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

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
And via Teams	**On 21st January 2022**
On 2nd December 2021	

Before

UPPER TRIBUNAL JUDGE KEITH
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

SAFAN AHMED HAJI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: *Mr G Hodgetts,* instructed by Surtovic & Hartigan Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the remaking of the decision in the appellant's appeal against the respondent's refusal of his protection and human rights claim.

2. Both representatives and the appellant attended the hearing via Teams, while the panel attended from Field House, which was accessible to members of the public. There was no objection to attending via Teams

and we were satisfied that the representatives were able to participate effectively in the hearing.

3. The appellant, an Iraqi citizen of Kurdish ethnic origin, sought leave to remain in the UK on the basis of humanitarian protection and human rights claims (articles 3 and 8 ECHR), in the context of an automatic deportation order having been made against him as a "foreign criminal" as defined by section 117D of the Nationality, Immigration and Asylum Act 2002. He had received three concurrent prison sentences of one year in prison, relating to use of two false UK identity documents, by which he had claimed state benefits to which he was not entitled. There is a lengthy immigration history, suffice it to say at this stage that the respondent's most recent decision, the subject of the appellant's appeal, was dated 6th November 2019. It followed earlier FtT decisions of 1st April 2004 and 10th July 2011, both dismissing the appellant's appeals (including the later, in the context of the deportation order), both of which were highly critical of the appellant's credibility. These remain relevant as both were considered by Judge Boyes in the most recent FtT decision of 15th December 2020, which this Tribunal considered in the error-of-law decision annexed to these reasons. While we concluded that Judge Boyes's decision did include errors of law, we preserved his significant adverse credibility findings, (§40 of our decision), which were in part based on the adverse credibility findings in the 2004 and 2011 decisions.

4. We had also concluded at §42 that absent any new evidence, Judge Boyes's findings on which he rejected the appellant's appeal based on article 8 ECHR were preserved. This became relevant when we identified and agreed with the representatives the issues they were asking us to consider.

The issues in this appeal

5. We identified and agreed with the representatives that the issues in remaking the FtT's decision were as follows:

   a) first, whether the appellant's crimes for which he was convicted were serious for the purposes of paragraph 339D(iv) of the Immigration Rules;

   b) second, whether the appellant had, or would be able to gain possession of, a CSID, to enable him to travel from Baghdad Airport to the Iraqi Kurdistan Region or "IKR". Mr Lindsay posited three scenarios: first, that the appellant already had his CSID document, never having lost it prior to his departure from Iraq in 2004. Second, his family members with whom the respondent asserted that he remained in contact, would be able to provide this to him, were he returned to Baghdad Airport. Third, whilst it was not disputed that in the appellant's city where he would need to register, INID documents were now being issued so that he would not be able to obtain an INID document by proxy, nor would a CSID document be issued in Iraq,

nevertheless the Iraqi Embassy in London would be willing to issue a CSID document for him.

6. In the event that the appellant was unable to obtain or did not have his CSID document, the respondent accepted that his return to Baghdad and/or his transit from Baghdad to the IKR would represent a breach of his rights under Article 3 ECHR. Conversely, Mr Hodgetts accepted that were we to find that the appellant had, or had access to, his CSID document, the appellant's claims for humanitarian protection and/or Article 3 ECHR would fall to be dismissed. In particular, the claim of humanitarian protection was solely on the basis of the risk to the appellant, as someone of Kurdish ethnic origin being returned to Baghdad, as part of the minority Kurdish population there, and unable to travel to the IKR. The previous protection claims of imputed political opinion had been dismissed. The Article 3 claim was pursued on a similar basis to the protection claim. Accordingly, the claims stood or fell on the question of whether the appellant had his CSID card or would be able to obtain it.

7. We explored with Mr Hodgetts at the beginning of the hearing whether any claims continued to be pursued in respect of Article 8 ECHR. As had been set out in the error of law decision at §42, absent any new evidence, Judge Boyes's findings and conclusions in dismissing the appeals on the basis of Article 8 would be preserved. In terms of the new evidence in relation to any Article 8 issues, in fact the appellant now accepted that at least for a period for some four to five months he was no longer in contact with his estranged partner or child. Mr Hodgetts confirmed to us that no further appeal was pursued in respect of the Article 8 claim.

Documents

8. As well as the respondent's bundle, which included details of the appellant's immigration history and the impugned decision, the appellant provided a bundle running to some 758 pages, as well as an updated expert report, which the appellant sought to adduce under Rule 15(2A) of the Upper Tribunal Rules. The expert report of Dr Farangis Ghaderi confirmed that in town where the appellant claimed he was from, specifically Chwarqurna, as opposed to Irbil, the new biometric INID cards were being issued. Whilst Dr Ghaderi provided detailed evidence on other aspects of the appellant's claim, including the risk to the appellant of Kurdish ethnicity in Baghdad, we focused on that particular element of the claim as it was, in reality the key to the substantive central point in this case, namely whether the appellant needed to obtain a CSID card as opposed to an INID.

9. The appellant's consolidated bundle included an updated witness statement from the appellant which he adopted and on which he was cross-examined in oral evidence, as well as a chronology. Much of the additional documentation related to the appellant's family life which, as we have already indicated, was not an issue now for us to consider. We

turn now to summarise the gist of the appellant's written witness statement and his oral evidence before us.

The appellant's witness evidence

10. In his witness statement at pages [7] to [9] of the appellant's bundle ("AB"), the appellant reiterated that he had lost contact with his family in Iraq, after he had left Iraq. At the time of his leaving, no one had mobile phones and his family had no house phone, so there was no way to contact his family when he left Iraq. It was possible that they now had mobile phones or even a house phone but he did not have the number and had no way of finding out. His only family was with his partner and son in the UK. However, in his updated statement, dated 16th November 2021, the appellant confirmed that he was no longer in a relationship with his partner, who was angry with him. She had blocked him on "everything", WhatsApp, Facebook Messenger and even by telephone and she would not allow him to see his son, whom he missed very much. He wanted to remain in the UK so that he could rebuild his relationship with his son. He added no further detail about his family in Iraq.

11. In cross-examination, the appellant reiterated that he had been born in Chwarqurna and during his asylum interview, the notes of which started at page [385] AB, he had referred to Chwarqurna, Irbil because Irbil was the larger and better known city. When he was challenged that he must have been issued with identification documents when still in Iraq, he said that he had never been issued with any identification documents. Mr Lindsay put to him that Dr Ghaderi had, in her expert report at §34, indicated that people who wished to travel in Iraq were expected to carry their identification document at all times. He disputed that this was the case when he lived in Iraq. He had no idea of what the situation was now, as he had not lived in Iraq for a long time.

12. The appellant disputed having his Iraqi ID documents in the UK, asserting that he had been arrested on a number of occasions and challenging Mr Lindsay as to how in those circumstances his ID documents had not been found. He said he had no idea how he would obtain ID documents from the Iraqi Embassy and he had also confirmed that he had made no effort whatsoever to find out how to do so. He was not even aware of the laissez passer document, in his bundle, about which he was later asked, although he did recall signing for a document under a voluntary return scheme. He indicated that his lack of any effort to contact the Iraqi Embassy in order to obtain an ID document was because he was willing to do anything not to return to Iraq. He had a life here and "of course" he did not wish to return. When he was asked whether he would be willing not to tell the truth to avoid going to Iraq, he maintained he was telling the truth. It was put to him that he had used false identification documents in the UK and was willing to tell lies about identification documents. He said that at the time, he had no accommodation or support and that was why he had needed to use false ID documents in two names. However when he was challenged

whether, if it suited him, he would conceal the truth about ID documents, he accepted that he would.

13. The appellant was also challenged as to whether, if he had ID documents in Iraq, they could be sent to him. He maintained that he had no contact with his family in Iraq since leaving that country. When asked why he was no longer in touch with his family, who included a brother, sister and mother, he said he did not need them and they did not need him. He was not even living with them when he left Iraq. When asked whether he was still in contact with anyone from his hometown he said he did not have any contact.

The respondent's closing submissions

14. The respondent relied upon the refusal decision. The first issue was the question of exclusion. There were two gateways as to exclusion. The first gateway was the risk presented by a person. The second, regardless of any rehabilitation, was whether a person had committed a serious crime. There was no question that the appellant had. His crimes involved significant dishonesty resulting in concurrent sentences and the passage of time did not diminish the seriousness. His convictions were also directly relevant to his credibility. His immigration appeal turned on his credibility and the circumstances of his conviction indicated that he was willing to deceive about both documentation and his ID status.

15. There were three ways in which the appellant might have access to a CSID card. Either he already had it with him; second he could obtain it from his family and third he could obtain a new copy from the Iraqi Embassy. The impugned decision had, at §§17 and 18 referred to the earlier judgment of Judge Martineau, at §40 where he had stated:

> "For all of these reasons, we are firmly satisfied that where the appellant has stated something to his advantage in a disputed issue, he is not to be believed unless persuasively supported from another source. We should have unhesitatingly found him an unreliable witness and rejected his account of events allegedly founding his fear of persecution, even if we were not bound by Devaseelan to follow".

16. The adverse credibility findings of Judge Boyes were similarly preserved by this Tribunal and his credibility was so low that his evidence should not be treated as reliable unless it was supported by independent evidence. He relied solely on his own assertion that he did not have the documents nor any access to them. Even the general evidence of Dr Ghaderi at §34 indicated that travellers within Iraq would normally need to carry ID documents, which the appellant did not accept.

17. Judge Boyes had, in his decision at §84 stated:

> "Put simply and quite frankly the appellant is incapable of belief in relation to the topic in the issue of his family life in Iraq and is only safe when it is supported and buttressed by other, independent evidence."

18. By reference to the well-known authority of MA (Somalia) v SSHD [2010] UKSC 49, Lord Dyson had, at §§31 to 33, considered the issue of whether a claimant told lies in relation to a central issue. In those circumstances his or her case would not be saved by general evidence unless that evidence was extremely strong. Where an appellant had given a totally incredible account of the relevant facts, the Tribunal must decide what weight to give to the lie, as well as all of the other evidence in the case, including the general evidence. The significance of the lies would vary from case to case and in some cases a Tribunal may conclude that a lie was of no great consequence but in other cases where an appellant told lies on a central issue, the Tribunal might conclude that it was of great significance. MA's appeal was such a case, and Mr Lindsay urged us to consider that the appellant's appeal was an analogous case. In particular, he had specifically used false documentation under assumed aliases and was willing to lie about his identity and identity documents. The general evidence was in any event contrary to his assertion about not having an ID document to travel. The particular lies in relation to his documentation went not only to what had happened in the UK but also what had happened in Iraq. Judge Boyes had found at §§93 and 94:

> "93. I have no doubt, having considered this case as a whole and on its individual aspects, that the appellant is very much in touch with his family in Iraq and the reason that there are attempts by him to disassociate himself from any previous statement which he has made showing that his family are alive and well and that he is in contact with them is purely an account on account of the fact that he does not want to return to Iraq and that he believes in massaging and manipulating what is evidently the truth, he will get to remain in the United Kingdom.
>
> 94. I have no doubt that the appellant will not suffer any persecution or Article 3 harm in Baghdad if he is met there by his family members who can help him return to his own area and obtain the identification cards which he clearly can get or has."

19. If that particular finding was not preserved, there was no reason to reach any other conclusion. By the time that the appellant had left Iraq he had one brother, a sister and a mother living there, with whom he was in contact, even if (which was not accepted), his father was now dead. He had accepted, when cross-examined, that he would be willing to conceal the truth about his identification when it suited.

20. With regard to the CSID, Mr Lindsay did not dispute that the Chwarqurna office only produced INID documents but nevertheless it did not make a difference whether he had CSID documents from the Iraqi Embassy in London or from family members when he arrived at Baghdad Airport. He had previously been issued with a laissez passer and there was no reason to suppose that he would not obtain one now. Indeed were he not to obtain a laissez passer then he would be irremovable and his protection claim must fail.

The appellant's closing submissions

21. Mr Hodgetts accepted that the focus of this appeal was the appellant's ability to obtain a CSID, as the government office in his home area of Iraq was only issuing INID cards. He agreed with Mr Lindsay the three possible scenarios as the ones that needed to be examined as it was accepted that he was likely to be able to get a laissez passer. Crucially, notwithstanding MA (Somalia), the untruths that the appellant had been told were not central to his case. Instead they had related primarily to his claimed fear of persecution, not because of being of Kurdish ethnic origin and being at risk because of being without a CSID card, but because of imputed political loyalties. He had, when asked at his screening interview, indicated the exact location of where he had lived and also said in answer to question 1.17, page [193] AB that he had never had a passport (albeit no reference had been made to an ID document). The core issue in the previous appeals was his father's activities with the PKK and a family feud. The question of identity documents was not core. The authority of SMO, KSP & IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC), (in particular, at §395) made clear that there were reducing areas which still issued CSIDs. It was only logical in these circumstances that the Iraqi Embassy in London would not issue a CSID card, which was consistent with the headnote of that case at §16:

> "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."

22. With regard to the question of exclusion, the appellant's offence was not particularly serious (although we reminded Mr Hodgetts and he accepted that we were not considering "particular" seriousness) because of the mitigating circumstances. The pre-sentencing report at page [448] AB dated 30th November 2019 had noted the appellant's apology, his plea of guilty and the circumstances of his offending, namely his lack of money and assistance.

The Law

23. The relevant parts of Paragraphs 339C and D of the Immigration Rules state:

> Grant of humanitarian protection
>
> 339C. A person will be granted humanitarian protection in the United Kingdom if the Secretary of State is satisfied that:

(i) they are in the United Kingdom or have arrived at a port of entry in the United Kingdom;

(ii) they do not qualify as a refugee as defined in regulation 2 of The Refugee or Person in Need of International Protection (Qualification) Regulations 2006;

(iii) substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm and is unable, or, owing to such risk, unwilling to avail themselves of the protection of that country; and

(iv) they are not excluded from a grant of humanitarian protection.

Exclusion from humanitarian protection

339D. A person is excluded from a grant of humanitarian protection for the purposes of paragraph 339C (iv) where the Secretary of State is satisfied that:….

(iii) there are serious reasons for considering that they constitute a danger to the community or to the security of the United Kingdom; or

(iv) there are serious reasons for considering that they have committed a serious crime;…

Refusal of humanitarian protection

339F. Where the criteria set out in paragraph 339C is not met humanitarian protection will be refused.

24. Mr Hodgetts accepted that sub-paras (iii) and (iv) were in the alternative, and following the authority of Kakarash (revocation of HP; respondent's policy) [2021] UKUT 236, if the respondent succeeded in showing that there are serious reasons for considering that the appellant had committed serious crimes, this Tribunal would be bound to dismiss his humanitarian protection claim (but not his claim under article 3), by virtue of paragraph 339F. We mention this, as issues of rehabilitation would not be relevant to the seriousness of the appellant's crime, only whether he constituted a danger to the community of the UK.

25. In the event that the appellant was not excluded from humanitarian protection, we considered the Country Guidance case of SMO, KSP & IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC).

26. In respect of the Article 3 claim, the burden of proof rests with the appellant to satisfy us that there are substantial grounds for believing that,

as a result of the respondent's decision, that he will be exposed to a real risk of serious harm in breach of Article 3.

Findings of fact

27. Dealing first with the appellant's criminal offence, the fact of his offending is uncontentious. The pre-sentencing report starting at page [448] AB deals with his use of fake UK identity cards, using an assumed name. It explained his justification as being alone and desperate but also noted the impact on general members of the public who had to pay higher taxes because of fraudulent claims for benefits. It also noted that he accepted culpability for the matter and had apologised. It also referred to him maintaining contact with his family members in Iraq (page [451] AB). We also considered the sentencing remarks of His Honour Judge Webb on 30th October 2009, starting at page [453], appellant's bundle. HHJ Webb described the appellant had entering the UK illegally, claiming benefits to which he was not entitled and that those claims were dishonest from the start. He noted:

> "It is a further feature of this case that you had at least two false identities on which you could rely if you needed to. You received in total some £7,200 but because of the features of this case your Counsel realistically accepts that there is no alternative to a custodial sentence. I think that had there been a trial you would have received eighteen months' imprisonment on conviction. But notwithstanding the strength of the evidence against you, I shall allow you the maximum credit of one third which means the sentence which I impose on each count is twelve months and those sentences will run together".

28. There is no suggestion that the appellant has reoffended.

Conclusion on exclusion

29. On the one hand we are conscious that there is no statutory presumption that the appellant's crimes were serious. This is not, for example, a case under which certification pursuant to Section 72 of the Nationality, Immigration and Asylum Act 2002 applies. However, we accept Mr Lindsay's submission that there are serious reasons for considering that the appellant committed serious crimes. As HHJ Webb recognised, the offences involved intentional dishonesty from the very start. Whatever the motivation may have been, which prompting the offending, we also reflect on the length of sentence, namely a year in prison, albeit reduced for the appellant's early plea of guilty. Noting those two core features of intentional dishonesty and the length of sentence, notwithstanding the context of the offence and the appellant's claimed desperation, we are satisfied that the test is met. The lack of re-offending and the passage of time since the offences are not, as Mr Hodgetts candidly, accepted, relevant to the seriousness of the offences. The consequence of us finding that the test is met is that, as Mr Hodgetts also accepted, we must dismiss the appellant's claim for humanitarian protection. However, for completeness we go on to consider the central question of the appellant's

CSID card or lack of it both in the alternative in relation to humanitarian protection and also by reference to Article 3.

The CSID issue

30. We accept Mr Hodgetts' submission that on one of the three scenarios, namely an ability to obtain a CSID card from the Iraqi Embassy in London, based on SMO, we are persuaded that there is a real risk that it is not possible any longer to obtain a CSID card. This is consistent not only with the headnote of SMO (§16), but also the respondent's own Country Policy and Information Note - Iraq: Internal relocation, civil documentation and returns (June 2020):

> "2.6.15 Since SMO was promulgated in December 2019 further information regarding the issuance of CSIDs in the UK has been obtained by the Home Office in April 2020 [see Annex I]. When asked to describe the process of obtaining a CSID from the Iraqi Embassy in London the Returns Logistics department stated:
>
> > 'CSID cards are being phased out and replaced by INID (Iraq National Identification) cards. It is not currently possible to apply for an INID card outside of Iraq. As a result, the Iraqi embassy in London are advising their nationals in the UK to apply instead for a 'Registration Document (1957)' which they can use to apply for other documents such as passports or an INID card once they have returned to Iraq.
> >
> > 'The registration document (1957) must be applied for on the applicant's behalf by a nominated representative in Iraq. In order to start the application, the individual requiring documentation would normally provide at least one copy of a national identity document [see paragraph 2.6.24 for list of national identity documents] and complete a power of attorney (to nominate a representative in Iraq) at the Iraqi embassy along with the embassy issued application forms. If they have no copies of identity documents they also would need to complete a British power of attorney validated by the FCO and provide parents names, place and date of birth to their nominated representative in Iraq.
> >
> > 'Once issued the nominated representative will send the registration document (1957) to the applicant in the UK. The process takes 1-2 months.
> >
> > 'The HO cannot apply for documentation other than Laissez Passers on someone's behalf but the embassy is willing to check to see if the individual already holds documents and provide copies if necessary.'
>
> 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."

31. However, we turn to the two alternative scenarios, namely that the appellant already has his CSID card and has never lost it; or alternatively that he remains in contact with his family relatives, who have his CSID card and they would arrange for him to be given his CSID card on return to Baghdad Airport.

32. We are satisfied that the previous judges were highly critical of the appellant's credibility in every respect. Whilst Mr Hodgetts submitted, as per MA (Somalia), that the focus of the earlier determinations was the claim of imputed political opinion and/or some form of blood feud which had been rejected and that the ID documentation issue was not part of the central issue, it was clearly part and parcel of the whole claim and findings that the appellant was still in contact with his family in Iraq. Moreover, other than to assert that the record of what he had said was incorrect, the appellant has no answer to pre-sentencing report, to which we have already referred, which states that the appellant was in contact with his family in 2009, a number of years after he entered the UK. We do not regard as credible that having been funded by his family to enter the UK, either that he would have risked that investment by not ensuring he had, or had access to, any ID documents needed for travel, or would have not sought to re-establish contact with his family on entry to the UK. Clearly the appellant is active by means of social communications and indeed has referred in his witness statement to attempting to contact his former partner by WhatsApp and Facebook Messenger. The appellant's explanation that he has not even attempted to contact any family members because he does not need them and they do not need him is in stark contrast to his written witness statement where he asserts that he has not practically been able to do so because of the absence of an ability, not knowing, for example, their telephone number. These are not consistent positions and in any event neither in our view is plausible or credible.

33. We also do not accept Mr Hodgetts' submission that merely because the appellant has been absent from Iraq for seventeen years that he does not have his CSID card. We accept Mr Lindsay's submission that the appellant's convictions for his offences, involving the use of false aliases and identity cards, is relevant to the question of whether the appellant is being truthful about not having his CSID. This is the case, even if we accept that Dr Ghaderi's evidence about the need to have an ID to travel internally in Iraq only reflects the position now, and not when the appellant left Iraq.

34. In the circumstances we reach two alternative findings. The first is that we are satisfied to the relevant standard that the appellant in fact still has his CSID card. He would be able to use a laissez passer to travel to Baghdad and then, as Mr Hodgetts accepts use his CSID to travel internally. In the alternative even if had we found differently we are entirely satisfied that in the alternative scenario, the appellant would have left his CSID document, given its importance, with his family members with whom he remains in contact. We are further similarly satisfied that on return to Baghdad

Airport the appellant's family would be able to make arrangements for his CSID card to be given to him, to enable his internal travel to the IKR.

35. In the circumstances even if we had not found that the appellant's crime for which he was convicted was not serious so that his exclusion did not apply we would have dismissed the claim for humanitarian protection in any event, because he has, or has access to, his CSID. For the same reason, as Mr Hodgetts accepts, the claim of a risk of breach of his rights under Article 3 also falls to be dismissed.

Conclusions

36. On the facts established in this appeal, the appellant is excluded from humanitarian protection. There are no grounds for believing that the appellant's removal from the UK would result in a breach of the appellant's rights under Article 3 of the ECHR. The Appellant no longer pursued his appeal under Article 8 ECHR.

Decision

37. The appellant's appeal on humanitarian grounds is dismissed.

38. The appellant's appeal on human rights grounds is dismissed.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **5th January 2022**

TO THE RESPONDENT
FEE AWARD

The appeal has failed and so there can be no fee award.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **5th January 2022**

ANNEX: ERROR OF LAW DECISION

IAC-AH-KRL-V1

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

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
And via Teams	**……**
on 19th May 2021	

Before

UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE KEITH

Between

SAFAN AHMED HAJI
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: *Mr G Hodgetts*, instructed by Sutovic & Hartigan Solicitors
For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the approved record of the decision and reasons which were given orally at the end of the hearing on 19th May 2021.

2. Both representatives attended the hearing via Teams and the Tribunal panel attended the hearing in-person at Field House. The parties did not object to attending via Teams and we were satisfied that the representatives were able to participate effectively in the hearing.

3. This is an appeal by the appellant against the decision of First-tier Tribunal Judge Boyes, (the 'FtT'), promulgated on 15th December 2020, by which he dismissed the appellant's appeal against the respondent's refusal of his protection and human rights claims; and refused his application to revoke the deportation order against him on the basis of right to respect for his family and private life, specifically the non-residential relationship he claimed to have with a British national partner and son. The appellant has a lengthy immigration history. The summary of his claims of humanitarian protection and risk of breach of article 3 ECHR, were that as an Iraqi citizen of Kurdish ethnic origin, who was born in Erbil, he was (1) at risk of indiscriminate violence and (2) faced particular risk in traveling from Baghdad to his home town of Erbil and remaining there because he lacked a relevant identity document, the so-called 'INID' card and had no means to obtain one by proxy in Iraq, or in person in the UK. He also resisted deportation on the basis of his relationship with his qualifying partner and son for the purposes of 'Exception 2,' as set out in section 117C(5) of the Nationality, Immigration and Asylum Act 2002.

The FtT's decision

4. The FtT rejected the appellant's claim in its entirety, rejecting the risks to the appellant on his return to Iraq. In particular, the FtT rejected the appellant's credibility, noting adverse findings by a prior First-tier Tribunal Judge in December 2010 (noted at §22 of the more recent decision). The FtT recorded at §66 the appellant's Counsel's concession that the appellant did not fall within the Refugee Convention because of a fear of Isis or Shia militia and that instead, it was now argued that the appellant could not return because he lacked an INID card and because of his genuine and subsisting relationships with his UK family.

5. At §85, the FtT rejected the competency of a country expert who had expressed a view on obtaining an INID card in Erbil, on the basis that she was a documentary filmmaker, rather than an academic who had produced peer-reviewed research material; who did not claim to speak Kurdish; nor had she lived in the IKR. Instead, the FtT criticised her for basing her report on the appellant's account of persecution, which had been roundly rejected in the past by a First-tier Tribunal.

6. At §91, the FtT rejected the claim the appellant no longer had relatives in Iraq and at §92, concluded that he could be returned to Baghdad on an emergency travel document, to be met by his relatives who could either accompany him on a flight or by other means of travel to Erbil. The FtT also did not accept that he had a subsisting relationship with his claimed British national partner or the child, with whom he had very limited contact.

The grounds of appeal and grant of permission

7. The appellant lodged seven grounds of appeal which are very lengthy and are merely summarised below. Permission to appeal was granted by a Judge of the First-tier Tribunal, Judge Fisher, on all grounds. In her Rule 24 response, the respondent has since accepted that the FtT erred in respect of grounds (1) to (3), but disputes errors in relation to grounds (4) to (7).

The grounds of appeal

8. These grounds are summarised as follows:

   (a) Ground (1) - the Judge failed to apply properly the country guidance in SMO, KSP & IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC), on the basis that while he accepted the appellant was from Erbil, he had failed to consider that the appellant would have to register in person for an INID card in Iraq and could not safely travel to the registration office to register. The FtT had failed to make any findings that he could obtain an INID card in the UK by proxy.

   (b) Ground (2) - the Judge had erred in assuming, in his reasoning, that the appellant would be returned to Erbil directly, when in her decisions, the respondent had referred to the appellant being removed to Baghdad. Current practice was only to remove Iraqi nationals from the IKR to Baghdad. Travel within Iraq without identification documents would expose the appellant to risk, contrary to article 3 ECHR.

   (c) Ground (3) - the Judge had unfairly criticised the country expert, whose expertise had been recognised by the BBC and Portsmouth and Bristol universities; and Amnesty International. She had also spent a year working in Iraq and was in constant touch with Iraqi journalists and aid workers. Her report had not been based entirely on the appellant's account. She had provided an analysis of the location of the issuing office in Iraq, at which the appellant would need to register.

   (d) Ground (4) - the Judge had failed to make findings on exclusion from humanitarian protection and the appellant's claimed rehabilitation, both of which were relevant to the proportionality exercise under article 8 ECHR.

   (e) Ground (5) – the Judge had failed to analyse relevant evidence about the subsisting relationship between the appellant and his partner and son, which might otherwise explain their limited contact.

   (f) Ground (6) - the Judge had failed to take into account the report of an independent social worker in relation to the same relationship.

(g) Ground (7) - the Judge had failed to consider section 1177C(6) of the 2002 Act, specifically whether there were very compelling circumstances over and above those set out in 'Exception 2.'

The hearing before us

Documents and issues

9. We identified and agreed with the representatives the issues that we were being asked to resolve and the documents that they asked us to consider. We mention this as the documentation, including numerous bundles from previous hearings, was extensive, so we asked the representatives to direct us as to what they regarded as the relevant documents, which we have referred to where necessary.

10. Among the many documents, the appellant relied upon bundles which were before the FtT, one entitled a 'subjective and objective bundle'; and a supplementary bundle. The most pertinent documents to which we were referred were two independent social worker reports written by Christine Brown, dated 25th June 2018 and 20th October 2019, at pages [36] and [68] of the first bundle; and an email from the appellant's solicitors dated 9th April 2020, at page [35] of the same bundle, which it was said supported his contention that he was asking to be rehoused in NASS accommodation in Wolverhampton (he was currently housed in Wales), so he could be near to his son.

Grounds (1) to (3)

11. In her Rule 24 response dated 2nd February 2021, at §2, the respondent conceded that the FtT had materially erred in his consideration and application of the authority of SMO; and in his assessment of the expert report. On that basis, the respondent accepted that the FtT had erred in respect of grounds (1) to (3). However, Mr Whitwell pointed out that while the respondent conceded these grounds, the appellant had not challenged the FtT's extensive adverse credibility findings, a submission we accept.

Conclusion in relation to grounds (1) to (3)

12. On the basis of the respondent's concession, which we regard was rightly made, we conclude that the FtT erred in law in respect of grounds (1) to (3) and we set aside his conclusions in respect of humanitarian protection and article 3 ECHR on that basis. However, we preserve the FtT's adverse credibility findings in respect of the appellant, which include, but are not limited to, the following: at §78, where the FtT made findings on the appellant's general credibility and had referred to two earlier Tribunal decisions of 2004 and 2010, which were also critical of the appellant's credibility; and the findings between §§79 to 82, which ended with the conclusion that the appellant's propensity for untruthfulness and willingness to say anything that would further his own cause was quite apparent.

Ground (4)

13. The appellant's challenge is in two parts. The first was in relation to the 'exclusion decision' as referred to at §4.1 of the grounds. What was said was that the FtT had referred at §100 to the issue of exclusion from humanitarian protection, which had clearly been referred to in the respondent's refusal decision, and had erred by failing to make any findings or reach any conclusion on the issue. In relation to the first part of ground (4), Mr Whitwell conceded that the FtT did materially err in raising, but not resolving the exclusion issue.

14. The second part was that that failure to consider the appellant's rehabilitation was then said to be material to the proportionality exercise under article 8 ECHR, crossing over to ground (7). Mr Hodgetts referred to the well-known authority of Maslov v Austria (application no: 1638/03). Mr Whitwell said that the respondent contested this part of the ground, which we deal with later in these reasons.

Conclusion in respect of the 'exclusion' decision – ground (4)

15. We regard Mr Whitwell's concession as rightly made and conclude that the FtT did err in raising, but failing to reach a decision, in relation to the 'exclusion' decision.

Grounds (5) to (7)

The appellant's submissions

Ground (5)

16. By way of background, Mr Hodgetts contextualised the history of the relationship between the appellant and his claimed partner as volatile. As a consequence, if we were to find that there had been an error of law, any remaking of the appeal may need to consider any developments in that relationship.

17. The FtT's analysis was simply too limited. At §71, he referred to the appellant's limited active involvement in the qualifying son's life. That analysis did not reflect the reality of the appellant's involvement and the specific context, based on evidence before the FtT. The child had been born in 2005. The appellant had been the subject of reporting requirements while in NASS accommodation, which explained the separation of the appellant, based in Wales, from the appellant's son and his partner/former partner who lived in the Midlands. The partner had also discussed at §14 of her witness statement the couple's limited finances, which had a further impact on their ability to see one another. The desire of the two to live closely together had been referred to not only in the skeleton argument before the FtT (albeit as Mr Hodgetts accepted, very briefly, at §67); but in the email dated 9th April 2020, which corroborated

the couple's desire to live nearer to one another. The FtT had failed to engage in or analyse that evidence.

18. The respondent's Rule 24 response had suggested that the FtT had dealt with the evidence adequately at §§63 and §102, but turning to those paragraphs, they did not engage adequately with the evidence. At §§60 and 63, the FtT had merely referred to the appellant's skeleton argument, while at §102, the FtT had rejected the appellant's article 8 claims with a finding that there was nothing compelling about the appellant's case and claim to remain in the UK.

19. Mr Hodgetts further argued that the FtT's conclusion at §71 was perverse. He had concluded that the appellant could not have conversations with his son because of the son's speaking impairment. It was obviously possible and natural, even if a child themselves had language difficulties, for a father to call and speak to them daily, which was evidence of a genuine commitment to that relationship.

Ground (6)

20. It appeared at §70 that the FtT had impugned the independence of the social worker who produced the report, because it was suggested that such reports were naturally framed in a positive and encouraging light and were slow and hesitant to criticise those being assessed. The FtT ought to have recognised that the social worker was independent and owed a duty to this Tribunal. We were invited to read the reports in full, which spoke of the child's best interests and in particular the need for the child to have both parents involved in his life. We canvassed with Mr Hodgetts, in this context, the FtT's reference at §71 to the social worker accepting that the child had not held his father in the forefront of his thoughts and that the appellant had involved himself in the child's life to only a limited degree. Mr Hodgetts's answer to that was that that was something that had to be contextualised with delayed development on the child's part; and limited contact between the appellant and the son, which had been explained and which did not cut across the child's long-term needs to have care from both parents. In essence, the FtT had cherrypicked parts of the reports and taken them out of context.

Ground (7)

21. It was plain that the FtT had not considered section 117C(6) of the Nationality, Immigration and Asylum Act 2002, namely very compelling circumstances. Whilst the respondent suggested at the FtT had considered the circumstances at §§102 and §103, the FtT had failed to engage with them in substance and had not considered the fact that the index offence was in 2009. While rehabilitation might have a limited weight, this was not the same as no weight (see CI (Nigeria) v SSHD [2019] EWCA Civ 2027). The issue of rehabilitation had been raised both in oral submissions and also at §69(iv) and §75(v) of the skeleton argument before the Judge.

The respondent's submissions

22. Dealing with the last point, the FtT had expressly referred to considering the skeleton argument before him. Moreover, in terms of credibility in respect of the family life claim, clearly the FtT had not believed the appellant's claim to have such a genuine and subsisting relationship, and was entitled to reach that conclusion on the evidence before him.

Ground (4) - rehabilitation

23. As confirmed at §141 of HA (Iraq) v SSHD [2020] EWCA Civ 1176, even positive evidence of rehabilitation would rarely be of great weight in countering the public interest in deportation, based not only on public protection but deterrence and public concern. Here, the lack of offending took the appellant's case nowhere, noting the FtT's wider findings in relation to the lack of a genuine and subsisting relationship with the claimed partner or child, in respect of which it was argued it is said there were no errors.

Ground (5)

24. In relation to the argument that the FtT had failed to analyse the relevant evidence, Mr Whitwell urged us to consider that the FtT had made highly critical findings in relation to the appellant's credibility, not only about the protection and article 3 ECHR claims but the appellant's motives in seeking to contrive relationships with the claimed partner and biological child, whom he had barely seen or written to. The FtT had specifically engaged with all of that evidence. Mr Whitwell asked us to consider, in particular, the social worker's two reports.

25. In terms of the difficulties said to exist concerning the couple's desire to cohabit or live nearer to one another because of NASS accommodation and reporting responsibilities, the ground was essentially asking us to substitute our view on the evidence and the appellant's motives, for the FtT's conclusions. By way of example, at §72, the FtT had specifically considered the lack of evidence of what the appellant had done with the child when he did visit on the very few occasions; what the appellant had done by way of seeking to cement or develop the claimed relationship; and the lack of evidence of the telephone calls which were said to be between himself and the mother in order for him to speak to the son. The FtT had clearly engaged with that evidence, as well as the independent social worker reports, which had confirmed the appellant's very limited involvement.

26. The FtT had also considered, at §75, the very point now which Mr Hodgetts asserted he had ignored, in relation to the couple's limited finances. The FtT had considered whether the appellant would nevertheless be able to afford the cost, for example, of letters and whether the appellant had such a genuine, as opposed to a contrived relationship in order to bolster his immigration appeal.

Ground (6)

27. Mr Whitwell referred us to the original and updated reports of the independent social worker, Ms Brown. At the time of the updated report it was clear Ms Brown had become disillusioned with the lack of contact between the appellant, his claimed partner and biological son, see for example, §§3.38 and 3.44 at pages [86] to [88] of the first bundle. The FtT also clearly considered, at §74, what he described as the 'cursory' email to the family mediator, which he assessed as showing very little in terms of a genuine and concerted relationship. Any brevity in the FtT's remarks, such as at §64, had to be read in context, something to which we will return.

28. Even if, which was not accepted, the FtT had erred in his findings on whether there was a genuine and subsisting relationship between the appellant and the qualifying child and partner, it was immaterial as the FtT had considered, at §76, the alternative, that in the context of the very limited contact between the appellant and the child and partner, (seeing them on only a handful of occasions in a two-year period), the FtT was unarguably entitled to conclude the effect of deportation, with the partner and child remaining in the UK, would not be unduly harsh. While the FtT had acknowledged and referred in detail at §§47 to 48 about the child's best interests having both parents involved, the FtT had explicitly considered that, which was only one part of the report, at §70.

29. The 'unduly harsh test' as set out in 'Exception 2' of section 117C(5) of the 2002 Act included a 'best interests' assessment. The FtT had considered this at §§76; 77; and 102 and 103, where he had referred to the passages in the skeleton argument which dealt with bests interests (§§74 to 76 of the skeleton argument).

Discussion and conclusions – grounds (4) to (7)

Ground (4)

30. We reminded ourselves that we should not substitute our view for what we might have decided in the appeal and the FtT must have erred in law. We are also conscious that we should not take comments in the FtT's decision out of context; and that the FtT will have had the benefit of hearing the evidence in far greater detail than when we do in considering whether the FtT erred in law. In that context, we noted at §64 the FtT's comments:

> *"64. I have taken into account all that I have read about the appellant's case and claim and all the documentation. That I may not mention a specific nuance or page number or highlight of the appellant's case and claim or of the respondent for that matter does not mean that I have not taken into account and it does not mean that I have not considered it in reaching these conclusions. I have painstakingly re-read all the documentation provided which was voluminous and ran to over 500 pages and which was supplemented by a further bundle of evidence*

> *provided shortly before the hearing. That this contained a further expert report is in my view lamentable and wholly unacceptable to serve an expert report effectively the day before the hearing."*

31. It is also worth noting that the FtT had explicitly referred to considering the appellant's skeleton argument and the FtT went on to cite specific paragraph numbers of it at §103.

32. We make these observations in the context of ground (4), where it is said that the FtT failed to analyse the fact of the appellant's claimed rehabilitation. As we have already noted, the issue was raised in the skeleton argument, in the briefest of terms, at §§69(v) and 75(v) of the skeleton argument. At §103 of his decision, the FtT had expressly referred to §75 of the skeleton argument, and in an assessment of the cumulative factors, concluded that they did not amount to very compelling circumstances. Whilst we accept that the FtT's references are brief, we bear in mind the context of that brevity, as the FtT himself made clear at §64. We discern no error of law based on ground (4), which expressly considered that factor in a wider, cumulative assessment. Any limited weight attached to rehabilitation would have to be seen in the context of the findings of very limited family life in the UK.

Ground (5)

33. Dealing with the next ground that the FtT had failed to analyse and consider relevant evidence about the genuineness of the claimed relationship between the appellant and the partner and son, we repeat our observation that the FtT's findings have to be read as a whole; and the FtT's specific reference to the social workers' reports at §47 and §48. These are particularly important because they refer, at §48, to the appellant having had no opportunity to properly involve himself in his son's life; and having kept a distance which has now begun to impede and compromise the relationship with the son. The FtT cited this material in the context of an assessment of the child's best interests. The FtT also, while considering the social worker reports, considered the appellant's credibility and lack of evidence about what steps the appellant had taken to strengthen and develop his relationships, at §72. We accept that the FtT considered the skeleton argument's reference to attempts made by the appellant up to 2016 to move closer together (but nothing after that date until the email dated 9th April 2020, to which we have already referred). The FtT's assessment was in the context of the social worker reports which cited not only the limited contact but also the volatility in the relationship with the partner at §4.11 of the updated report. The same report at §4.5 had referred to the appellant barely having seen his son since the first visit in May 2018; and the son not holding the appellant in the forefront of his thoughts; and communication with the appellant other than direct means being more difficult by the child's compromised ability to communicate verbally.

34. What was apparent to the FtT was first, the limited nature of the relationship, whatever the explanation or context for that; but also the FtT's finding at §72 that there was an absence of evidence of any attempt to strengthen and develop the relationship. We do not accept, as Mr Hodgett suggests, that the FtT's remark at §70 that social workers tend not to criticise those they are assessing is a perception that the social worker was not independent. It reflects the fact that social workers will effectively not try to be overly critical during the assessment of a child's setting. What instead the FtT was unarguably entitled to do was to take into account all sources of evidence, at outlined at §§72 to 74, when concluding that the appellant's limited attempts at contact and reference to those relationships were self-serving, and that the relationships were not genuine and subsisting. Even noting that parental relationships may exist where a parent does not have an active involvement in a child's life (see SR (subsisting parental relationship – s117B(6)) Pakistan [2018] UKUT 00334 (IAC), the FtT's conclusion that there was no subsisting relationship on the particular facts of this case was unarguably open to the FtT to reach; he adequately analysed the evidence and explained his reasons for his conclusion. His scepticism about the nature of any contact was not perverse, and the reference to the son's impaired communication needs to be put in the context of the absence of any detail about cementing the relationship; and the absence of any written contact. Ground (5) discloses no error of law.

Ground (6)

35. The FtT made express reference to both social worker reports and cited excerpts from them at §§47 to 48. The challenge is that he failed to consider the reports adequately, but we accept Mr Whitwell's submission that the FtT was unarguably entitled to take particular account of the updated report, as supporting the conclusion that there was not a subsisting parental relationship. The ground essentially asks us to prefer the appellant's assertion that the obstacles to that relationship are explicable for financial reasons and the social worker had noted the best interests of the child to have involvement of both parents, but the FtT had considered the wider context, in which he found even the limited contact as not supporting a subsisting relationship. The FtT did not fail to engage with the reports; rather he made findings in the context of those reports which the appellant asks us to set aside, and to prefer his account. The ground does not disclose an error of law.

Ground (7)

36. We turn finally to the ground (7) and sections 117C(5) and (6) of the 2002 Act. Dealing first with 'Exception 2', and the 'unduly harsh' effect of deportation, what was clear was that the FtT had expressly considered this, at §76, on an alternative analysis, assuming that family life, for the purposes of article 8 ECHR, existed. He stated:

> *"Even if the relationship was genuine and subsisting I would reach the conclusion that it would not be unduly harsh for [child L] to remain in the United Kingdom whilst the appellant was deported. Even on the appellant's own account the contact between him and his child and [partner K] is by telephone. The appellant could continue this arrangement from Iraq without difficulty and as such it is difficult to envisage, in light of the fact that he doesn't see either [K] or [L], how this would be any change from the current position which he claims to exist."*

37. We conclude that that was a conclusion, open to the FtT to reach, on the alternative basis that family life, even if of a very minor kind, did exist. We accept that such an assessment required consideration of the appellant's child's best interests, which the FtT plainly considered, including that child's special needs and delayed development.

38. In relation to the question of very compelling circumstances, we have already referred to the appellant's claimed rehabilitation. This was referred to in the skeleton argument, which in turn the FtT had referred to expressly at §103. We accept Mr Whitwell's submission that where, as here, the FtT had found that family life, in an article 8 sense, either did not exist, or alternatively, analysed on the basis of its very limited extent, (with few face to face contacts, no correspondence, and lack of any evidence of steps taken to develop the relationship), the FtT's assessment and reasons were adequate, and took into account all of the relevant circumstances, including rehabilitation.

39. Whilst we accept that the FtT did not refer explicitly to the statutory provision of section 117C(6) of the 2002 Act, the FtT clearly referred to it in using the phrase, '*very compelling circumstances'*, in that section, at §103. That followed an analysis of the wider article 8 issues, including, for example, the appellant's family in Iraq; the relationship between the appellant and his claimed partner; and a summary of the article 8 conclusions at §102. There was, in our view, albeit briefly put, a clear and adequately explained analysis, open to the FtT to reach. We therefore conclude that the second part of ground (4) (rehabilitation) and grounds (5) to (7) are not sustained.

Decision on error of law

40. In relation to grounds (1) to (3), the FtT materially erred in law. His conclusions on the appellant's protection and article 3 ECHR claim are set aside. However, there was no challenge to the FtT's significant adverse credibility findings on respect of the appellant and we preserve these findings. The issue for remaking is the application of SMO and the assessment of the expert evidence on Iraq.

41. In relation to ground (4), to the extent that it relates to a failure to make findings on the issue of exclusion, we find that the FtT did fail to make any findings on this issue and to that extent, the FtT erred in law. In relation to

the second issue in relation to ground (4) and the appellant's rehabilitation, we conclude that there is no error of law.

42. We conclude that grounds (5) to (7) contain no errors of law. Absent any new evidence, the FtT's findings in relation to the appeal on the basis of article 8 ECHR and section 117C of the Nationality, Immigration and Asylum Act 2002 are preserved.

Disposal

43. With reference to paragraph 7.2 of the Senior President's Practice Statement and the limited scope of the issues, it is appropriate that the Upper Tribunal remakes the FtT's decision.

Directions

44. The following directions shall apply to the future conduct of this appeal:

    (a) The Resumed Hearing will be listed via Teams, without the need for an interpreter, time estimate **3 hours**, to enable the Upper Tribunal to substitute a decision to either allow or dismiss the appeal. The applicant shall make any application to vary this direction, in terms of a face-to-face hearing with an interpreter, without delay.

    (b) The appellant shall no later than **4 PM, 14 days prior** to the Resumed Hearing, file with the Upper Tribunal and served upon the respondent's representative a consolidated, indexed, and paginated bundle containing all the documentary evidence upon which he intends to rely. Witness statements in the bundle must be signed, dated, and contain a declaration of truth and shall stand as the evidence in chief of the maker who shall be made available for the purposes of cross-examination and re-examination only. Any breach of this order may have an implication in respect of a costs order.

    (c) The respondent shall have leave, if so advised, to file any further documentation she intends to rely upon and in response to the appellant's evidence; provided the same is filed no later than 4 PM, **7 days** prior to the Resumed Hearing.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law in relation to the protection and article 3 ECHR claims and we set it aside, subject to the preserved findings referred to in these reasons.

The decision of the First-tier Tribunal in relation to the appellant's article 8 ECHR claim and section 117C of the Nationality, Immigration and Asylum Act contains no errors of law, and stands.

Remaking of this appeal is retained in the Upper Tribunal.

No anonymity direction is made.

Signed J Keith Date: 2nd June 2021

Upper Tribunal Judge Keith