IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11194/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 June 2017	**On 29 June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

HMM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Hodson, Elder Rahimi Solicitors (London)
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The appellant in this case is a male citizen of Iraq who claimed to have been born on 1 July 2000 and therefore claimed to be aged 16 at the hearing. The appellant had appealed against the respondent's decision on 29 September 2016 to refuse the appellant's asylum claim (although as a minor the appellant was granted leave to remain and the respondent indicated he would not be returned until contact had been made with his family or until he turned 18).. In a Decision and Reasons promulgated on 20 April 2017 following a hearing on 14 November 2016 Judge of the First-tier Tribunal M S Emerton dismissed the appellant's appeal on all grounds,

nevertheless finding that the appellant's date of birth was 1 July 2000 and that he was aged 16 as claimed.

2. The appellant appealed on the following grounds:

Ground 1 – that there was a misdirection in relation to returnability and humanitarian protection; **AA (Article 15(c)) Iraq CG** misunderstood; and

Ground 2 – failure to consider asylum claim on alternative basis of membership of particular social group on which the appeal ought to succeed on the facts as found.

Error of Law Discussion

3. Although the grounds for permission to appeal at paragraph 5 alluded to the fact that there was a five month delay in the judge promulgating his decision, as I indicated at the hearing, there was no specific ground as conceded by Mr Hodson on this basis and in any event no nexus has been established between the delay and the alleged errors, despite the vague accusations made at paragraph 5 that the First-tier Tribunal had forgotten or had not taken notes on some of the oral submissions and points made by the legal representatives at the hearing (**Arusha and Demushi (deprivation of citizenship – delay) [2012] UKUT 80 (IAC)** applied). Mr Hodson withdrew this issue, properly in my view.

4. I am of the view that the appellant's first ground in relation to humanitarian protection is made out. I am satisfied that the judge's reasoning discloses a misreading of the country guidance in relation to Article 15, namely **AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC)**. The judge made detailed findings of fact in this case including that the appellant was aged 16 as claimed. However, the judge did not accept that the appellant had established that he faced any risk from the family of Rasoul and was satisfied that the asylum claim could not succeed on that basis. The judge went on to consider at [36] that there were references to the appellant being at risk as a Sunni Kurd but these were not relied on and seemed to have no basis. The judge found at [37] that:

> "I do accept that there would have been risk from ISIS, once they took over the area of the appellant's village, and entirely appreciate why he would feel unsafe. However, I agree with the respondent that a generalised risk from ISIS does not constitute a Convention reason."

5. Mr Hodson referred me to paragraph 18 of the Reasons for Refusal Letter where the respondent had set out that the appellant had claimed he had fled Iraq because ISIS took over his village and that he feared that he would be assumed on return to have a political opinion and that it was accepted that this reason for claiming asylum may be on the basis of an imputed political opinion which would engage the 1951 United Nations Convention relating to refugees. However that ground was not in the appellant's grounds for permission to appeal and is not therefore before

me. In any event I am satisfied that the judge adequately addressed this at [37] where he did not accept that in the appellant's case this would constitute a Convention reason and although his reasoning is brief on this issue, it is adequate. This was not substantively challenged in the grounds for permission to appeal. The judge went on to find at [38] that he did not accept that the appellant had established even to the low standard of proof required that he would be at risk for a Convention reason and at [39] that there were "no facts capable of substantiating the asylum claim, which must accordingly be dismissed."

6. However, the judge made a number of positive findings, including that the appellant was 16. The judge also accepted, at [31], that the appellant's parents were dead and that he had lost contact with his uncle in Iraq and that if they were alive it was by no means clear where they were living. The judge went on to make findings that the appellant was an unaccompanied minor and that it would not be reasonable to expect him to make his way to the IKR and noted at [50] that he had been provided with no evidence suggesting that it would be practicable and in the absence of any evidence suggesting family members in the IKR would be able to provide assistance the judge did not find that this proposed solution would be reasonable. The judge also found that that position under Section 55 of the Borders, Citizenship and Immigration Act 2009 strengthened this argument and that it would not be in the appellant's best interests to subject him to this process.

7. Although there was some discussion at the hearing before me that the judge was exercised about the question of when he should consider the situation in relation to return, it was not disputed by the parties that the judge made no error in his subsequent findings and that he had to consider the situation that the appellant would be returned at the date of the hearing despite the fact that this was not what would in practice happen.

8. The judge's findings of fact were not substantively challenged. Mr Hodson submitted that the judge had failed to consider that the appellant would qualify for asylum on the facts as found by the First-tier Tribunal Judge as a member of a particular social group, as a minor and an orphan whose home area is under the control of ISIS. Mr Hodson relied on **LQ (Age: immutable characteristic) Afghanistan [2008] UKAIT 00005**, which established that age can be a basis of membership of a particular social group. Mr Hodson also relied, by analogy, on **AA (unattended children) Afghanistan CG [2012] UKUT 16 (IAC).** It was submitted that the vulnerabilities of the appellant to violence from ISIS and the attendant risk of serious harm on account of being an orphaned child apply equally to the appellant's circumstances in his home area of Iraq in making internal relocation unduly harsh as they would in the circumstances of unattended children in Afghanistan.

9. I am of the view that given the judge's particular findings of fact that it was not **Robinson** obvious, as submitted by Mr Hodson, that the appellant

would be at risk for a Convention reason as a minor child with no family and at risk in his home area. **AA (unattended children) Afghanistan CG [2012] UKUT 16 (IAC)** was allowed on refugee convention grounds on the basis of that appellant's anti-Taliban political opinion, whether actual or imputed. The First-tier Tribunal in this appeal considered and rejected, at [37] that the generalised risk from ISIS would constitute a convention reason for this appellant (and the judge evidently had in mind that this appellant is a minor). There was no error in that approach.

10. However, as I indicated at the hearing I am satisfied that the judge erred in his approach to Article 15(c). Whilst the judge indicated that if the appellant was returnable he would be entitled to humanitarian protection, the fact that the appellant's return is not currently feasible as indicated in the refusal letter, is not authority for humanitarian protection claims being refused in every case, as the judge appears to have concluded.

11. As set out subsequently in **R (on the application of H) v The Secretary of State for the Home Department (application of AA (Iraq CG) IJR [2017] UKUT 00119 (IAC)**, at paragraph 41:

> "Secondly (and crucially), a person whose return is not currently feasible may, nevertheless, still succeed in a claim to international protection, if and insofar as the claim is based on a real risk of harm, which arises otherwise than by not having the requisite documentation."

12. Ms Isherwood accepted that she was in difficulties in relation to the judge's dismissal of the appeal on humanitarian protection grounds, given his (unchallenged) findings of fact. That has to be the case. The judge's findings were not that the harm was on the basis of a lack of documentation but rather on a variety of factors including his age, that he did not formerly come from the IKR, that there was no evidence suggesting that his uncle and aunt, who appeared to be the only sort of close family members, had relocated there, that the appellant spoke Kurdish and little Arabic and that he had no passport. Taking these factors cumulatively therefore, the risk of harm to the appellant was not solely based on his lack of documentation.

13. Therefore I am satisfied that although the appellant cannot succeed under the refugee convention, the claim must succeed under the Qualification Directive, Article 15(c).

Conclusion

14. The decision of the First-tier Tribunal contains an error of law such that the conclusion is set aside. All findings of fact are preserved. I remake the decision as follows:

Notice of Decision

15. The appellant's asylum appeal is dismissed.

16. The Humanitarian Protection appeal is allowed under Article 15(c) of the Qualification Directive.

17. The appeal is allowed under Articles 2 and 3 on the same basis.

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 his 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 Dated: 28 June 2017

Deputy Upper Tribunal Judge Hutchinson

TO THE RESPONDENT
FEE AWARD

No fee award application was made or is payable.

Signed Dated: 28 June 2017

Deputy Upper Tribunal Judge Hutchinson