Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/01143/2019**

THE IMMIGRATION ACTS

Heard at Civil Justice Centre, Manchester	**Decision & Reasons Promulgated**
On the 20th September 2021	**On the 10 November 2021**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

AM
(anonymity direction made)

Appellants

and

Secretary of State for the Home Department

Respondent

For the Appellant: **Mr J. Greer, Counsel instructed by Parker Rhodes Hickmotts Solicitors**
For the Respondent: **Mr M. Diwnycz, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Iraq. The Respondent wants to deport him because he is a criminal. The Appellant says that she cannot, because to do so would be in violation of his human rights and protection needs.

2. The Respondent last rejected the Appellant's protection claim on the 23rd February 2017 but has in fact been trying to deport him since as long ago as 2006. There has been at least one attempt to remove him to Baghdad, and the

Appellant's case has been considered by at least four Judges of this Chamber before myself. His latest appeal was dismissed by the First-tier Tribunal (Judge Birrell) on the 2nd April 2019 but permission to challenge that decision was granted by Judge Eshun of the Upper Tribunal. The matter first came before me on the 24th August 2020 when it was listed as a 'remote' hearing in accordance with the restrictions then in place to control the spread of Covid-19. At that hearing the Appellant was represented, as he is today, by Mr Greer. The Secretary of State was represented by Mr A. McVeety. Following that hearing the parties received my decision, to set the decision of Judge Birrell aside, in writing[1]. The difficulties arising from the pandemic means that there has been a long delay in the matter being relisted, which is regrettable.

3. There can be no doubt that the Appellant qualifies for automatic deportation: since his initial convictions for robbery in 2005 he has received a further conviction for wounding (stabbing a man who attempted to flee when the Appellant held him up at knifepoint) and assault (breaking the wrist of his former partner). Before me the parties were however in agreement that this criminality, and the long and complex history of this matter can, for the purpose of this appeal, be put aside. If the Appellant can show, on the lower standard of 'reasonable likelihood' that he qualifies for protection, then his appeal must be allowed on the grounds that he meets one of the 'exceptions' set out at s33 of the Borders Act 2007. That is because the United Kingdom's obligations to protect individuals from torture, inhuman and degrading treatment are absolute.

4. At the 'error of law' stage I was asked to focus on only one issue: did the First-tier Tribunal (Judge Birrell) err in law in her approach to the Appellant's ability to re-establish himself in Iraq, and more specifically to whether he will be able to secure the identity documentation required to secure access to basic necessities within a reasonable time after returning to Iraq. For the reasons set out below, I concluded that she had. At the resumed hearing I heard further evidence and submissions from the parties with a view to resolving that outstanding issue. My conclusions on that matter are set out below.

Error of Law: Discussion and Findings

5. At the 'error of law' stage the question of identity documentation assumed significance in two ways.

6. First of all because of developments in the caselaw. Since Judge Birrell promulgated her decision on the 2nd April 2019 the operative 'country guidance' on Iraq has changed. In SMO, KSP & IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC) the Tribunal makes several findings pertinent to this appeal which mean that the conclusions reached by Judge Birrell can no longer be sustained. These findings are:

[1] Dated the 4th September 2020 but promulgated in the 2nd October 2020.

(a) That the Appellant's home town of Tuz Khurmato can no longer be considered to be 'contested territory' where conditions on the ground are so dangerous that Article 15(c) of the Qualification Directive would apply;

(b) That Iraqis not in possession of a valid Iraqi passport will be returned using a *Laissez-Passer* issued by the Iraqi embassy in London. That document is only valid for the flight and cannot be used to facilitate onward travel within Iraq;

(c) The Civil Status Identity Document (CSID) – the focus of Judge Birrell's enquiry - is now being replaced with a new biometric Iraqi National Identity Card (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;

(d) Undocumented Iraqis must apply to their local civil registry in order to get identity documentation. At the date of the appeal in SMO the new terminals issuing INIDs were being progressively rolled out throughout the country, with only rural areas still issuing CSIDs;

(e) For our purposes the primary distinction between CSIDs and INIDs is that the former could be issued to family members or legally appointed proxies; because of its biometric requirements the INID cannot;

(f) If an individual can establish that he or she will be unable to obtain valid identity documents within a reasonable time frame after return the appeal will fall to be allowed on the grounds that the individual will face a real risk of destitution in circumstances engaging the United Kingdom's obligations under Article 3 ECHR and/or Article 15(b) QD.

7. The second reason that the issue of documentation – and the corresponding case under Article 3 - was at the centre of my decision is because the Appellant has no other avenues open to him. Judge Birrell found, in unchallenged findings, that he is a particularly serious criminal who constitutes a danger to the community. She therefore upheld the Respondent's decision to certify this case with reference to s72 of the Nationality, Immigration and Asylum Act 2002. The effect of that certificate is to exclude the Appellant from the benefit of either refugee status or humanitarian protection. She found no other reason why he should succeed in his deportation appeal. Accordingly the only ground that the Appellant has left is Article 3: if he can show that his removal to Iraq will create

a real risk of violation he will succeed in defeating the automatic deportation action under the exception at s33(1)(a) of the Borders Act 2007.

8. The first matter in issue was whether it was properly open to Judge Birrell to find that the Appellant is likely in possession of a valid 'CSID' but is concealing it in order to frustrate removal. Her findings on this matter are found at her §40:

> "I take into account that the Appellant himself never appears to have believed that he would have any difficulty in re-establishing himself in Iraq in the past in that he indicated in 2009 and has recently as 2014, when if anything the security situation was worse, that he wanted to return to Iraq and did not raise any issues about having no CSID card".

9. Before me Mr Greer established that this reasoning is flawed for two reasons. The first is that the summary of the evidence contains a factual error. In fact the Appellant did not "want" to return to Iraq in 2009. The Respondent tried to deport him but the Iraqis refused to admit him to their territory: because he did not have the correct documentation. The second ground is that in making her findings Judge Birrell omitted to address a matter in issue between the parties. That concerned the whereabouts of the Appellant's CSID. It was his evidence that he had submitted it to the Home Office; the Home Office could not find it. On that basis the Appellant had invited the Tribunal to find that the document was lost. As Mr McVeety accepted before me, the decision of the First-tier Tribunal does not resolve that dispute.

10. The second matter in issue was whether the Appellant could obtain a CSID from the Iraqi embassy before he ever sets foot on Iraqi soil. Judge Birrell had found that he would be able to get one with the assistance of his younger brother in Iraq if necessary. Mr Greer submits that in reaching this conclusion Judge Birrell does not appear to give any consideration to pertinent evidence, and country guidance on the matter. She does not for instance consider the relevance of the failed 2009 deportation, nor the detailed evidence of Dr Fatah, set out at length in the country guidance decisions of AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC) and AAH (Kurds – internal relocation) Iraq CG [2018] UKUT 00212 (IAC) about the unreliability of consular services in London. It has long been Dr Fatah's position that whilst it is technically *possible* to obtain documents from London, the likelihood of actually doing so must be evaluated against the background of the multiple challenges faced by the Iraqi administration, including the weakening of the civil service by the "de-Ba'athification" program that followed the US-led invasion in 2003, corruption, inefficiency and the fact that there are now many millions of Iraqis who require re-documentation: against this background the problems of individual returnees from the west are seen as "trivial". I accept that at its §42 the First-tier Tribunal appears to assume that documents could be obtained from the embassy here without considering whether that is reasonably likely not to be

possible. If confirmation were needed of the importance of Dr Fatah's evidence on this matter, I note that the Respondent now herself concurs that consular services cannot generally be relied upon in this context. The June 2020 CPIN *Iraq: Internal relocation, civil documentation and returns* reads:

> 2.6.16 Based on the above information, it is highly unlikely that an individual would be able to obtain a CSID from the Iraqi Embassy while in the UK. Instead a person would need to apply for a registration document (1957) and would then apply for an INID upon return to their local CSA office in Iraq.

11. As to whether the Appellant would be able to get an identity document once he returned to Iraq the parties agreed that Judge Birrell's decision has now been overtaken by events. Regardless of whether her findings were open to her at the time, as of today's date the law is as it is set out in SMO (summarised above). If the civil registry in Tuz Khurmato is now issuing the new INID, it is common ground that the Appellant will have to travel there in order to get one, because of the requirement that he attend in person in order to provide his biometric details. Applying SMO he would in doing so face a real risk of encountering either treatment or conditions violating Article 3.

12. For the foregoing reasons I was satisfied that on the narrow issue of documentation the decision of Judge Birrell must be set aside.

The Re-Made Decision

13. At the conclusion of the 'error of law' stage it appeared to me, and to the parties, that there were only two questions remaining in this appeal. Did the Appellant in fact have his CSID in this country, and was the civil registry in Tuz Khurmato now issuing biometric INIDs? As I shall explain, I find that both of these issues are resolved in the Appellant's favour. As became apparent, however, the evidence on the matter was not as everyone had assumed it to be. The Appellant gave what I regard as candid and straightforward evidence about his CSID, which raised another question altogether.

Is the Civil Registry in Tuz Khurmato now using an INID terminal?

14. The Appellant relies on a screenshot from the Government of Iraq website news page. The headline in translation reads "The national card of Tuz Khurmato State Department was opened in Salah-al-Din governate". The accompanying article details the esteemed guests in attendance when the electronic mechanism was unveiled: they included the Ministry of the Interior and the local member of the House of Representatives.

15. The translation provided is not great. It appears to have been produced using an automated web-based translator rather than a certified translation by a qualified interpreter. I am however familiar with the article, and have accepted

it as probative (as has the Respondent) in a number of other appeals. In the circumstances I am prepared to accept that this article on the official GOI website is covering the installation of the INID terminal in Tuz Khurmato.

16. This means that if the Appellant wants to get a new ID once he gets back to Iraq, he will have to go there to get one himself.

Is the Appellant's CSID in this country?

17. The evidence of the Appellant had hitherto been that he had in 2010 handed his CSID card in to the Home Office. The Home Office denied all knowledge, and had argued before the First-tier that if it had not been handed in as claimed, it could reasonably be inferred that the card was still in his possession.

18. The Appellant's evidence on the point is as follows. In 2009 the Respondent tried to deport him to Iraq. It was a charter flight and they arrived in Baghdad early in the morning. The Appellant and others were held in detention at the airport for the whole day before being returned to the UK in the evening. It is common ground that he and others were refused entry by the Iraqi authorities because they did not have any identity documents. When the Appellant arrived back in the UK he was released from detention: this is unsurprising given that there was no realistic prospect of removal at that stage. He was asked to report to a Home Office centre in Loughborough. One day in 2010 whilst he was attending there he was spoken to by an immigration official who noted that the Appellant had outstanding 'fresh claim' submissions waiting to be considered. He told the Appellant that before they could be assessed he needed to produce some identity documentation. The Appellant left and called his brother in Iraq. His brother subsequently sent him what has hitherto been described as his 'CSID card' and the Appellant duly delivered it to the Home Office, this time at the Asylum Screening Unit in Liverpool.

19. At the hearing before me further evidence in support of this account emerged. Mr Diwnycz found a note on the 'CID' electronic record held by the Home Office. It is dated the 2nd September 2010 and reads:

> "sub attended FSU he advised he was reporting and the address on CID is his current address.
>
> Sub had no further evidence except docs without English translations. I advised him he needed to get them translated into English by a bona fide interpreter and make another appointment.
>
> Sub had sols letter stating they had no docs belonging to him and it appeared he had no further evidence to support his FAS."

20. When this record was put to the Appellant he immediately agreed that it was accurate. He recalled being asked to provide a translation and said that it took

some time for him to do so. The officer he spoke with had given him a PO Box address in Liverpool and asked him to send it in by post, which he duly did. That was the last time he saw the document. Mr Diwnycz confirmed that the Home Office file has been "strip searched" and contains no identity documentation. There is no record of any having ever been received: as Mr Diwnycz very fairly acknowledged, that does not mean that they were not sent. The CID record is only as accurate as the human staff who are using it. As Mr Greer pointed out, Mr Diwnycz was himself involved in one of the Appellant's appeals back in 2008 yet the system contains no record of that.

21. I am satisfied, on the lower standard of proof, that the Appellant's account of these events is true. Given the failed deportation, it is reasonably likely that the Respondent did ask the Appellant, in the months that followed, if he could obtain some identity papers. Given that the Appellant went to the trouble of contacting his brother in Iraq and having them sent, and then – as the record proves he did - taking them to the unit in Liverpool, I see no reason to reject his evidence that he subsequently had them translated and posted them as asked.

22. I accept that the Appellant is no longer in possession of the document that he posted to the Respondent back in 2010.

Another Option?

23. As I record above, the Appellant was in my assessment credible in the evidence that he gave to me. When probed about the document that he took to Liverpool in 2010 a striking piece of evidence emerged: it was not, as we had all previously thought, his actual CSID card. It was in fact a copy of that card. The Appellant cannot ever remember having even seen his original it was so long ago when he left Iraq. He was young then and had never needed it. In 2010 he had asked his brother to send him some identification, and he had sent him a copy. Asked whether he was still in touch with his brother he said that he had lost contact in recent months. His mother had passed away in September last year and the Appellant had spoken with his brother then. At that stage he was living in the family home in Tuz. Since then the Appellant has tried twice to call his brother, who has not responded. He does not know why.

24. Having heard this evidence Mr Diwnycz asked me to dismiss the appeal on the ground that the Appellant will be able to get his old CSID back when he gets to Baghdad. His brother was still living in the family home and in the absence of any evidence to the contrary, it could be assumed that the original CSID, copied by his brother in 2010, was still in the family home. His brother could therefore bring it to Baghdad airport and the Appellant could use that until he managed to get to Tuz Khurmato and get a new INID.

25. In response Mr Greer pointed out that the applicable standard was relatively low. All the Appellant need do is prove that it is *reasonably likely* that he will not

be able to access his CSID card upon arrival at Baghdad. With that in mind I take the following matters into account.

26. The Appellant has been in this country since 2002. Although the exact date of his departure from Iraq is not known it can be inferred from his date of arrival that he was no more than 20 at the time. In the period since he left his country has been in an almost continual state of war, with huge population displacement from the affected areas. Since his brother posted him a copy of his CSID in 2010 their home town of Tuz Khurmato has been under the various control of the government of Iraq, ISIL, the peshmerga and latterly Iranian-backed Shi'ite militias known as the People's Mobilisation Units. Whilst we know that the Appellant's family remained in the family home until at least September 2020, we do not know what disruption they have faced, or whether they have at any point been displaced, for instance in the mass displacement of the Kurdish population in 2018.

27. I do not know whether the Appellant's brother made a copy from an original, or simply sent a photocopy that was in the family home. Nor do I know whether the card in question would still be valid. I have been given no direct evidence about whether CSID cards expire but I note from the summary of the guidance given in AA (Iraq) CG [2015] UKUT 544 (IAC) (as amended on appeal [2017] EWCA Civ 944) and AAH (Iraq) CG [2018] UKUT 212 (IAC) set out at Annex A of SMO that apparently they do: see 9(i). It would certainly make sense if they did. This Appellant would have been a teenager when his was issued, and the photo on the card is unlikely to bear much resemblance to the 40 year old man who faces removal today. Just as in the UK individuals must renew passports and driving licences to ensure that the picture remains an accurate reflection of the holder, the new INID cards have an expiry date: see Annex H of the June 2020 CPIN. Taking all of that into account I find it to be reasonably likely that if a CSID is still in the family home, it is of little use to the Appellant today. It will be at least twenty years old, is reasonably likely to be expired, and will certainly feature a picture of an adolescent boy, if not a child. I find it reasonably likely that such a document is not going to suffice as valid identity documentation such that would enable the Appellant to pass through a checkpoint en route to Tuz Khurmato.

28. That being the case, following the guidance in SMO, I must allow the appeal on that narrow ground alone. The Appellant will not have in his possession a document enabling him to get to Tuz Khurmato, and there is no valid document that his family could provide him with to help him make that journey. The Appellant will in effect be stuck in Baghdad and it is reasonably likely that without an identity document, friends or family to assist him, he will within a short time face living conditions accepted by the Respondent to be a breach of Article 15(b) of the Qualification Directive.

29. No doubt once the Respondent has come to an agreement with the Iraqi authorities about issuing documents to returnees, the question of deportation may be revisited.

Anonymity

30. The Appellant is a criminal and as such he should not benefit from an order for anonymity. This appeal does however concern a claim for protection. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decision and Directions

31. The decision of the First-tier Tribunal is flawed for error of law and is set aside to the limited extent identified above.

32. There is an order for anonymity.

33. The decision in the appeal is remade as follows: the appeal is allowed.

Upper Tribunal Judge Bruce
20th September 2021