Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/04653/2019**

THE IMMIGRATION ACTS

Heard at Field House by video (Skype for Business) On 27 November 2020	**Decision & Reasons Promulgated On 09 March 2021**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M H
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Senior Home Office Presenting Officer
For the Respondent: Mr S Saeed, Aman Solicitors Advocates

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge I Howard promulgated on 3 December 2019, allowing MH's appeal against a decision of the Secretary of State made on 22 October 2018 to deport him pursuant to Section 3(5)(a) Immigration Act 1971. The judge dismissed the appeal on asylum and humanitarian protection grounds but allowed it on human rights grounds.

2. The respondent was born in Fallujah, Iraq, in 1989. He lived there until 2002 with his mother, father, two brothers and sisters. He is a Sunni Muslim. The appellant's father was in the Iraqi Army from 1981 to 1988.

3. In 2002 the respondent and his parents fled Fallujah. The rest of the family remained including older siblings, the father fearing the actions of the American Forces due to his previous service in the Iraqi Army. The family then travelled to Turkey and then to Libya where they remained for three years. The appellant was forced into servitude on a farm there but escaped. He lost contact with his parents in 2012 once in Libya, then made his way back to Turkey, then on to Europe, arriving in the United Kingdom in 2006.

4. The appellant had heard nothing from his family since it fell to Daesh and fears that if returned to Iraq, being from Fallujah, he would be targeted as a Daesh sympathiser by pro-Iranian Shia Muslims who now control the country.

5. Although he says he arrived in the United Kingdom in January 2006 the appellant was not encountered by the authorities until 15 March 2009. He has a number of convictions for shoplifting and common assault and on 17 July 2018 was sentenced to a total of nine months' imprisonment for three offences of shoplifting subsequent to a conviction on 26 May 2018 and two convictions for shoplifting and common assault for which he was sentenced to four months' imprisonment. It was only after that incident that the respondent claimed asylum.

The Secretary of State's Case

6. The Secretary of State accepted that the respondent is a citizen of Iraq but did not accept an account of how he was nearly raped by people who were targeting Sunni Muslims, nor did she accept that he is wanted by both the Iraqi and American governments. With respect to the latter she noted inconsistencies in his accounts of when and how he learnt his father was wanted, nor did she accept that the authorities would have an adverse interest in him or that he would subsequently be targeted by the Hashid al-Shabi, a militia group.

7. The Secretary of State did not consider it credible that the respondent and his parents would not have endeavoured to maintain contact with the siblings who remained living in Fallujah and with his uncle. It was not considered credible either that he had a genuine fear for his parents' life if he had not made a call to the Libyan government, as he said he intended to do, in over seven years but that "nonetheless the benefit of this doubt has been given to this element of your claim".

8. The Secretary of State drew inferences adverse to the respondent from his failure to claim asylum en route to the United Kingdom and from failing to claim asylum until 2019. She concluded this damaged his credibility pursuant to Section 8(4) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

9. Having had regard to paragraph 339L, the Secretary of State considered the respondent was not entitled to the benefit of the doubt principle and did not accept he was no longer in contact with his family.

10. Assessing his claim in line with AA (Article 15(c) Iraq CG [2015] UKUT 544, she concluded that it was not unreasonable to expect him to reunite with his family with whom he had had a very caring relationship and there would not be a real risk for him travelling from Baghdad Airport to the southern governorates. She considered also that as the respondent was in possession of an expired Iraqi ID card he would be able to use this and obtain a laissez-passer to return anywhere in Iraq and thus it was feasible for him to return there. She did not consider either that he was entitled to humanitarian protection there being no real risk of serious harm on return nor was she satisfied that he was entitled to leave on Article 3 or Article 8 grounds.

11. The judge heard evidence from the respondent who was cross-examined. He also heard submissions from both representatives. The judge also had before him a medical report from Dr Beeks and an expert report from Dr Allen George. The judge directed himself that the primary issue was to determine the credibility of the respondent's account [26]. While accepting the medical evidence that there had been violent assaults on him, he did not discount that the violence was perpetrated upon him elsewhere than Fallujah [35] given the inconsistencies identified in the core account and did not accept the account of the violent assault on him at the age of 10 in Fallujah, noting he had lived on the margins of society in several countries as an adult and had been attacked there also.

12. Given he did not accept the respondent's account of what had happened to him at about the age of 10, the judge was not satisfied the parents did in fact leave Iraq when they did [37].

13. The judge then went on to consider returning the respondent to Iraq [41], considering that he would travel first back to Baghdad remaining in the "Baghdad belt" discounting him travelling east of Fallujah as that remains as a contested area [42]. Noting that the respondent had an expired Iraqi ID card [44], he concluded he would be able to obtain a laissez- passer to allow him to travel to Baghdad which would not assist him beyond arrival at the airport. He concluded the respondent would need other documentation to make the journey such as an INC, passport or an Iraqi CSID. He noted that without that card he could not travel away from Baghdad as considered by the Tribunal in AAH (Iraqi Kurds – internal relocation) Iraq CG [2018] UKUT 212. The judge directed himself that given the breakdown in effective administration between 2014 and 2017 the only way that a CSID card can be obtained by the attendance of male relatives at the civil registry armed with their own CSID and a willingness to vouch for the appellant. Noting the respondent would be in Baghdad and his relatives elsewhere in Iraq, possibly Fallujah or elsewhere in the Al Anbar province which placed him in a legal limbo, he found [47] it was not clear whether he had to be able to leave the airport, referring to AAH at paragraph 40. He noted also further that Fallujah was under Daesh control from 2016 until 2018 it remaining unclear if any of the Iraqi state was able to function in that area or whether

the records needed to be accessed by the appellant's family to secure his CSID would be obtainable at all.

14. Turning then to AA, the judge concluded having regard to Section E of the country guidance [52] that the respondent is one of the small number of people for whom it is not reasonable to relocate to Baghdad [55].

15. The judge then concluded the respondent had not shown he faced persecution for a qualifying reason if returned to Iraq [57] then that:

> "I am satisfied that the [respondent] has established substantial grounds for believing that if returned to Iraq he would face a real risk of suffering serious harm and is unable, or owing to such to risk, is unwilling to avail himself of the protection of that country."

16. The judge then concluded that the respondent was not excluded from humanitarian protection by paragraph 339D but then wrote simply:

> "The case advanced by the appellant is not one that warrants consideration of subsidiary protection."

17. The judge then wrote that the respondent had not advanced on Article 8 before him, dismissed the appeal on asylum grounds and humanitarian protection grounds but allowed it on human rights grounds.

18. The Secretary of State sought permission to appeal on the grounds that the judge had erred by not:

    (i) specifying under which articles he had allowed the appeal on human rights grounds and in failing to give reasons for doing so;

    (ii) making any findings with regards to Article 8;

    (iii) giving adequate reasons as to why the appellant would not be able to obtain a CSID on return to Iraq or that his treatment on return to Iraq would be to Articles 2 or 3 of the Human Rights Act.

19. On 17 January 2020 Resident Judge JFW Phillips issued a notice stating that he proposed to set aside the decision under Rule 35, for it to be dealt with again by the First-tier Tribunal because,

> having found at paragraph 57 that the respondent's removal "would not be in breach of the Refugee Convention or the Qualifying (sic) Directive, the judge goes on at paragraph 59 (to find that the appellant would face a real risk of suffering serious harm). This is contradictory. Further, having made these findings the judge goes on to dismiss the appeal both on asylum and humanitarian protection as granted then to allow the appeal on human rights grounds. In doing so not only does he not articulate why he has allowed the appeal on human rights grounds or, having dismissed the appeal under the

Qualification Directive, which article of the Human Rights Convention is nevertheless engaged. This is a material error of law.

20. The respondent's representatives did not, however, accept there was an error of law and thus permission to appeal was granted. Also, on 19 March 2020, Judge Howard provided a note stating that as it was not his intention to allow the appeal on humanitarian protection grounds but to allow it on Article 3 of the Human Rights Convention, his decision could not be remedied by operation of Rule 31.

21. Subsequent to this and directions issued at various times, the respondent has provided a Rule 24 response.

22. I heard submissions from both representatives.

23. Mr Whitwell submitted first, that although the judge directed himself that credibility was an issue, there appeared to be no explanation or findings as to whether the respondent was still in contact with family in Iraq despite this having been put in issue in the refusal letter. Having proceeded on the basis that the respondent had an expired INC card, the judge has not sufficiently engaged with AAH at paragraph 27 as to how his CSID card was obtained. He submitted that the Secretary of State was unable to determine from the decision why the judge had accepted, as appeared to be the case, that the appellant had no relatives to assist him in obtaining a CSID card. He submitted further that these defects were amplified by the judge's failure to properly explain how he had got from there being no CSID card available to allowing the appeal on Article 3 without having to go through, in detail, the relevant country guidance without which much of what the judge said made little sense.

24. Mr Saeed submitted that the findings with regard to the CSID were sustainable given that personal attendance of the relevant office was required and that the records would have been in Fallujah. He submitted relying on the country guidance case that the reasoning was sustainable as regards the CSID cards.

25. Mr Saeed submitted that probably there was no deficiency of reasoning with regard to the CSID card. He submitted further that there was no need for there to be any discussion regarding whether the appeal was allowed on Article 8 grounds given that it was expressly stated that the respondent was relying on these. That had been clear in the skeleton argument and thus presented to the First-tier Tribunal and thus the parties were clear about the issues.

26. Mr Saeed submitted further that on a proper examination of the risk factors identified in the relevant country guidance, there were proper reasons given for the finding that the appellant would be destitute and therefore had reached the risk of an Article 3 breach. Mr Saeed submitted further that the respondent's identity document was out of date. Without a CSID he could not travel away from Baghdad and in order to obtain one a number of other documents were required or that he would require the attendance of male relatives at the civil registry armed with their own CSID and the willingness to vouch for the respondent. He submitted that in this case given what had happened in Fallujah it is not clear whether the records needed

to be accessed to secure a CSID at all. Further, he submitted that based on the most up-to-date country guidance in SMO, KSP and IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 that the respondent would qualify for a humanitarian protection (see paragraph 7 to 19) and thus the appeal should be allowed on that basis.

27. I bear in mind that this is expressly a reasons challenge. I bear in mind also as was noted in KB (Jamaica) that care has to be exercised in overturning decisions of the first fact-finding of the First-tier Tribunal.

28. The challenges to the judge's findings fall into two categories:

    (a) That the reasoning behind the finding that the respondent would not be able to get a replacement CSID is flawed; and,

    (b) That the basis on which there would be a breach of Article 3 of the Human Rights Convention is not properly explained.

29. There is, I consider, a sufficient basis in the grounds of challenge to permit the Secretary of State to argue that insufficient reasons were given regarding the inability to obtain a CSID in the sense that there were, as Mr Whitwell submitted, no findings regarding relevant members of the family. That does not, however, mean that the error was material.

30. In fairness to the Secretary of State I do note that the judge, having made findings with regard to the respondent's credibility, does not make any specific findings, although this was clearly put in issue in the refusal letter which stated it had not been shown that the respondent is still in contact with his family. The only findings that the judge reached is with regard to the respondent's account as to the timing and circumstances of his departure from Fallujah. He does accept that he left Fallujah but does not make any findings as to when, nor does he make any findings as to whether there was any truth in the account of the family having left with him. That said, it is evident that the appellant has been in the United Kingdom since at least 2009. But it is necessary to have regard to what is said about the CSID and how it can be obtained as is set out in AA (Iraq) and AAH (Iraq). It is worth noting also that the issue first arose in MK (Iraq) CG [2012] UKUT 126. Irrespective of whether this is still country guidance there is nothing to suggest that the details that he gave as to how one replaces a lost CSID is to be done. The headnote makes it clear that the general position is they are required to return to their home area to do so, in this case Fallujah. That is implicit also in AA and AAH hence the need for personal attendance by family members who can vouch for an individual and who also have a valid CSID (see AAH at paragraph 179).

31. In considering the then relevant Country Guidance at the time of the decision, it must be recalled that Fallujah is in Anbar (see paragraphs 104 and 105 of AA (Iraq)). It is also necessary to consider paragraph 25 of AAH:

25. Dr Fatah states to his knowledge the documents that must be produced in order to apply for a CSID within Iraq are:

i) Application form
ii) Birth certificate
iii) A 'housing card' or a letter from the local council confirming the applicant's residence
iv) (In the IKR) a recommendation from the *mukhtar*
v) PDS card
vi) Two photographs of the applicant (or in the IKR, four)

This information broadly accords with that reproduced by Landinfo (December 2015), who confirm this list but add that the ID card of a close relative would also be required. Dr Fatah has been told by practitioners in the IKR that a person returned to Iraq from abroad who wishes to replace his CSID would, before making his application, also require a certificate from the Ministry of Foreign Affairs.

32. The judge rightly directed himself at [41] in respect of the relevant country guidance. That he applied that guidance is implicit from what he says at 42 to 47 although it might have been easier if this had been clearer more clearly expressed.

33. The judge states at [46] the difficulties in obtaining a CSID. It is evident the judge considered, rightly, that the respondent would have significant difficulties in actually going from Baghdad to Fallujah to present himself. Even with the assistance of relatives. That is consistent with the then applicable guidance on contested and formerly contested areas, and travel without documents. It is also evident that the respondent would not be able to provide the documents listed by Dr Fatah to be able to get the CSID on his own.

34. It does appear at [51] that the judge found the respondent's family and friends would not be in Baghdad but would be in and around Fallujah. There is little or no reasoning behind that, but it is to be recalled that the respondent had been out of Iraq for at least 10 years by that point, living on the margins in various countries.

35. Absent a finding about family contact, is the judgment still sustainable? It is evident that the judge did not discount all of the respondent's account as at [35] he accepted that he had spent a large number of years living on the margins of society in countries including Libya.

36. It is in that context also relevant to consider whether, even if the respondent were in contact with relatives, he could obtain a replacement CSID.

37. In AA (Iraq) at point 13 of the country guidance it says this:

13. P's ability to obtain a CSID is likely to be severely hampered if P is unable to go to the Civil Status Affairs Office of P's Governorate because it is in an area where Article 15(c) serious harm is occurring. As a result of the violence, alternative CSA Offices for Mosul, Anbar and Saluhaddin have been established in Baghdad and Kerbala. The evidence does not demonstrate that the "Central Archive", which exists in Baghdad, is in practice able to

provide CSIDs to those in need of them. There is, however, a National Status Court in Baghdad, to which P could apply for formal recognition of identity. The precise operation of this court is, however, unclear.

38. In that context, whether or not the appellant had relatives is of limited assistance or relevance in determining whether or not he could obtain a CSID and accordingly, it not being suggested that the judge erred in concluding by following AAH that it would be difficult to return to Fallujah which is in Anbar, that part of the decision is sustainable.

39. The question then becomes whether on that basis the appellant is at risk of an Article 3 breach; there is no effective challenge to the findings at paragraph 51 of the decision.

40. The judge does, however, appear to have misunderstood Section E quoted in paragraph 52. A careful reading of AAH makes it clear that this relates to entry into the IKR. But this is not a point prayed in aid in the grounds by the Secretary of State. There is no challenge to the fact that the respondent is Sunni and of Kurdish origin and came from the area of Fallujah which, as is accepted, was under Daesh control for a significant period. As was noted in BA (returns to Baghdad) Iraq CG [2017] UKUT 18, at [107]:

Individual characteristics, which do not in themselves create a real risk of serious harm on return to Baghdad, might amount to a real risk for the purpose of the Refugee Convention, Article 15(c) of the Qualification Directive or Article 3 of the ECHR if assessed on a cumulative basis. The assessment will depend on the facts of each case.

41. Similarly, in AA (Iraq)

151. The Respondent's position is that, save for those returnees in the category identified below, it would in general be reasonable, and not unduly harsh, to expect a person to relocate to Baghdad city if there is an Article 15(c) risk in their home area. The exception to this generality is identified by the Respondent as being:

> "A person returned to Iraq who was unable to replace their Civil Status ID Card or Nationality Certificate [who would] be likely to face significant difficulties in accessing services and a livelihood and would face destitution which is likely to reach the Article 3 threshold. [6]"

152. Having considered the entirely of the evidence before us, we have come broadly to the same conclusions as the Respondent - save that we observe that there will undoubtedly be persons who do not have a CSID and who have been returned with a passport or an expired passport who will not be destitute in Baghdad, and for whom there are no other reasons why relocation there would not be reasonable. In this regard, whilst Dr Fatah provides evidence, which we accept, that a CSID is required to access income/financial assistance, employment, education, housing, a pension, and medical committee documents, there will be persons who do not have a CSID but who nevertheless have access to an adequate support mechanism in Baghdad; for example those persons with family or friends in Baghdad who are willing and able to provide such assistance to them. Such matters will,

of course, require careful consideration of the evidence, and a reasoned finding to be made, in each case.

153. The number of persons for whom it is not reasonable, or for whom it would be unduly harsh, to relocate to Baghdad is, we think, likely to be small.

42. This is implicitly the guidance followed by the judge at [55] of his decision.

43. Pulling all these strands together, while the reasoning could be clearer, it is adequate and sustainable when seen through the lens of the relevant country guidance; it is clear that the judge followed it, and the Secretary of State is also fully aware of that guidance. It is sufficiently clear that the judge concluded that there would be an article 3 breach, following Country Guidance and that his finding that the respondent would not be able to obtain a CSID was sustainable, even if the findings as to family contact were not sustainable given the other difficulties there would be in the respondent attending with those relatives in Fallujah, even assuming that the records there were extant.

44. Given it was common ground before the judge that article 8 was not being pursued, it is sufficiently clear that the appeal was allowed on the grounds that the respondent's article 3 rights would be breached and that the reason for that followed country guidance. To that extent, there is no merit in the observation that there is no proper explanation for the judge's decision to allow the appeal on human rights grounds.

45. But what that does not do is explain why if there was an Article 3 risk, as Resident Judge Phillips noted, that such a threat did not engage the Refugee Convention. Further, an Article 3 breach in these circumstances would inevitably amount to serious harm within Article 15(b) of the Qualification Directive which would in itself entitle the respondent to humanitarian protection.

46. Further, and as Mr Whitwell accepted, the respondent would appear to be entitled to humanitarian protection if the finding of an article 3 breach is sustained.

47. Accordingly, for these reasons, I conclude that the decision of the First-tier Tribunal did not involve the making of an error of law as averred by the Secretary of State.

48. I do, however, observe that as Judge Phillips noted, the respondent ought to have been recognised as being entitled to humanitarian protection

49. For that reason, I issued a decision on 15 December 2020, proposing that the appeal be disposed of by substituting a decision allowing the appeal on humanitarian protection grounds rather than human rights grounds, stating my preliminary view that the findings of the First-tier Tribunal should be upheld, save for the finding that the respondent is not entitled to humanitarian protection and that a fresh decision should be issued, allowing the appeal on humanitarian protection grounds, without the need for a further hearing.

50. I also directed that any objection to that proposed course of action must be made in writing within 14 days of the issue of this decision.

51. The respondent has agreed to the proposed course of action; the Secretary of State has made no response.

52. Accordingly, I find that the decision of the First-tier Tribunal did not involve the making of an error of law, save for the finding that the appeal should be allowed on human rights grounds, rather than humanitarian protection grounds. Subject to that substitution, the decision of the First-tier Tribunal is upheld

Notice of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

2. For the reasons given above, I substitute the First-tier Tribunal's decision with a decision allowing the appeal on humanitarian protection grounds, as well as on human rights grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 4 March 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul