IAC-HW-AM-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/02816/2012

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 September 2015	**On 11 November 2015**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

H N N
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Bandegani, Counsel, instructed by Kesar & Co Solicitors
For the Respondent: Mr M Clark, Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the determination of First-tier Tribunal Judge Brenells promulgated on 17 April 2012, dismissing his appeal against the decision of the respondent made on 2 March 2012 to refuse to vary his leave and to refuse his claim for asylum.

Summary of Issues

2. The appellant is a citizen of Iraq of Sorani Kurdish origin and is from Kirkuk in Northern Iraq. His case is that he has no family left in Iraq other than a mother, whose whereabouts are unknown; is unable to obtain either with the assistance of the Iraqi Consulate in London and/or any contacts (which he does not have) in Iraq the necessary documents to return there or to the area under the control of the Kurdish Regional Government ("KRG"). He maintains also that he now has a well-founded fear of persecution in his home area of Kirkuk; that it would be unduly harsh to expect him to return either to Baghdad or to the KRG which, in any event, he would be unable to reach.

3. Although the respondent accepts that the applicant has a well-founded fear of persecution in his home area it is not accepted that he is unable to acquire the necessary documents to permit his return to Iraq. Although it is also accepted that he could not return to Baghdad it is submitted that it is open to him to relocate to the KRG and that it would not be unduly harsh to expect him to do so.

History of This Case

4. Given that more than three years have elapsed since this matter was heard by the First-tier Tribunal and given the significant changes in the situation in Iraq since then, it is, helpful to set out in some detail the history of this appeal.

5. The appellant was born on 1 March 1994. He fled Iraq in December 2008, travelling overland via Turkey, Greece and France to the United Kingdom, arriving on 28 June 2009 the date at which he claimed asylum. His application for asylum was refused on 7 August 2009 but given his age he was granted discretionary leave to remain until 31 August 2011. His appeal against the decision to refuse asylum was dismissed in a hearing by First-tier Tribunal Judge Thiew, promulgated on 6 October 2009. On 25 August 2011 the applicant applied for further leave to remain in the United Kingdom, maintaining his well-founded fear of persecution in Iraq and submitting that his removal there would be in breach of the Refugee Convention and also Articles 2, 3 and 8 of the Human Rights Convention.

6. First-tier Tribunal Judge Brenells did not find the appellant to be a credible witness and, basing his decision primarily on the decision of First-tier Tribunal Thieu dismissed the appeal on all grounds.

7. Permission to appeal was granted on 14 May 2012 by First-tier Tribunal Brunnen and the matter then came before Deputy Upper Tribunal Judge Wood on 25 September 2012. Judge Wood's decision in which he determined that there was an error of law is attached at Annex 1. The judge noted [7] that it was no longer being maintained that the appellant was at risk of being a victim of a blood feud, and that the issue was

whether the judge had properly considered whether the applicant was entitled to Humanitarian Protection on the basis of Article 15(c) of the Qualification Directive, that is the appellant was at serious risk of indiscriminate violence. The judge concluding [9] that the judge had erred materially in his consideration for Article 15(c) and that:-

> "None of the findings concerning the issues of Humanitarian Protection and Articles 2 and 3 of ECHR can stand. It was not suggested the FTTJ's treatment of Article 8 was in any way erroneous, and therefore, for the reasons I have already outlined above, his findings in relation to the Refugee Convention and Article 8 should remain undisturbed."

8. Directions were subsequently given as to how the matter was to proceed but, however, the matter was subsequently adjourned thus country guidance on this situation in Iraq as regards Article 15(c) was awaited.

9. By way of a transfer order, the matter came before me initially on 12 January 2015 when it was adjourned and again on 7 September 2015.

Variation of Judge Wood's Order

10. To a significant extent, Judge Wood's decision has been overtaken by events. Since it was written, the situation in the appellant's home area of Kirkuk has changed dramatically due to the activities of ISIS the security situation across the whole of Iraq has also changed.

11. It was agreed between the parties that it would be necessary to vary Judge Wood's directions as to how the appeal should proceed given the concession by the respondent that as someone who was not affiliated with ISIS the applicant would be at risk of persecution in his home area, that the issue of the Refugee Convention not being in issue would need to be revisited.

12. On reading the whole of Judge Wood's decision, it is clear that when he refers to the "Refugee Convention issues" he is in fact referring to the facts on which it is said the appellant was, on his case in 2012, at risk, that is the blood feud. The issue of persecution by ISIS forces has after the decision of Judge Wood it would accordingly be in the interest of justice to permit this issue to be considered in a remaking of the decision. Similarly, it was accepted that in addition to this it would be necessary to consider the issue of whether it was unduly harsh to expect the appellant to relocate within Iraq; it was also conceded that, were I not to find that the appellant was a refugee or was entitled to Humanitarian Protection, that it would be necessary, given the effluxion of time since 2012, to revisit the issue of Article 8.

13. As noted above, much of what is in dispute has been narrowed between the parties and I did not hear evidence from the appellant. I did, however, hear submissions from both representatives and I had before me the

following documents which were identified by the parties as being central to the issues in this dispute:-

(i) Expert report from Dr Rebwar Fatah, 28 August 2015.

(ii) Iraq: Internal Relocation (Technical Obstacles), 24 December 2014.

(iii) Iraq, Security Situation in Baghdad, Southern Governorates and the Kurdistan Region of Iraq (KRI).

(iv) Iraq, Humanitarian Situation in Baghdad, the South (Including Babil) and the KRI, June 2015 (republished July 2015).

14. In discussion between the representatives it was agreed, following what is said in the Humanitarian Situation Report at 2.4.6 the applicant would have a well-founded fear of persecution in his home area, it being a "contested" area. It was accepted also that he would need specific documentation in order to reach the KRG and to be accepted in there.

15. It is accepted also that the two documents necessary – an Iraqi nationality certificate ("INC") and the Civil Status Identity Card ("CSID") would be necessary for the appellant on return as otherwise he would be likely to face significant difficulties in accessing services and livelihood and would face destitution which would breach the Article 3 threshold (see internal relocation at 1.3.17).

Submissions

16. Mr Bandegani relied on the report of Dr Fatah in particular at paragraphs 183 to 184 to the effect that on the facts of this case, given the appellant's age when he left Iraq and lack of access to any support there, that it would be difficult if not impossible for him to replace either the CSID or INC. He submitted also that it was accepted by the Home Office in the guidance (1.3.27) that it would be unreasonable to expect a person to reacquire documents from their place of origin through a proxy. He submitted also that it would not be possible for the appellant to obtain help in Baghdad as he has no original or copies of the relevant documents and no one in Iraq to assist him, he does not know the book reference number required and no money and would therefore be unable to obtain an INC or CSID. It was accepted also (see paragraph 2.5.12) that the applicant could not travel to the Kurdish area except by air which, he could not do. Mr Bandegani submitted that there was no evidence within the documents provided by the Secretary of State either that it would be possible to obtain the documents before travelling to a Kurdish area. Mr Bandegani submitted also that, relying on paragraph 2.5.12 internal relocation document that admission was a discretion, that the grant of stay to those not from the Kurdistan region being temporary. Reference was also made (2.5.19 to 2.5.27) on the restrictions put in place on those who were not from the KRI and particularly who did not have a sponsor in the KRG as well concerns about those from the contested areas.

17. Mr Clark submitted that the appellant would be able to obtain the necessary documents and relying on the internal relocation report at 2.5.7 to 2.5.12 it is likely he will be able to get a permit although it was accepted, contrary to Dr Fatah's less generous interpretation of the evidence, that the appellant would not be able to return to a contested area he did, however, accept that the applicant could not on the evidence as accepted be returned to Baghdad, the safest area being for him the KRG.

18. Relying on the material at 1.2.27 to 1.28 as well as 1.2.41 Mr Clark submitted that the applicant would in this case be able to obtain the necessary documentation with consular assistance from the United Kingdom and would be able to obtain other documents through UNHCR and other assistance on return. He submitted that it was apparently arbitrary that he would be entitled to enter the KRG and on what basis, temporary or otherwise, accepting on the basis of 1.3.41 however accepting that being from a contested area it may be difficult for the applicant to get permanent residence given the risk of terrorism identified by the KRG.

19. In reply Mr Bandegani submitted that the respondent's position with regards to the availability of documents was not sustainable but was supported by the evidence which was vague and not properly sourced. He submitted that in reality the applicant would not be able to get the relevant documents in Baghdad and it was clear on the basis of the evidence put forward by Dr Fatah, none of which was disputed by the respondent that it would be unduly harsh to expect this appellant to return to the Kurdish area.

20. I reserved my decision. Subsequent to the hearing and before I had finalised my decision, the Upper Tribunal handed down its decision in **AA (Article 15 (c)) Iraq CG** [2015] UKUT 144. In the light of that I gave directions to both parties to make submissions, if so advised. The respondent has made no submissions.

Findings

21. It is not in issue that the appellant is at risk within his home area of Kirkuk. It is also accepted by the respondent that he would be returned to Baghdad and that this would not, on the particular facts of this case be reasonable given the lack of any family or other connections with Baghdad, his inability to speak Arabic and, as Dr Fatah identified, the lack of any real Kurdish community with which he would have links of language and/or faith. The question then is whether it would be reasonable to expect him to relocate to the KRG or whether it would be unduly harsh to expect him to do so.

22. In this context I note from **AH (Sudan)** [2007] UKHL 49 at [5]:

> "5. In paragraph 21 of my opinion in *Januzi* I summarised the correct approach to the problem of internal relocation in terms with which all my noble and learned friends agreed:
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> > "The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so ... There is, as Simon Brown LJ aptly observed in *Svazas v Secretary of State for the Home Department*, [2002] 1 WLR 1891, para 55, a spectrum of cases. The decision-maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls. ... All must depend on a fair assessment of the relevant facts."
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> Although specifically directed to a secondary issue in the case, these observations are plainly of general application. It is not easy to see how the rule could be more simply or clearly expressed. It is, or should be, evident that the enquiry must be directed to the situation of the particular applicant, whose age, gender, experience, health, skills and family ties may all be very relevant. There is no warrant for excluding, or giving priority to, consideration of the applicant's way of life in the place of persecution. There is no warrant for excluding, or giving priority to, consideration of conditions generally prevailing in the home country. I do not underestimate the difficulty of making decisions in some cases. But the difficulty lies in applying the test, not in expressing it. The humanitarian object of the Refugee Convention is to secure a reasonable measure of protection for those with a well-founded fear of persecution in their home country or some part of it; it is not to procure a general levelling-up of living standards around the world, desirable though of course that is."

23. The decisions in **MK** and **HM and Others** were both considered by the Court of Appeal in **HF (Iraq) & Others [2013] EWCA Civ 1276** which at paragraphs [95] to [101] considers the respondent's policy of not returning to Baghdad those who do not have the necessary documentation given that they would not be accepted by the Iraqi government. I do, however, consider, despite Mr Bandegani's submissions, that whether or not the applicant would be able to obtain the necessary documents is a matter which I should decide before considering whether he would be at risk on return. In **HF** at [101] Elias LJ held:-

> "In my judgment, this analysis is correct. I accept, as Mr Fordham submits, that it would be necessary for the court to consider whether the appellants would be at risk on return if their return were feasible, but I do not accept that the Tribunal has to ask itself the hypothetical question of what would happen on return if that is simply not possible for one reason or another. Section 67 of the 2002 Act envisages that there may be practical difficulties impeding or delaying making removal arrangements, but those difficulties do not alter the fact that the failed asylum seeker would be safe in his own country and therefore is in no need of refugee or humanitarian protection. I agree with the Secretary of State that the *sur place* cases are distinguishable because there the applicant could be returned and would be at risk if he were to be returned. They are not impediment to return cases."

24. On that basis, I do not consider that it is necessary for me to engage with the question of whether or not the applicant would be able to obtain the necessary documentation as, for the reasons set out below, I consider that even were these technical obstacles overcome and he were able to travel to the KRG, it would be unduly harsh to expect him to do so.

25. As Mr Clark accepted, the evidence produced by the respondent as to what the appellant would encounter on return to the KRG is lacking in some detail.

26. Putting aside the technical difficulties that the appellant may have in reaching the KRG, I must consider what is likely to happen on return. No issue has been taken with Dr Fatah's evidence on this point.

27. It is accepted by the respondent in her most recent report on Humanitarian Protection (which was not considered in AA as it post-dates the haring in that case) section at 2.4.3 while the majority of internally displaced persons ("IDP") are accommodated in private settings a minority are in IDP camps although this number is greater in one of the KRG provinces, Dahuk the circumstances appear to vary considerably and it is stated 2.1.1 "In particular decision makers need to consider whether the person is from a contested area and therefore will be an IDP, since this is likely to have impact on the support they will be able to access in the area of relocation."

28. It is evident from Section 8 of the report that there is significant variation in living conditions within the various IDPs. It appears from paragraph 8.4.1 to 8.4.10 that there are significant shortfalls in the appellant asking for assistance. In his report at [138] to [140] Dr Fatah states:-

> "138. However, there exist barriers to the movement of Iraqi Kurds from the 'disputed territories' into the KRI.
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> 139. I interviewed an Asayesh officer who works in the Asayesh service in Sulaimaniyah. He is responsible for the 'fundamentalist file'. The Asayesh officer stated that the Kurds from the disputed territories can visit KRI as tourists but they could obtain formal residence or transfer their food rations cards either. The Asayesh officer stated that it was a KRG policy to keep Kurds in the disputed territories in order to main what the KRG preserves to be the Kurdish identity of those areas.
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> 140. The appellant is from Kirkuk, a city which sits in the disputed territories and as such, he is liable to fall foul of the KRG policy to maintain the Kurdish presence in the disputed territories. ...
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> 147. Although as a Kurd [the appellant] would not have to overcome a hurdle of providing a sponsor in order to enter IKR, and, for the same reasons, is considered unlikely to face the arbitrary procedures existing in ... points, it is clear from the 'disputed territories' it would not be possible for Mr Namiq [the appellant] to relocate to IKR with any permanency."

29. Given that it is accepted that he has no connections with the KRI other than being Kurdish and speaking the language, has no family support and

connections, and has only one relative in Iraq, whose whereabouts are unknown, as well as the fact that he left the country seven years ago as a teenager, given the clear evidence of significant food shortages set out in the Country Information and Guidance on the humanitarian section as well as the likelihood that he will not obtain a permanent residence and therefore would place restrictions on being able to work I consider that on the particular facts of this case it would be unduly harsh to expect the appellant to relocate to the KRG given these factors when taken cumulatively. Given the acceptance that relocation to Baghdad would not be viable and given the evidence also of Dr Fatah that relocation to anywhere else other than the KRG or Baghdad would not be realistic, I am satisfied that there is nowhere in Iraq to which the applicant could reasonably be expected to relocate and that it would be unduly harsh to expect him to do so.

30. Accordingly, for these reasons, I find that the appellant has established that he has a well-founded fear of persecution in Iraq and to return him there would be in breach of the United Kingdom's obligations pursuant to the Refugee Convention. I therefore allow the appeal on that basis. Further, and in the alternative, for the same reasons I found that to remove him they would be in breach of Article 3 of the Human Rights Convention.

31. As I have found that the applicant is entitled to refugee status he is by definition not entitled to humanitarian protection.

32. In the circumstances also, it is unnecessary for me to make any findings with respect to Article 8 of the Human Rights Convention.

33. I maintain the anonymity order made by the First-tier Tribunal.

Summary of Conclusions

(1) The determination of the First-tier Tribunal did involve the making of an error of law and it is set aside.

(2) I remake the appeal by allowing the appeal on asylum and human rights grounds.

Signed Date: 10 November 2015

Upper Tribunal Judge Rintoul

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date: 10 November 2015

Upper Tribunal Judge Rintoul