Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11568/2016

THE IMMIGRATION ACTS

Heard at Newport (Columbus House)	**Decision & Reasons Promulgated**
On 7 September 2017	**On 3 October 2017**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

K M A
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Fitzsimons instructed by Migrant Legal Project (Cardiff)
For the Respondent: Mr I Richards, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or Court directs otherwise, no report of these proceedings shall directly or indirectly identify the Appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Iraq who was born on [ ] 1983. He is a Kurd and comes from Kirkuk.

3. He arrived in the United Kingdom and was arrested on 21 February 2003 having been found in the back of a lorry. He claimed asylum and that application was refused on 7 April 2004. However, on 16 December 2009, the appellant was granted leave to remain as the unmarried partner of a person settled in the UK. That leave was valid until 16 November 2011.

4. On 22 October 2010, the appellant was convicted at the Bristol Magistrates' Court of possessing a class A drug and fined £75. On 15 February 2011, he was convicted at the Bristol Crown Court on two counts of using false instruments and two counts of knowingly being in possession of false ID documents. On 10 March 2010, he was sentenced to a total of twelve months' imprisonment. As a result, on 12 April 2011 the appellant was notified by the Secretary of State that he was liable to be deported. On 15 June 2011, the Secretary of State made a decision to deport the appellant to Iraq.

5. The appellant appealed that decision to the First-tier Tribunal. The First-tier Tribunal dismissed that appeal on asylum and humanitarian protection grounds and under Art 8 of the ECHR. The Tribunal made an adverse credibility finding and did not accept the appellant's account that he was at risk on return because of his father's involvement with the Ba'ath Party and because he had refused to join the party. The Tribunal also found that the appellant could not succeed on the basis of Art 15(c) of the Qualification Directive (Directive 2004/83/EC) as the level of indiscriminate violence in his home area did not reach the required threshold under Art 15(c). Finally, the Tribunal found that the appellant's removal would not be a disproportionate interference with his private life under Art 8 of the ECHR.

6. On 17 May 2012, the Upper Tribunal granted the appellant permission to appeal solely on the ground that the judge had arguably failed properly to consider Art 15(c) of the Qualification Directive. Subsequently, the Upper Tribunal (UTJ Spencer) concluded that the First-tier Tribunal had erred in law in its approach to Humanitarian Protection and its decision was set aside. Following that decision, the Upper Tribunal (UTJ Grubb) remade the decision in respect of Art 15(c) dismissing the appellant's claim on that ground. The FtT's decision to dismiss the appellant's appeal on asylum grounds and Art 8 stood unchallenged.

7. Following further submissions, on 13 October 2016, the Secretary of State made a further decision refusing the appellant's claims for asylum and humanitarian protection and under Art 8 of the ECHR.

The Decision of the First-tier Tribunal

8. The appellant appealed against that decision to the First-tier Tribunal. In a determination promulgated on 30 January 2017, Judge O'Rourke dismissed the

appellant's appeal on all grounds. Judge O'Rourke rejected the appellant's asylum claim based upon his father's involvement with the Ba'ath Party. Further, departing from the country guidance decision in AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC), the judge found that there was no longer an Art 15(c) risk in the appellant's home area of Kirkuk. In any event, the judge found that the appellant could internally relocate to the IKR. Finally, the judge concluded that the appellant had not established a breach of Art 8 of the ECHR.

The Appeal to the Upper Tribunal

9. The appellant sought permission to appeal to the Upper Tribunal on a number of grounds challenging the judge's adverse finding in respect of the appellant's asylum claim; the judge's departure from AA and his conclusion that the appellant could internally relocate to the IKR. Further, the grounds challenged the adverse decision under Art 8.

10. On 24 February 2017, the First-tier Tribunal (Judge E B Grant) granted the appellant permission to appeal on all grounds.

11. On 16 March 2017, the Secretary of State filed a rule 24 notice seeking to uphold the judge's decision to dismiss the appellant's appeal on all grounds.

12. Thus, the appeal came before me.

13. At the outset of the hearing, I raised with both representatives my involvement in the appellant's earlier appeal. Both Ms Fitzsimons, who represented the appellant and Mr Richards, who represented the Secretary of State, indicated that they had no objection to my dealing with the appellant's current appeal. I indicated that whilst I was content to deal with the error of law issue, if established any remaking of the decision should be undetaken by a different judge.

Discussion

14. First, Ms Fitzsimons challenged the judge's decision, in effect, to follow the adverse factual finding made by the First-tier Tribunal in 2012 in respect of the appellant's asylum claim based upon his father's involvement with the Ba'ath Party.

15. The judge's reasoning leading to his adverse factual finding is contained within para 21 of his determination as follows:

> "Father's Ba'ath Party Activities. This matter was fully considered in the previous FtT determination of Judge Page in 2012 [S13]. That Tribunal did not find the Appellant's account credible. It disbelieved his account of his family fleeing to Jordan, as if, as he said, he was not in contact with them, how then was he aware of this fact. It was also considered relevant that he had not appealed against the 2004 decision to reject his asylum claim, based on the same grounds. His knowledge as to his father's position and activities was considered very limited. There was no evidence that he had been subject to any personal threat, or any evidence to indicate that he would continue to be of adverse interest after so many years had passed, under a new regime. His appeal to the UT did not challenge that decision. There is no new evidence before me to permit me to come to

> any other conclusion. The Appellant's witness evidence is the same as that considered by the previous FtT and he has provided no additional documentary or objective evidence to support it. Professor Joffé comments [AB38] that there were attacks on Ba'athists in Kirkuk in 1991 and that it was plausible, if he was the son of a Ba'ath Party member that the Appellant would have been approached by the Fedayeen, but accepts that there is no independent evidence of these events. We are left, therefore, with the Appellant's evidence on this issue which was found wanting by the previous FtT and accordingly, therefore that decision must stand, i.e. that the reason he gives for leaving Iraq and the related fear on return is not accepted."

16. Ms Fitzsimons submitted that the judge had failed to take into account the evidence of two witnesses, Mr J and Mr S in their witness statements at pages A4-A5 and A6-A7 respectively. Ms Fitzsimons relied upon the evidence of Mr S that he had been to Kirkuk and had spoken to neighbours of the appellant's family who had said that they did not know where they were and that the local Mukhtar had said that he knew the family but they were "not in the area anymore". It was wrong, therefore, for the judge to state in the concluding sentence of para 21 that there was only the appellant's evidence which was "found wanting" by the Tribunal in the earlier appeal. Ms Fitzsimons submitted that this evidence was supportive of the appellant's claim that his family had had to leave Kirkuk. Further, Ms Fitzsimons relied upon the evidence of Mr J that the reason why the appellant had not appealed the earlier Tribunal decision to reject his asylum claim was that he had not been able to find a lawyer to represent him. The appeal forms had been completed by the appellant with the help of Mr J.

17. Whilst the judge does make reference to evidence given by Mr S (and to an extent Mr J) at paras 16 and 23(i) of his determination, he does so only in the context of whether the appellant would have support from family or friends on return. I do not accept Mr Richards' submission that it was sufficient for the judge to say that he had taken into account all the "written evidence" as sufficient to demonstrate consideration of the evidence of Mr S and Mr J. The evidence of Mr J was, in large part, of less relevance than that of Mr S when the judge was considering whether, applying Devaseelan [2002] UKIAT 00702 there was evidence subsequent to the earlier tribunal's decision which might justify a different factual finding. Mr S's evidence was, despite it not directly engaging with the appellant's claim that his father was a member of the Ba'ath Party, some support for his claim that his family had lived in Kirkuk and had left and that their present location was unknown. That was, at least, relevant in applying the guidelines set out in Devaseelan to the judge's consideration of whether to depart from the "starting point" of the tribunal's earlier factual finding in the light of the evidence before him. Likewise, although perhaps with somewhat less force, the evidence of Mr J was relevant in that the earlier tribunal took into account in reaching its adverse credibility finding that the appellant had not appealed the refusal of his asylum claim in 2004.

18. I do not say that this new evidence should, or even probably would, have led the judge to reach a different factual finding. It was, however, relevant and I am unable to say, albeit with some diffidence, that the judge's factual finding would necessarily have been the same. The error was, therefore, material to that finding. Of course, it

would not be material to the judge's dismissal of the appellant's appeal on asylum grounds if his decision in respect of internal relocation was sustainable. However, for the reasons I shall give shortly, that is not the case.

19. Secondly, Ms Fitzsimons submitted that the judge had failed to give sufficient reasons, including for rejecting the evidence of Professor Joffé, in departing from the country guidance case of AA in para 22 of his decision concluding that although Kirkuk remained a "contested" area, the level of indiscriminate violence no longer reached the threshold required to establish a claim for humanitarian protection under Art 15(c) of the Qualification Directive. Ms Fitzsimons submitted that the judge's reasoning in para 22 focused unduly narrowly upon the risk of civilian casualties; wrongly characterised Professor Joffé's evidence that there were "long-term ongoing security concerns" as being "merely speculation"; and failed properly to take into account the appellant's individual circumstance in Kirkuk (including the absence of any family) applying the 'sliding scale' adopted by the CJEU in Elgafaji v Staatssecretaris van Justitie [2009] 1 WLR 2100 at [39].

20. Whilst Mr Richards did not formally concede the points raised by Ms Fitzsimons, he acknowledged that he was in some difficulties in arguing that the judge was entitled to depart from the country guidance in AA as it had been – at least in this respect – approved by the Court of Appeal in AA (Iraq) v SSHD [2017] EWCA Civ 944. He acknowledged that, therefore, the guidance in relation to Kirkuk remained undisturbed despite the Court of Appeal effecting an amendment to the country guidance promulgated by the Upper Tribunal (but not relevant to this appeal) based upon a concession by the parties before the Court of Appeal.

21. The judge's reasoning is at para 22 of his determination as follows:

> "Kirkuk – 'contested' area/Art. 15(c). The latest CIG on the subject, 'Security situation in the 'contested' areas' of August 2016 [paragraph 3] indicates that while Kirkuk continues to be 'contested', levels of violence there have dropped [2.3.10 onwards], being much lower when compared to other 'contested' areas. Also, despite only 4% of IDPs coming from Kirkuk, of those returning to 'contested' areas, returnees to Kirkuk make up 20% of the total. As a consequence, the CIG concludes that Art. 15(c) is no longer engaged in Kirkuk, and taking account an individual's circumstances, persons can generally relocate there. ISIS has been forced out of Kirkuk and there is no indication from the expert or objective evidence that they could return there. Professor Joffé does not make that claim, merely stating [AB38] that there will continue to be long-term ongoing security concerns and posits the possibility of future Iraqi Government and KRI conflict over the town, but that is, of necessity, merely speculation. The objective evidence relied upon (as set out in paragraph 48 of the Appellant's skeleton argument) is either not up to date [CE13 – October 2014], or not included in the Bundle [CB1-10], or indicative of ongoing terrorist acts and criminality, but falling short of Art.15(c). Reverting to the CIG advice, I see nothing in particular in the Appellant's individual circumstances that dictate that he would fall outside the parameters of a person who could not return: he is in his thirties, generally physically fit, comes from the area, speaks the language and his best chance of re-uniting with his relatives will be there. I note the medical evidence as to his psychological state, but there is no reason why he could not continue to receive the same medication in Iraq. Some of that evidence indicates that his *'low mood and anxiety'* is attributable to his experience of arrest and imprisonment in UK [A14] and being obliged to report to a police station which, while perhaps understandable, cannot be a factor

> weighing against his return to Iraq. His medical notes refer also to *'low mood'*, exacerbated by him not being permitted to work [A35] or get citizenship [A19] and his ongoing asylum claim. This will, no doubt, be a common experience for many asylum-seekers, caught in 'limbo' while they await an outcome to their claims and appeals, but it cannot of itself be something that supports such a claim. I find therefore that the Appellant can relocate to Kirkuk."

22. Although the judge refers to the appellant being able to "relocate to Kirkuk" in the final sentence of para 22, that was, of course, his home area. It is clear that the judge's conclusion was that there was no Art 15(c) risk in his home area.

23. In the light of Mr Richards' approach to this ground of appeal, it is unnecessary for me to deal with Ms Fitzsimons submissions in detail. As Mr Richards acknowledged, the Court of Appeal in AA (Iraq) approved the country guidance of the Upper Tribunal in AA. That country guidance was that an Art 15(c) risk existed in Kirkuk, the appellant's home area. The respondent plainly did not argue otherwise before the Court of Appeal. The decision in AA was "authoritative" (see, SG (Iraq) v SSHD [2012] EWCA Civ 940) unless "very strong grounds supported by cogent evidence" justify departure (see, SG at [47]).

24. The judge accepted that Kirkuk remained a "contested" area but, nevertheless, in the light of the *CIG Report on Iraq*, "Security situation in the contested areas" (August 2016) (referred to in para 7 of the decision letter), he concluded that there had been a sufficient diminution in the levels of violence to depart from the authoritative finding in AA. I have considerable doubt as to whether he was entitled to do so simply on the basis of that *CIG Report*. However, in departing from AA, he failed in my judgment properly and fully to consider the evidence of Professor Joffé, in particular at para 83(vi) of his report (AB38) identifying not only that the area is not "clear of all threat" from ISIS but also that there is a "distinct possibility" of conflict between Peshmerga forces (of the IKR) and the regular Iraqi Army or militia over control of Kirkuk and the surrounding areas. It was not, in my judgment, an appropriate characterisation of Professor Joffé's evidence to describe it as "merely speculation". In failing properly to grapple with that evidence and the proper weight to be given to the background evidence concerning Kirkuk today, the judge failed to give adequate reasons for department from the authoritative guidance in AA. As I have already indicated, Mr Richards did not press the Secretary of State's case on this issue. Instead, he sought to argue that any error was immaterial as the judge's finding in relation to the option of internal relocation was sustainable.

25. I now turn to the issue of internal relocation. The judge dealt with this at paras 23 and 24 of his determination. At para 23 he dealt with the possibility of relocation to the IKR as follows:

> "Relocation to, or return via the IKR. In the alternative, I find that the Appellant could relocate to the IKR, for the following reasons:
>
> i. He is of Kurdish ethnicity and speaks the language and again, is a thirty-three-year-old fit single man. As he is an adult, I do not view any lack of family links in the KRI as a significant bar to his return. I do not consider that this situation

would be unduly harsh. He is keen to work, has worked in UK and has learnt English which may be of assistance to him in finding employment. I accept, from the expert and objective evidence that there is a refugee crisis in the KRI, but many of these people are Syrians or non-Kurds and therefore restricted from work and restricted to IDP camps [CC143] which will not apply to the Appellant. Also, he is, as stated, a single adult male, without the burden of a wife and children, which is not the case for many IDPs. Finally, he has two very close friends who gave evidence on his behalf, both with family and contacts in the KRI who, while unwilling perhaps at this hearing to indicate an ability to assist him, would nonetheless doubtless do so if the situation arose. Indeed, [Mr S] states that he goes there 'regularly'.

ii. CIG 'Iraq: Return/Internal Relocation' indicates [5.2] that ethnic Kurds, albeit not from the KRI, will be accepted in the KRI, provided they are 'pre-cleared' with the KRI authorities, enter on a European Union Letter (EUL) and would fly direct to Erbil. Those persons do not, therefore, require a *laissez-passer*, or passport. While, currently that does not include those from Kirkuk that may not continue to be the case and in any event is a matter of the mechanics of return, not a reason for rejecting the possibility. As stated by Ms Fitzsimons, it is for the Respondent to provide a safe, legal and practical route of return and if they cannot do so, then return will not be feasible, albeit that such return is lawful, following this and previous determinations. **AA (Iraq)** also indicates that non-KRI Kurds can obtain short-term entry, increased if they find employment. Alternatively, in view of my findings in respect of relocation to Kirkuk, the Appellant could transit through the KRI, to the neighbouring province of Kirkuk, obtaining a CSID from his own governorate and if possible re-unite with his family. I note also that assistance could be available to him from the Facilitated Returns Scheme."

26. In para 24, the judge accepted that internal relocation to Baghdad was not an option given the appellant's circumstances and lack of contacts or family there. In addition he stated: "Transit from there to Kirkuk/KRI may also be more difficult, or dangerous." It follows from that final statement that the option of internal relocation was only present if the appellant could be returned directly to the IKR.

27. Ms Fitzsimons raised a number of points in relation to the judge's reasoning in para 23(i). She submitted that the judge had failed, in accordance with AA to consider that the appellant had no family in the IKR. His finding in relation to the support he would obtain from the family or contacts of Mr S, Ms Fitzsimons submitted, was contrary to Mr S's evidence that they would not be able to assist. Ms Fitzsimons also submitted that the judge had failed properly to consider whether the appellant could remain in the IKR as that would be contingent upon him obtaining employment and the evidence was that, given the economic situation, it was unlikely that he would be able to do so.

28. Mr Richards submitted that the judge's reasoning in para 23(i) was sustainable and made any other error in his decision not material. The judge was entitled to reject the evidence that the appellant's friends' families would not be prepared to support the sponsor.

29. In my judgment, there is a fatal flaw in the judge's reasoning. He accepts that the appellant could not relocate to Baghdad and, in the final sentence of para 24 that I have set out above, he effectively finds that the appellant could not safely travel from

Baghdad to Kirkuk or the IKR. The only method by which the appellant could internally relocate to the IKR would, therefore, be as a result of travelling by air to Erbil in the IKR. However, in para 23(ii), the judge accepts that the IKR will not accept a person, even if they are Kurdish, who comes from Kirkuk. This was not simply, as the judge stated, "a matter of the mechanics of return". It was, rather, whether the appellant could relocate to the IKR. If he could not return there either via Baghdad or by plane to Erbil, internal relocation to the IKR was simply not an option available to him. In my judgment, on the judge's own findings relocation to the IKR was not open to the appellant coming from Kirkuk despite his Kurdish ethnicity.

30. Whether a person of Kurdish ethnicity could be returned to the IKR, form part of the country guidance in AA which was approved by the Court of Appeal. In para 17 of that guidance it is stated:

> "The respondent will only return P to the IKR if P originates from the IKR and P's identity has been 'pre-cleared' with the IKR authorities. The authorities in the IKR do not require P to have an expired or current passport or *laissez passer*."

31. Of course, the appellant does not originate from the IKR. The guidance, nevertheless, also provides (at para 19) that a Kurd who does not originate from the IKR can obtain entry for ten days as a visitor and then renew this entry permission for a further ten days. Such an individual, who finds employment, can remain for longer period. The *CIG Report*, "Iraq: Return/Internal Relocation" (August 2016), which the judge referred to in para 23(ii), however points out that the IKR will only accept persons of Kurdish ethnicity who are from an area currently under the administration of the IKR, including some parts of Kirkuk Governorate (but not persons from Kirkuk City). That would appear to be the basis for the judge's conclusion in para 23(ii) where, at the beginning of that paragraph, he accepts that the appellant would not be accepted by the IKR at present.

32. On the basis of this evidence, it is wholly unclear to me how the judge came to the conclusion that the appellant would be able to return to the IKR given that he would at present not be accepted there given that his home area is Kirkuk City.

33. Consequently, on the basis of the Country Guidance case of AA and the evidence to which the judge referred, I am not persuaded that his finding that the appellant could relocate to the IKR was properly open to him. The judge's view that the appellant could "transit through the KIR, to the neighbouring province of Kirkuk" is also flawed if the appellant could not gain entry even if the judge's finding in relation to Art 15(c) in Kirkuk was sustainable – which, as I have already set out, it was not.

34. For these reasons, I am satisfied that the judge's adverse finding in relation to internal relocation also cannot stand and it is not necessary for me to consider the additional submissions made by Ms Fitzsimons in relation to the appellant's employability and what, if any, support he would have in the IKR. These are matters which can be explored in remaking the decision together with the up-to-date evidence concerning the ability of the appellant to reach and enter the IKR.

35. Consequently, I am satisfied that the judge's findings in relation to the appellant's asylum claim, his humanitarian protection claim relying on Art 15(c) and in respect of internal relocation cannot stand.

Decision

36. The decision of the First-tier Tribunal to dismiss the appellant's appeal involved the making of an error of law. The decision cannot stand and is set aside.

37. In the light of the nature and extent of fact-finding required and having regard to para 7.2 of the Senior President's Practice Statement, the proper disposal of this appeal is that it is remitted to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge O'Rourke and, because of the earlier appeal, Judge Page.

38. No submissions were made to me in relation to the decision to dismiss the appeal under Art 8. However, in my judgment, the Art 8 claim can only properly be assessed once sustainable factual findings have been made regarding the appellant's circumstances in Iraq. As a result, at the hearing before the First-tier Tribunal, a fresh decision in respect of Art 8 must also be made.

Signed

A Grubb
Judge of the Upper Tribunal

Date: 28 September 2017