



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: AA/05700/2012

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 20 March 2014**

**Determination**

**Promulgated**

**On 25 April 2014**

**Before**

**UPPER TRIBUNAL JUDGE DAWSON**

**Between**

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

Appellant

**and**

**DELSHAD KADIR AHMAD**

Respondent

**Representation:**

For the Appellant: Mr G Saunders, Senior Home Office Presenting Officer

For the Respondent: Mr B Turner, instructed by Barnes Harrild & Dyer Solicitors

**DETERMINATION AND REASONS**

**INTRODUCTION**

1. The Secretary of State for the Home Department has been granted permission to appeal the determination of First-tier Tribunal Judge Pacey. A reasons challenge had been made to the judge's finding that the respondent (whom I shall refer to as the claimant) could not obtain his own

identity document nor obtain replacements in order to enable his return to Iraq of which he is a national and where he was born on 1 July 1985. The judge concluded that the claimant would be undocumented and could not be returned. As a consequence, he would be left in limbo and accordingly the judge concluded the claimant must be granted discretionary leave to remain in order to ensure there would be no breach of Article 3. Furthermore she found there would also be a breach of the claimant's Article 8 right to private life if such discretionary leave were not granted. Although she considered she did not need to consider humanitarian protection and Article 15(c) of the Qualification Directive, she explained that were she to do so, she would take account of the country guidance decision in *HM & Others* (Article 15(c)) Iraq CG [2012] UKUT 00409.

2. The claimant who is of Kurdish ethnicity and from Kirkuk, claimed asylum on 25 July 2007 after his clandestine arrival the same month. According to the Secretary of State he was placed in immigration detention on arrival and absconded on 3 August 2007. He did not report thereafter until March 2012 unprompted by any procedures by the Secretary of State. His asylum screening interview took place the day he claimed. His substantive asylum interview did not take place until 15 May 2012. According to his asylum screening interview he arrived in Turkey from Iraq some 27 days previously. Although unsure when he left Turkey, he thought it was 24 days prior to his interview and arrived in France two days thereafter.
3. At the substantive interview the claimant explained that he had left Iraq in February 2007 however he also gave a chronology indicating that he had left in November 2006. In a statement relied on at the hearing, he explained that he left Iraq at the beginning of November 2006 and apologised for lying to the immigration authorities. This was because he had had a very bad experience in Greece and because he was scared that he would be sent back there.
4. The basis of the asylum claim arises out of a fear of a colonel because the claimant's brother had eloped with the colonel's daughter without permission. The claimant believed his brother had run away with the colonel's daughter in September or October 2006. It was during those months the colonel had visited the family home looking for the claimant's brother and when he did not find him, told the claimant's father he would kill all his children.
5. The Secretary of State did not believe the claimant giving her reasons in a letter dated 16 May 2012. This was largely because of the inability of the claimant to give certain details. This included uncertainty over the colonel's name, not remembering the actual date when his brother had run away with the colonel's daughter and because no mention had been made of this fear at the screening interview when he is stated to have said he had come to the United Kingdom to have a better life and for his family's life. The threats from the colonel had occurred whilst the claimant was in the KRG area in Iraq where he had stayed for a week before

leaving. Based on the claimant's explanation that he had left Iraq in February 2007, some five months after the elopement, it was considered this undermined the credibility of the claim. In his screening interview the claimant had stated that his siblings and parents were living in the family home in June 2007 the month he had last seen them. The claimant explained at interview that his parents had reported the colonel to the Iraqi police but he did not know the outcome. The Secretary of State considered this to be inconsistent with the claim that the colonel had bought Peshmergas with him who are part of the Iraqi police force to raid the house. Further reasons given for disbelieving the claimant related to his failure to claim asylum in France and his initial denial that he had not been in Greece despite his fingerprints having been taken. Regard was also had to the claimant having absconded from the immigration authorities.

## THE DETERMINATION

6. The claimant was cross-examined. The judge recorded in her determination that the claimant's counsel stated at the hearing that the asylum claim would not be pursued and that the issues for her to determine for whether he could be lawfully returned raising consideration of Articles 3 and 8.
7. The judge further records in her determination that the claimant explained he had last had contact with a family member in 2006 when he telephoned his maternal uncle who told him that his brothers and sister and sister-in-law had left Iraq and headed for somewhere in Europe. The claimant had left behind two brothers, a sister and his parents. He had not sought to regain contact through friends because he did not want to come to the attention of the immigration authorities and had left his ID card in Iraq with his father.
8. On behalf of the claimant, it was argued that he is undocumented and hence could not be returned. He was therefore entitled to discretionary leave under the Home Office policy, chapter 53 Enforcement Instructions Guidance. As forced removals to Iraq posed a risk of breach of Article 3, they were suspended. The SSHD had failed to consider paragraphs 353B and Chapter 53; the claimant could not voluntarily return with a *laissez-passer* since he had no ID card and was not in contact with nor knew the whereabouts of any male members of his family. He would thus remain in the United Kingdom at a real risk of destitution. Article 8 was argued on the basis that because of the failure by the SSHD either to remove the claimant or grant him leave, he remained in limbo which amounted to a breach of his protected right to a private life, reliance being placed on *R on the application of Abdullah v SSHD* [2013] EWCA Civ 42. Counsel for the claimant supplemented these points that had been raised in a skeleton argument at the hearing with a submission that the claimant had no access to the documents necessary in order to be documented by the Iraqi Embassy.

9. For the Secretary of State it was argued that for the reasons set out in the refusal letter the claim was not credible. Since that account had not been accepted, he would not be at real risk of serious harm or death including consideration under Article 15(c). The claimant was of Kurdish ethnicity, had family in the KRG and had previously relocated there an option that remained open to him. It was argued that it could not be confirmed that the claimant had no access to his ID card.
10. In her findings and conclusions the judge set out her conclusions in the following respects relevant to the challenge now made. Under the heading credibility she states:

“20. The appellant’s account was expressly stated not to be credible in the refusal letter. Credibility is not, however, a material issue in this appeal given that the appellant is not pursuing his asylum claim, save in two related respects – firstly, whether or not he is in possession of any identity documents or whether as he claims he left his ID card in Iraq with his father, and secondly whether or not he is still in touch with, or could trace, male members of his family who could provide the documents necessary for him to obtain identity documents.

21. The fact that the appellant lied in interviews with the Home Office, as it is specifically conceded he did, should not in my view lead inextricably to the conclusion that he has lied about every aspect of his claim. He has explained that he told untruths because he was afraid of being returned to Iraq and while such an explanation can in no way justify lying to the authorities, it is to my mind reasonable viewed from the appellant’s perspective.

22. Moreover he has not only now admitted that he lied but has chosen to contact the authorities after five years in which his whereabouts were unknown to them following his absconding from detention.

23. Given this, it is in my view reasonable for the appellant to have left his identity documents in Iraq given that he was leaving the country clandestinely and under the control of the agent. I accept therefore he has no identity documents.”

11. After identifying the issues to be determined, the judge proceeded to consider the claim under Article 3 as follows:

“25. I therefore first consider Article 3 of the European Convention on Human Rights on the basis of the appellant’s lack of identity documents.

26. I consider first if he can reasonably obtain such documents.

27. The appellant stated that he last had contact with his family in 2006, seven years ago and that all but his parents have since left the country for unknown destinations ‘in Europe’. It is to my mind reasonable that he would seek to maintain or restore contact with those members of his family who stayed put, and hence in a settled place, mainly his parents. He has not, however been able to do so. I accept as plausible

his explanation that he did not want to endanger friends by making enquiries, or indeed himself. Moreover given the turbulent situation in Iraq, it is at least conceivable that his parents are no longer in their home and equally that his father might not have retained his son's identity documents, given that he would expect that the latter would not, having fled, return to Iraq.

28. I therefore accept that he could not obtain his own identity documents. The other possibility would be able to obtain replacements."

12. After directing herself in accordance with *MK* (documents - relocation) Iraq CG [2012] UKUT 00126, the judge concluded at [30]:

"30. However, in this case the appellant has, I have found, no family in Iraq, or at least no family with whom he is in contact, or with whom he could establish contact. This option, therefore, is in my view not possible for him.

31. I note *HM & Others* (Article 15(c)) Iraq CG [2012] UKUT 00409 (IAC) in which it was held, post *MK*, that the existence of a central archive provided another way in which a person's identity could be established. Again, however, this appellant has no way of accessing this database from the UK."

## THE GROUNDS OF CHALLENGE AND ARGUMENT

13. The grounds of challenge argued that the judge had misdirected herself in law in her Article 8 assessment in failing to have regard to all the relevant sections of Immigration Rules. That failure resulted in the decision being incomplete and unsustainable. The second ground argues that the judge had failed to provide adequate reasons for her finding on the claim to have lost contact with his family and not to have an identity document.

14. With the claimant having admitted lying to the Secretary of State and having absconded from detention without contact for five years, there was nothing credible at all about him and that his actions demonstrated he was one who was willing to deceive in order to benefit himself and only admits to the truth when all his options have been exhausted.

15. At the hearing before me, Mr Saunders accepted that unless he was successful on the second ground the claimant would win. He did not advance a perversity challenge but maintained the Secretary of State's view that the judge had failed to give reasons for the positive credibility findings.

16. Mr Turner relied on a detailed skeleton argument, oral submissions which he then supplemented with further written submissions served after I had reserved my decision. In essence he makes the following points dealing first with the skeleton argument:

- (i) There was no requirement by the judge to consider the case in respect of the new Immigration Rules which were not of

retrospective effect as was clear from *MF* (Nigeria) [2010] UKUT 00393 (IAC).

- (ii) With reference to *MF* (Nigeria) [2013] EWCA Civ 1192 it is incumbent upon a decision maker to carry out a two stage test where the exceptional circumstances established were that the claimant could not be removed.
- (iii) As to the second ground of challenge, this was no more than a disagreement, the judge having arrived at a legally sustainable and rational decision.
- (iv) There was no evidence by the Secretary of State that there was any realistic prospect of the claimant being able to obtain a travel document. The relevant threshold was whether it was reasonably likely someone would be able to return within a reasonable period of time.
- (v) The Secretary of State had not acted with reasonable diligence and expedition.

And at the hearing,

- (vi) The appellant had provided a detailed witness statement, had turned up for the hearing and was cross-examined. It was not unreasonable that he did not want to return to Iraq. What the judge said that it was reasonable to lie because of the claimant's fear.

And as set out in the note provided subsequently,

- (vii) It was not said that the facts had underpinned the claim were untrue merely that the case was being pursued on the basis that the claimant was not documented and that this effectively made him un-removable which would place them in breach of his protected rights.
- (viii) The judge's finding that he had accepted that he had not been truthful had to be seen in this light; it was not the claimant's evidence that the entire case was a fabrication but merely are that issues raised in [9] are to the statement were relating to the date of departure from Iraq.
- (ix) The claimant had provided a reasonable explanation why he had not told the truth about having been in Greece.

#### DID THE TRIBUNAL ERR IN LAW?

17. The judge explained in [20] that credibility was not a material issue in the appeal save in two related respects regarding the possession of any identity documents and whether or not he is still in touch with or could trace male members of his family. These were the core issues she was

required to decide. In my view credibility remained a material issue regardless of the asylum claim having been abandoned since the basis on which the claimant considered he could no longer make contact arose out of the nature of his departure, the events leading up to which had been comprehensively challenged.

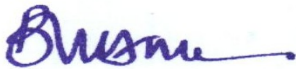
18. The judge was entitled to express the view in [21] that it did not inextricably follow from untruths that had been told, the claimant had lied about every aspect of his claim. She refers to the claimant having explained he had told untruths because he was afraid of being returned to Iraq. This is not however the explanation given at [9] of the witness statement where he states that the departure dates given in the screening interview and the substantive asylum interview were not correct because he had had a bad experience in Greece and was concerned that he would be sent back there.
19. It is difficult to understand the judge's reasoning that the explanation by the claimant was a reasonable one from the "[claimant's] perspective". The task before the judge was not to forgive the lie but to make findings of fact. In her conclusion at [23] that it was reasonable for the appellant to have left his ID documents in Iraq as he was leaving the country clandestinely under the control of the agent appears implicitly to acknowledge the truthfulness of the account on which the claimant no longer relied in order to seek international protection.
20. It appears that at the hearing, the claimant explained that his last contact had been with a maternal uncle by telephone in 2006 who had told him that his siblings and sister-in-law had left Iraq and headed for somewhere in Europe. It is not clear why the judge therefore considered it reasonable for the claimant to seek to maintain or restore contact with members of family who had stayed put as opposed to those who had left. It may be that this aspect was not the focus of any cross-examination. More significantly, the judge does not particularise what the dangers were that the claimant considered his friends would encounter by making enquiries on his behalf or what dangers were the claimant himself would face in the light of enquiries that could be conducted from the United Kingdom. It was no doubt conceivable that the claimant's parents are no longer in their home but as it is the claimant's case that he has not had contact with them, there appears to be no evidential basis for this speculative possibility. Without making findings on the pre-flight events, it was not rationally open to the judge to conclude that the claimant's father might not have retained his identity documents because his son had fled and would not be expected to return.
21. I am not satisfied therefore that the judge has given adequate or sufficiently clear reasons for the findings reached that the claimant could not obtain his own identity document and that he had no family in Iraq with whom he is in contact or with whom he could establish contact. Accordingly I am satisfied that the second ground of challenge is made out. The extent of the error is such that the decision must be set aside

and remade in its entirety. As this will involve a further assessment of the claimant's credibility it is appropriate for that exercise to be undertaken by a Judge of the First-tier Tribunal other than First-tier Tribunal Judge Pacey.

22. By way of conclusion therefore the appeal by the Secretary of State in the Upper Tribunal is allowed. The decision of the First-tier Tribunal is set aside. Pursuant to s.12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007, I remit the case to the First-tier Tribunal for its reconsideration by a judge of that Tribunal other than FTJ Pacey.

Signed

Date 24 April 2014



Upper Tribunal Judge Dawson