humanitarian protection under Art 15(c). The Upper Tribunal remitted the appeal to the First-tier Tribunal in order to remake the decision, in particular to internal relocation.

6. That appeal was heard by Judge Parkes on 20 August 2018. In addition to the issue of internal relocation, upon which Judge Parkes made an adverse finding, namely that the appellant could reasonably and without undue harshness relocate to the IKR, Judge Parkes also considered the issue of whether the appellant would be at risk on return because he lacked a necessary ID document, namely a Civil Status Identity Document ("CSID"). On that issue, Judge Parkes did not accept that "the appellant either does not have access to his CSID or the ability to obtain a new one" (see para 22). As a consequence, in his determination sent on 3 September 2018, Judge Parkes dismissed the appellant's appeal on all grounds.

7. On 16 October 2019, the appellant made further submissions. On 20 December 2019, the Secretary of State again refused the appellant's claims for asylum, humanitarian protection and under the ECHR.

8. The appellant again appealed to the First-tier Tribunal. In a determination sent on 6 June 2020, Judge J McIntosh allowed the appellant's appeal under Art 3 of the ECHR.

9. The Secretary of State was granted permission to appeal by the First-tier Tribunal (Judge L S Bulpitt) on 19 June 2020.

The Appeal

10. Due to the COVID-19 crisis, the appeal was listed for a remote hearing by Skype for Business on 29 October 2020. I was based in the Cardiff Civil Justice Centre and Mr Howells, who represented the Secretary of State and

Ms Kelleher who represented the appellant joined the hearing by Skype for Business.

The Judge's Decision

11. The appellant's asylum claim was based on his account that he worked in a prison and that in, or around, May 2015, while transporting a prisoner to hospital, the appellant shot the prisoner who was attempting to escape from the transport vehicle after it had broken down. The prisoner was, the appellant claimed, of Kurdish ethnicity but was a member of ISIL. As a result of the shooting, the prisoner lost both his legs. Subsequently, the appellant received threats from associates of the prisoner and the appellant was forced to move to Chamchamal in the IKR to live and work.

12. Before Judge McIntosh there were a number of matters in issue. Chief amongst these was whether the appellant had contact with his family in Iraq and whether or not he had, or could obtain, a CSID or other relevant ID document to safely travel and live within Iraq. In his earlier appeal, Judge Parkes appears to have reached findings adverse to the appellant on both of these issues. In para 21 of Judge Parkes' decision, he said that:

> "It is difficult to see on what basis it could be accepted that the Appellant is not in contact with family members or friends in Iraq, does not actually have his CSID or is otherwise unable to obtain it or obtain a new one."

13. Then at paragraph 22, Judge Parkes said:

> "I do not accept that the appellant either does not have access to a CSID or the ability to obtain a new one."

14. Judge McIntosh correctly identified that his starting point should be the findings in the earlier appeal following Devaseelan [2002] UKIAT 00702 (see para 30 of his determination). However, it appears that the previous decision which he referred to is that of Judge Ghani. He refers to it at para 27 as the "previous decision" of the First-tier Tribunal and then at para 31 sets out some of Judge Ghani's findings. It does not appear, therefore, at that point or elsewhere in his determination that Judge McIntosh referred to Judge Parkes' later (and more current) decision and its findings.

15. Nevertheless, Judge McIntosh went on to consider the evidence in the appeal before him, including evidence concerning approaches by the appellant to the Red Cross in order to contact his family members (see para 32 of his determination). At paragraph 35, Judge McIntosh said this:

> "The appellant's chronology of events is that he travelled with his friends to Turkey and at that point engaged an agent. The appellant at this stage gave his passport to the agent and apparently retained his prison guard identification, which he submitted to the Home Office. It is reasonable to assume that if the appellant was serious about obtaining the CSID/Passport from the Iraqi Embassy in the United Kingdom, he would write to the Home Office to obtain the documentation for presentation to the Embassy. I find the appellant

> has been less than proactive in obtaining replacement documentation. I also find it unrealistic that the appellant would surrender his passport but retain his prison guard identification documents."

16. On the basis of the reasoning in that paragraph, in particular the final sentence, it might be thought that the judge would find that the appellant, since he had his prison guard identification, had not established that he had surrendered his passport or his CSID and that therefore he had access to it. In fact, the judge said no more concerning that issue until paragraph 42 of his determination where he said this:

> "The basis for the appellant leaving Iraq and traveling to Turkey, is not accepted as credible. I do not accept that prior to leaving Iraq the appellant was either targeted by member of ISIL or indeed family members or associates of [the prisoner]. The appellant left Iraq with his personal identification documents, his CSID/passport and prison guard identification documents. The appellant asserts that his CSID/passport was taken by the agent assisting him in his travel to the United Kingdom, his prison guard identification submitted to the Home Office. The appellant maintains that he is unable to obtain replacement CSID/passport."

17. Again, the judge, whilst setting out the appellant's case in relation to the documentation, and whether the appellant surrendered it, made no finding.

18. Then at para 43, the judge set out the relevant parts of the judicial headnote in SMO and others (Art 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC) at paras 11 – 16 dealing with identity documents and their importance to individuals, in Iraq, in particular, that in order to safely travel and live in Iraq an individual would need a CSID or a new Biometric Iraqi National Identity Card ("INID"). Without one of those documents, the UT in SMO and others accepted that it was likely that an individual would be at risk of serious ill-treatment contrary to Art 3 of the ECHR in seeking to travel, for example from Baghdad (as would the appellant) to their home area (such as Kirkuk City in the case of the appellant).

19. At paras 44–45, the judge reached his conclusions on the appeal as follows:

> "44. I have to have regard to whether the appellant is eligible for a grant of Humanitarian Protection in accordance with paragraph 339C of the Immigration Rules. I have considered the appellant's claim under Article 3 of the ECHR with a real risk of ill-treatment due to his lack of identification documents. In relation to Article 2, I find the appellant has not established that upon return to Iraq, there is a real risk that he would be targeted due to his previous employment as a prison officer or his knowledge of the prisoner []. In relation to the appellant's lack of identification documents however I find there is a real risk of ill-treatment which are (*sic*) contrary to Article 3 ECHR. In evidence the appellant asserts that he does not have means of obtaining documents, with which to

relocate internally in Iraq. The evidence is finely balanced. The regime of the allocation of documentation has changed and there is no clear mechanism upon which it can be asserted with certainty that the appellant can obtain INID without adverse interest being drawn and placing him at risk of serious ill-treatment.

45. In respect of a claim under Art 3 of the ECHR, due to the nature of his claim, I find the appellant has established a risk of serious harm contrary to Article 3 and I therefore allow his appeal on those grounds."

Discussion

20. On reading Judge McIntosh's determination, it is clear that he dismissed the appellant's appeal on all bases other than that the appellant was at risk on return to Iraq contrary to Art 3 of the ECHR because he would lack a relevant identification document in order to safely travel to his home area and/or live in Kirkuk City.

21. It is plain, and both representatives accepted this, that in para 44 Judge McIntosh by dismissing the appellant's claim under Art 2 of the ECHR based upon his account of being at risk as a result of his shooting a prisoner also, in effect, rejected the basis of his claim for asylum and humanitarian protection under Art 15(b) of the Qualification Directive (Council Directive 2004/83/EC).

22. It may be that the judge also intended to dismiss the appellant's appeal under Art 15(c) when he stated in paras 40–41 that following SMO and others, the circumstances in Kirkuk did not engage Art 15(c). It may be that the judge intended to do that because in para 41 he referred to the appellant's case that, even if there is no general risk to all civilians in Kirkuk City, applying the 'sliding-scale' required by SMO and others the appellant argued that his particular characteristics, including his ethnicity and that he was a prison guard and therefore associated with local or national governments or the security apparatus, nevertheless put him at risk. In fact, the judge did not, thereafter, make any finding on this issue although it is plain from paras 44–46 that he did not allow the appeal on this basis.

23. Mr Howells submitted that the judge had erred in law in allowing the appellant's appeal under Art 3 on the basis of his claimed lack of documentation.

24. First, Mr Howells submitted that the judge had failed to make a finding as to whether or not the appellant had, in fact, retained his CSID. He relied upon what the judge had said at paras 35 and 44 of his determination. Ms Kelleher, despite her spirited defence of Judge McIntosh's reasoning, did not persuade me that this submission was wrong.

25. On reading para 35, it might be thought that the judge was setting out the reasons for reaching a finding that in fact he did not accept that the

appellant had surrendered his other travel documents (such as his passport and CSID) given that he had retained his prison guard identification document. However, Judge McIntosh did not make such a finding and in para 44, he only considered whether the appellant could obtain a new identification document. The premise of that must be, of course, that the appellant did not have his existing CSID. However, the judge did not make that finding and the only reasoning that he offers in para 35 of his determination would, on the face of it, be more consistent with a finding that the appellant still had his existing CSID.

26. For these reasons, I accept Mr Howells' submission that the judge erred in law by failing to make an adequate (or any) finding in respect to whether the appellant still had his existing CSID. The judge failed to give adequate reasons, if he is to be taken implicitly to have made a finding in the appellant's favour in para 44 as the premise for his consideration of whether the appellant could obtain a new CSID.

27. Secondly, Mr Howells submitted that, assuming the judge needed to consider whether the appellant could obtain a replacement CSID, his reasoning in para 44 was inadequate to justify a finding in the appellant's favour that he would not be able to obtain a CSID.

28. The judge set out the relevant country guidance on obtaining a replacement CSID in paragraph 43 of his determination. The relevant parts of the headnote in SMO and others is at paras (11) – (16) as follows:

> "**C. CIVIL STATUS IDENTITY DOCUMENTATION**
>
> 11. The CSID is being replaced with a new biometric Iraqi National Identity Card – the INID. As a general matter, it is necessary for an individual to have one of these two documents in order to live and travel within Iraq without encountering treatment or conditions which are contrary to Article 3 ECHR. Many of the checkpoints in the country are manned by Shia militia who are not controlled by the GOI and are unlikely to permit an individual without a CSID or an INID to pass. A valid Iraqi passport is not recognised as acceptable proof of identity for internal travel.
>
> 12. A Laissez Passer will be of no assistance in the absence of a CSID or an INID; it is confiscated upon arrival and is not, in any event, a recognised identity document. There is insufficient evidence to show that returnees are issued with a 'certification letter' at Baghdad Airport, or to show that any such document would be recognised internally as acceptable proof of identity.
>
> 13. Notwithstanding the phased transition to the INID within Iraq, replacement CSIDs remain available through Iraqi Consular facilities. Whether an individual will be able to obtain a replacement CSID whilst in the UK depends on the documents available and, critically, the availability of the volume and page reference of the entry in the Family Book in Iraq, which system continues to underpin the Civil Status Identity process. Given the importance of that information, most Iraqi citizens will recall it. That information may also be obtained from family members,

although it is necessary to consider whether such relatives are on the father's or the mother's side because the registration system is patrilineal.

14. Once in Iraq, it remains the case that an individual is expected to attend their local CSA office in order to obtain a replacement document. All CSA offices have now re-opened, although the extent to which records have been destroyed by the conflict with ISIL is unclear, and is likely to vary significantly depending on the extent and intensity of the conflict in the area in question.

15. An individual returnee who is not from Baghdad is not likely to be able to obtain a replacement document there, and certainly not within a reasonable time. Neither the Central Archive nor the assistance facilities for IDPs are likely to render documentation assistance to an undocumented returnee.

16. The likelihood of obtaining a replacement identity document by the use of a proxy, whether from the UK or on return to Iraq, has reduced due to the introduction of the INID system. In order to obtain an INID, an individual must attend their local CSA office in person to enrol their biometrics, including fingerprints and iris scans. The CSA offices in which INID terminals have been installed are unlikely – as a result of the phased replacement of the CSID system – to issue a CSID, whether to an individual in person or to a proxy. The reducing number of CSA offices in which INID terminals have not been installed will continue to issue CSIDs to individuals and their proxies upon production of the necessary information."

29. Mr Howells accepted that the appellant was unlikely to be able to obtain an INID from the Iraqi Embassy in the UK and, in order to obtain one in Iraq, he would have to attend in person since it is a biometric document. However, Mr Howells submitted that, following SMO and others, in order to determine whether the appellant would be able to obtain a replacement CSID through a proxy (such as a family member) in Iraq, required a consideration of whether he had the relevant documentation to present to the Iraqi Embassy and whether he knew, or could contact relatives who knew, the details of the page and volume of his family entry held in the relevant civil registry. The judge had not grappled with these issues and his reasons in para 44 were inadequate.

30. Ms Kelleher submitted that the appellant would need to provide a number of documents in order to obtain a CSID and she referred me to AAH (Iraqi Kurds – internal relocation) Iraq CG [2018] UKUT 212 (IAC) which had been approved and adopted by the UT in SMO and others. As regards the appellant's knowledge of the details of his family entry in the civil register, Ms Kelleher pointed out that in his witness statement at para 7, the appellant said that he did not know those family details. She submitted that that was the evidence despite what was said in SMO and others at [391]–[392] that this information was likely to be known by individuals.

31. If the appellant does not have his existing CSID, then the issue of whether he could obtain a replacement CSID (or an INID but that is unlikely) was a matter which required the judge, on the basis of SMO and others, to consider a number of issues, including whether the appellant had the necessary documentation and knowledge in particular of his family entry in the civil register. Linked to that latter issue is that, if he did not have that knowledge, could he contact family members in Iraq who could provide that information.

32. In SMO and others, the UT (at [390]) outlined the requirements for obtaining a replacement CSID in Iraq:

> "The process for obtaining a replacement CSID by the use of a proxy (or a power of attorney) has been considered in previous cases and there is no reason to depart from the guidance given in those cases. As explained at [25] of AAH (Iraq), a number of documents are ordinarily required and, if those documents are available, and a suitable proxy can present them to the relevant CSA office, a CSID should be issued within three days: [27]. In the event that some of the documents are missing, it might nevertheless be possible to obtain a replacement CSID and the key piece of information which is required is the family's volume and page reference in the civil register: [28]."

33. Crucial to the appellant obtaining a CSID from Iraq would be knowledge of the relevant page and volume for the appellant's family entry in the civil register held at the CSA Office in Kirkuk City. At [391] - [392], the UT dealt with whether individuals were likely to know the relevant page and volume of their family entry in the civil register:

> "390. We consider the number of individuals who do not know and could not ascertain their volume and page reference would be quite small, however. It is impossible to overstate the importance of an individual's volume and page reference in the civil register. These details appear on numerous official documents, including an Iraqi passport, wedding certificate and birth certificate, as well as the CSID. It was suggested in a report from the British Embassy in Baghdad, quoted at 6.1.9 of the Internal Relocation CPIN of February 2019, that "[a]ll Iraqi nationals will know or be able to easily obtain this information". We find the former assertion entirely unsurprising. The volume and page reference in the civil register is a piece of information which is of significance to the individual and their family from the moment of their birth. It is entered on various documents and is ever present in that person's life. We do not lose sight of the fact that there remain a significant number of people in Iraq who are undocumented. We do not consider that problem to be attributable to a difficulty with recalling the relevant information. It is instead attributable to the closure – until comparatively recently – of the local CSA offices at which people were required to obtain replacement documents and to their reluctance to return to those areas from a place of relocation.
>
> 391. There will of course be those who can plausibly claim not to know these details. Those who left Iraq at a particularly young age, those who are mentally unwell and those who have issues with literacy or numeracy may all be able to make such a claim plausibly but we

> consider that it will be very much the exception that an individual would be unaware of a matter so fundamental to their own identity and that of their family. The letter from the Embassy also suggested that most Iraqis would be able to obtain this information easily. Again, that assertion is unsurprising when viewed in its proper context. As is clear from AAH(Iraq), Iraq is a collectivist society in which the family is all important. It is also a country with a high prevalence of mobile telephone usage amongst the adult population. Even when we bear in mind the years of conflict and displacement in Iraq, we would expect there to be only a small number of cases in which an individual could plausibly claim to have no means of contacting a family member from whom the relevant volume and page reference could be obtained or traced back."

34. In para 44, Judge McIntosh did not adequately grapple with the issue of re-documentation, in particular whether the appellant had the relevant documentation and knowledge of his family's entry in the civil register, and whether the CSA Office in Kirkuk City continues to issue CSIDs.

35. Although the judge set out the relevant part of the headnote in SMO and others, his only finding in para 44 was that the "evidence is finely balanced" and that there was "no clear mechanism upon which it can be asserted with certainty the appellant can obtain an INID without adverse interest being drawn and placing him at risk of serious ill-treatment". In this appeal, the live issue was not whether the appellant could obtain an INID. He could not obtain an INID without personally attending the CSA Office which he could not do if he could not safely travel to his home area. The live issue was whether he could obtain a replacement CSID if he had not retained his existing one. The judge's reasons in para 44 are not adequate to sustain his conclusion that the appellant would not be able to obtain a new CSID. That also amounts to an error of law.

36. For these reasons, therefore, I am satisfied that the judge erred in law in allowing the appellant's appeal under Art 3 of the ECHR.

Decision

37. For the above reasons, the First-tier Tribunal's decision to allow the appellant's appeal under Art 3 involved the making of an error of law. That decision cannot stand and is set aside.

38. Both representatives invited me, if that was my decision, to remit the appeal to the First-tier Tribunal for a further hearing.

39. It was agreed that Judge McIntosh had determined the appellant's appeal (and international protection claim) adversely to him on the basis of any risk to him as a result of his being a prison guard who had shot and seriously injured an ISIL prisoner and so was now at risk of being targeted by ISIL. That decision (and the findings made in relation to it) were not challenged and stand. It was further agreed that none of Judge McIntosh's findings relating to the appellant's remaining claims should be preserved.

40. In the circumstances, the appropriate disposal of this appeal is to remit it to the First-tier Tribunal for the decision to be remade:

    1) Judge McIntosh's decision and findings that the appellant has not established an international protection claim based upon his account that he would be targeted due to his previous employment as a prison officer stand and his findings on that issue are preserved.

    2) The decision will be remade in respect of Art 3/Art 15(b) and whether the appellant would be at risk on return to Iraq because of a lack of identification documents.

    3) Although this matter was not raised at the end of the hearing before me, reading Judge McIntosh's determination as a whole, he did not reach any findings in relation to Art 15(c) (see my para 22 above). Given that, the appellant is also entitled to rely upon Art 15(c) if he wishes at the remitted hearing before the First-tier Tribunal.

41. Consequently, the appeal is remitted to the First-tier Tribunal for the decision to be remade in accordance with the above; the appeal to be heard by a judge other than Judge McIntosh and, because of their earlier involvement in the appellant's appeals, Judge Ghani and Judge Parkes.

Signed

Andrew Grubb

Judge of the Upper Tribunal
2 November 2020