Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00639/2018

THE IMMIGRATION ACTS

Heard at Field House
On 4 April 2019

Decision & Reasons Promulgated
On 17 April 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE LATTER

Between

MKA
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Haywood, counsel (8 January 2019)
Ms A Harvey, counsel. (4 April 2019)

For the Respondent: Mrs N Wilocks-Briscoe, Home Office Presenting Officer (8 January 2019)
Ms L Kenny, Home Office Presenting Officer. (4 April 2019)

DECISION AND REASONS

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An order has been made under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead to the appellant being identified. Failure to comply with this order could lead to a contempt of court.

1. This is an appeal by the appellant against a decision of the First-tier Tribunal issued on 23 July 2018 dismissing his appeal against the respondent's decision of 29 December 2017 refusing his application for asylum.

<u>Background</u>

2. The appellant is a citizen of Iraq born on 1 July 1999. He claims that he left Iraq on 26 November 2015 with the help of an agent, travelling through Turkey, Greece, Austria and other unknown countries before arriving in the UK on 24 December 2015. He claimed asylum on 25 December 2015 on the basis that he would be at risk on return as an Iraqi Kurd, who fled after his father was killed fighting ISIS and his brother was later kidnapped and killed.

3. The appellant is from Kirkuk where he lived with his mother, brother and sisters. He claimed that his father worked as a labourer and in 2011 he joined the Peshmerga for a better income. In October 2015 his father disappeared after he was captured during the war with ISIS. Some five days later his brother who worked in a shop in the market disappeared. He had left to go to work in the morning but, when the shopkeeper called their home to ask where he was, they became worried. A few days later his body was found and his mother was called to the police station to identify him. It was clear that he had been shot. The appellant does not know where the incident occurred nor where his brother's body was found.

4. A few days later his mother decided to go and stay with her father who lived about 20 minutes away by car as she was not able to cope with the situation and being left alone. The appellant did not wish to stay with his grandfather. He stayed at home but, as he felt sad about the situation, decided that he wanted to leave Iraq. He did so on 26 November 2017 with A, a wealthy friend of his brother. They travelled by bus to Turkey using his Iraqi passport. They went to Izmir where the appellant gave his passport to A to take back with him. The appellant continued his journey across Europe until he arrived in the UK.

5. The respondent accepted that the appellant was from Iraq and that he was of Kurdish ethnicity. However, he did not accept that his father worked as a Peshmerga soldier, that his brother had been killed or that the appellant would be at risk from ISIS because of his father's activities. It was the respondent's view that the appellant could be removed to Baghdad and would be able to internally relocate there or within other southern governorates within Iraq. The respondent also considered whether the appellant could relocate to Erbil or any other part of the IKR and was satisfied that he would be able to do so. In any event, it was the respondent's view that the appellant could return to Rahimawa, Kirkuk, which was no longer a contested area and where the records of the appellant's identity could be

easily accessed at the Civil Status Affairs Office. His application was refused on all grounds.

The hearing before the First-tier Tribunal

6. At the hearing before the First-tier Tribunal the appellant maintained his claim that he would be in danger if returned to Iraq because his father had disappeared. He believed that he would be killed in the same way as his brother and he would not be able to go and live safely anywhere else in Iraq. The appellant accepted that he had left Iraq with a passport and that he had had a CSID, his identity document in Iraq. The judge found that he had not given a credible explanation for leaving his identification behind when he embarked on his journey [53] and that, when the appellant left Iraq, he did not have a well-founded fear of persecution, either objectively or subjectively, neither was he at risk on return for the reasons he had given [54]. He was not a specific target and had given no reason why he could not live in Kurdistan where in his updated witness statement he said that his mother divided her time between Sulaymaniyah and Rahimawa.

7. The judge referred to the country guidance in AA (Article 15(c)) Iraq CG [2015] UKUT 544 at [57]-[58] (the guidance being amended subsequently by the Court of Appeal at [2017] EWCA Civ 944) and then to AAH (Iraqi Kurds - internal relocation) Iraq CG [2018] UKUT 212 at [61], setting out new guidance, supplementing the guidance in section C and the replacing section E of the guidance in AA but making no amendments to sections A, B and D. She considered at [62] the reasonableness of the appellant's internal relocation to the IKR against the factual background, by reference to the guidance in the new section E.

8. She said that the appellant should be able to travel from Baghdad to Erbil without any difficulty, his family could provide him with his CSID and he could board an internal flight or pass through checkpoints with no problems. AAH suggested that the appellant would be admitted to the IKR without any difficulty. He spoke Sorani and identified as Kurdish. He had not produced a copy of his CSID but, even if it showed him to be from Kirkuk, there was unlikely to be any dispute as to his ethnicity. As a Kurd he would not be required to have a sponsor, although he could if needed reference his family in Sulaymaniyah and pass through security screening without any problems. Once the appellant entered the IKR, there would be no legal impediment to him remaining there. He had his mother and sisters living there. He would not have to be entirely self-sufficient and was unlikely to be in a position where basic necessities such as food, clean water and clothing were not available. For these reasons the appeal was dismissed.

The Grounds of Appeal and Submissions.

9. In ground 1 it is argued that the judge determined the appeal on the basis of the country guidance in AAH. The appeal was heard on 22 June 2018 but AAH was not issued until on 26 June 2018, after this appeal had been heard. Accordingly, deciding

the appeal on the basis of AAH was a material error or, alternatively, on any analysis, it was unfair to do so because the parties were not able to make submissions on its impact and the guidance it contained.

10. Ground 2 argues that the judge maintained that the appellant could safely travel after returning to Baghdad because his family would be able to assist him in retrieving his CSID but that was not a safe approach on the appellant's evidence which was that he did not know where his CSID was and had not seen it for a very long time.

11. In ground 3 it is argued that the judge erred by failing to determine the appellant's claim that the Kirkuk region was his home area and was unsafe, that he could not reasonably or safely relocate elsewhere and that, in the light of his individual circumstances (no CSID, being a Sorani speaking Kurdish Sunni with no family living in the Baghdad area), he could not safely or reasonably return to Baghdad or travel on from there.

12. Permission to appeal was refused by the First-tier Tribunal but granted by the Upper Tribunal on the basis that the grounds raised arguable errors of law and, in particular, the fact that the representatives were precluded from making submissions on AAH and this cast doubt on the safety of the findings made by the judge.

13. Mr Hayward relied primarily on grounds 1 and 3. He submitted that the country guidance set out in AAH and relied on by the judge at [61]-[63] raised issues which had not been canvassed before her and on which he had not been given the opportunity of making representations, and, in particular, the issues of accommodation and employment. He further submitted that the judge had failed adequately to analyse the appellant's individual circumstances when considering whether he could relocate either in Baghdad, travel on from there or relocate in the IKR.

14. Mrs Wilocks-Briscoe submitted that, whilst the judge could have called back the parties for further submissions following AAH being issued, the evidence before her was such that she was able to proceed to determine the appeal fairly. She had been entitled to proceed on the basis that the appellant was someone who had a passport which would be safe with A and there was no reason to believe that he would not be able to obtain a CSID, if necessary, with help from his family. She had been entitled to find that the appellant would not be at risk of harm on return and that, even if there was a risk of serious harm in his home area, he could in any event relocate in the IKR. She submitted that any further arguments on the appellant's behalf based on AAH would not have led to a different result.

Consideration of whether the First-tier Tribunal erred in law.

15. I am satisfied that the judge erred in law by taking into account a country guidance case issued after the hearing was concluded but without giving the parties an

opportunity of making further representations, whether orally or in writing. However, that does not mean that the decision must necessarily be set aside. If further submissions could not have affected the outcome, then the appeal need not be set aside.

16. It is not entirely clear from the decision whether the judge accepted that there would be an article 3 or article 15(c) risk for the appellant in Kirkuk, his home area. At [57] she set out the country guidance from section A1 which refers to Kirkuk as one of the contested areas where there are substantial grounds for believing that any civilian returned there would face a real risk of being subjected to indiscriminate violence amounting to serious harm. The judge noted that the respondent did not dispute that the appellant was from Kirkuk. At [56] she commented, in the context of the evidence that his mother travelled regularly between Sulaymaniyah and Kirkuk, that in the light of the expert report of insecurity in Kirkuk it was not evident why she should divide her time by going to an area said to be unsafe. It is clear from the respondent's decision (para 85 of the reasons for refusal letter) and the submissions at [41] that it was the respondent's contention that the appellant could now live in safety in Kirkuk

17. In any event, the judge went on to consider issues of relocation in relation to the IKR and whether it could be reached successfully from Baghdad without the risk of harm. At [58] the judge referred to section E 20 of the guidance in AA identifying a number of issues to be considered. However, that guidance was replaced by the new section E in AAH, which introduced a number of new factors to be taken into account. Section E7 confirms that the issue of whether an applicant would be at particular risk of ill-treatment during security screening must be assessed on a case-by-case basis and that there are additional factors which might increase the risk such as coming from a family with a known association with ISIL, coming from an area associated with ISIL and being a single male of fighting age.

18. Section E9 deals with accommodation, noting that those without the assistance of family in the IKR with means have limited options. Section E10 deals with whether an applicant can secure employment. The judge clearly considered these issues as they are referred to in [63]. It follows that she took into account additional factors in the amended country guidance but neither party had an opportunity of commenting on them or making further submissions.

19. On balance, I cannot be confident that the judge would inevitably have come to the same decision, even if she had heard submissions on the substituted section E. Ground 1 is made out as the appellant should have had an opportunity of making further submissions on the new country guidance in AAH and of considering whether there was further evidence he wished to adduce in the light of the amended guidance. I am also satisfied that ground 3 is made out as a number of relevant matters set out in the new country guidance were not taken into account when assessing whether the appellant could safely and reasonably return to Baghdad and

travel on from there and relocate in the IKR. There is nothing in ground 2 which merely seeks to reargue an issue of fact.

20. I am, therefore, satisfied that the judge erred in law such that the decision should be set aside. I am also satisfied that the right course is for this appeal to remain in the Upper Tribunal for the decision to be re-made. I gave further directions and in the light of the issues raised in the appeal made an order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead to the appellant being identified.

21. At the resumed hearing the following further evidence was filed on behalf of the appellant, a further witness statement from the appellant and witness statements from his social worker and his foster carer and on behalf of the respondent the CPIN, Iraq Internal Relocation, Civil Documentation and Returns February 2019 with three articles relating to defeat of Isis. Ms Harvey produced a skeleton argument dated 30 March 2019 and a list of authorities. The appellant's bundle (A) before the First-tier Tribunal and the respondent's CPIN Iraq: Security and humanitarian situation March 2017 were referred to by both parties in submissions.

Further evidence

22. The appellant adopted his witness statement dated 4 April 2019. He said that he still feared returning to Iraq in the light of the situation there and because he had left at a very young age. He could not live in an Arab controlled area nor in a Kurdish area because the culture was different. It was also difficult for someone to live alone without a family connection. He had given his passport back to A, his brother's friend. He could not remember when his passport was issued but knew that his father had got it for him. He would have to have an ID card to get a new passport, but the card was never in his possession and he did not know where his documents were now.

23. His mother was currently living in Kirkuk in the area of Azadi, about an hour from where he had previously lived with her, his father and brother. His mother was travelling between Kirkuk and Sulaymaniyah to take one of his sisters to hospital where she was receiving treatment from Kurdish doctors. She had had an accident when she was little and had learning difficulties and a mental disability. If he had to get a new ID card in Baghdad, he would need to be there and have immediate family there. His father had died and his grandfather could not travel to Baghdad as it was not safe there. He had no family in Baghdad and did not speak Arabic.

24. The area where his mother lived was still a disputed area between Arabs, Kurds and Turkmans. The Kurdish flag was not allowed to be flown there and, although the Kurdish forces and Peshmergas had defeated Isis, the Iraqi government had now forced the Peshmerga Forces out. He had heard that high-ranking Kurdish police officers and Kurdish officials were being targeted.

25. In his oral evidence he confirmed that he had no family or friends in Baghdad. His mother lived in Kirkuk alone with his three sisters. She had told him that any documents she had in her possession were lost when she had to move. He confirmed that he was studying at college. He could not go back to Kirkuk because his life would be in danger there and he did not know anyone in the IKR. He did not know how life would be in the Kurdish area or how he could live there. He was not familiar with it. He had been advised to have some counselling and had contacted someone to make an appointment but had not yet had time to go there. He said he would not like to live alone in Iraq as he had never lived alone and did not know what it would be like.

26. The statement from the appellant's social worker is dated 28 March 2019. She says that the appellant has bonded excellently with his foster carer and has remained living with her under a Staying Put arrangement since his 18th birthday on 1 July 2017. He is learning skills for living independently but it is her view that he needs support for his emotional well-being and she does not feel that he would manage living on his own. He has been offered professional well-being support but has declined it on the basis that this type of help is unknown to him and is not typical in Kirkuk. She describes his social and emotional development of that of a younger child which could leave him vulnerable to being taken advantage of without the correct support and guidance and there have been concerns about the potential for him being groomed by older people.

27. In the statement from his foster carer dated 4 April 2019, she described the appellant as finding it hard to interact with other students due to a lack of social skills and confidence and said that he is quiet, whereas the other students come across as confident and loud. He is scared of going out on his own especially at night and on one occasion when he went with other members of the family to the beach, he became very frightened when he was taken out in a dinghy as it reminded him of a time on his journey to the UK of being a dinghy with about 30 others at night in the pitch black and cold. In her view the appellant is not ready to leave her care as he still has so many fears and would not manage on his own due to his lack of social interaction with groups of people, his lack of confidence in matters such as making a doctor's appointment and his struggle to understand the management of money. She described him as still very naïve.

Further Submissions.

28. Ms Kenny submitted that the basis of the appellant's claim could be summarised as a fear arising from his background and from the deaths of his father and brother, but his evidence had been vague. However, the situation in Kirkuk had changed as the threat from Isis had been defeated. She submitted that it was now possible for him to return to Kirkuk; he was in contact with his mother and she and his sisters were apparently living safely there. The appellant was unlikely to face any problem in obtaining documents for his flight to Baghdad and for his onward journey to Kirkuk or the IKR. He would be able to relocate, if necessary, in the IKR and there was no

reason to believe that he would not be able to feed and clothe himself there. She argued that relocation would not be unduly harsh. He would have some prospect of support from his family in Kirkuk. He had referred to attacks on high-ranking Kurdish officials but there was no reason to believe that he would be targeted.

29. Ms Harvey submitted the appeal essentially raised three issues, whether the appellant would be at real risk of serious harm in Kirkuk, whether it was realistic to expect him to be able to travel to Baghdad, obtain a CSID and then travel in safety to the IKR and whether it would be reasonable for him to relocate in the IKR. She argued that there was no reason to believe that the respondent was proposing to return anyone by any route other than via Baghdad. The letters from the Iraqi ambassador at annexes A and B of CPIN February 2019 tended to show that obtaining documents was not as clear cut as suggested.

30. The country guidance in AA was that Kirkuk was not a place where there would be no real risk under article 3. She accepted that Isis had lost control there, but Kirkuk remained a contested area, referring to the report of Dr Ghaderi at A476. The Iraqi government was active in Kirkuk seeking to maintain its control against any Kurdish forces. The situation there still gave rise to a risk of harm under article 15(c) and there was no compelling reason to depart from the country guidance in AA and affirmed in substance on this issue in AAH.

31. So far as getting to Kirkuk or to the IKR was concerned, she submitted that the appellant was in all likelihood going to have considerable difficulty, firstly in obtaining a CSID in Baghdad. He could not reasonably be expected to travel to Kirkuk to obtain one. He would be at risk when travelling from Baghdad because he was Kurdish, had no proper documentation and was likely to fall foul of roadblocks set up by the militias. Further, she submitted that, even if the appellant could reach the IKR, when the guidance set out in AAH was taken into account, it was clear that he would have considerable difficulties finding accommodation and work. The dire humanitarian situation in the IKR was evidenced in the report from Dr Ghaderi. She submitted that the appellant was not well placed to secure employment, he had no CSID and enjoyed no patronage. He had left Iraq when a child and had not acquired skills that would assist him in finding work. In his circumstances, so she submitted, it would not be reasonable to expect him to relocate to the IKR, even if he could get there.

Assessment of the issues.

32. There was no error of law in the First tier Tribunal's decision on the asylum claim and, in any event, the basis of that claim has been significantly reduced by the defeat of Isis in Iraq. The issue before me relates to humanitarian protection. The first issue to consider is whether the appellant would be at risk of serious harm within the scope of article 15(c) as a civilian who solely on account of his or her presence there faces a real risk of being subjected to indiscriminate violence amounting to serious harm. In AA at section A1, Kirkuk is amongst the contested areas identified where

the situation is such that as a general matter the threshold within article 15(c)is met. The First-tier Tribunal judge appears to have accepted that the article 15(c) threshold was met there in the light of the comment at [56] of her decision that it was not evident why the appellant's mother should divide her time going to an area said to be unsafe.

33. In the decision letter at [89] it is argued that the part of Kirkuk the appellant originated from no longer meets the threshold of article 15(c) in the light of improvements in the security situation. Ms Kelly relies on the CPIN March 2017 report which at 2.3.27 argues that there are strong grounds to depart from the assessment in AA of article 15(c) and that Kirkuk, except for Hawija and the surrounding areas, no longer meets that threshold.

34. Isis has been defeated in Iraq at present, and, although it is not clear to what extent there is a future terrorist threat if Isis seeks to regroup, there is, nonetheless, evidence of continued conflict in Kirkuk between Kurdish forces and the Iraqi army. Kirkuk is ethnically mixed, it is a contested province and the area is still volatile: see the report from Dr Ghaderi at A475-481 and in para 48 at A481. Her view that Kirkuk as a disputed region remains unsafe is supported by other background evidence, by way of example by the NIQASH report at A190-191, the US State Department report at A209 and the Danish Immigration Report A371 at A387 para 3.2.

35. Taking these factors into account, I am not satisfied that there are sufficiently clear and cogent reasons to depart from the country guidance in AA relating to the threshold of harm in Kirkuk.

36. The removal directions envisage a return via Baghdad. I was referred to evidence that the Iraqi government has now lifted the ban on international flights to the IKR (CPIN February 2019 2.7.2) but there is no evidence that the respondent intends to make a return other than by way of Baghdad.

37. When considering the feasibility of the appellant returning via Baghdad, I must consider whether he has a CSID or will be able to obtain one reasonably soon after arriving in Iraq (AA, section C9). This document is important not only to facilitate travel but also on the issue of whether and to what extent he would be able to obtain financial assistance from the authorities. I accept that the appellant does not currently have in his possession his passport or his CSID. There is evidence about how replacement documents can be obtained but the practical realties are such that I am satisfied at least to the lower standard of proof that the appellant will have real difficulties in doing so.

38. Even assuming he is able to obtain a passport, and the letters from the Iraqi Embassy suggest that this in not an entirely straight forward process, it will be even more problematic to obtain a CSID. He cannot reasonably be expected to obtain a CSID from Kirkuk in the light of the situation there (AA, annex C10). I am also satisfied that he would have considerable difficulties in obtaining a CSID in Baghdad,

particularly in the light of the risks for young, male Kurds there (see A494 at para 89 of Dr Ghedari's report).

39. I am also satisfied that he would have considerable difficulties with his travel arrangements and, in particular, his onward travel from Baghdad in the light of the fact that he may well not be able to obtain a CSID, he is a Kurdish Sorani speaker, he does not have family in the Baghdad area and is a member of two minority communities, a young male Sunni and a Kurd.

40. However, even if the difficulties in getting to the IKR can be overcome, in the light of the guidance in AAH, I am satisfied that it would be unduly harsh for the appellant to relocate there. Whilst I approach the appellant's evidence with some caution in the light of the findings of the First-tier Tribunal, I must take into account his age and lack of maturity as set out in the statement of his social worker and foster carer. I am satisfied at least to the lower standard of proof that his father and brother have been victims of the conflict in Iraq and that his mother and sisters continue to live in Kirkuk and the trips to Sulaymaniyah are to obtain medical treatment for her daughter.

41. In the IKR the appellant's accommodation options are limited (AAH section E9). He does not have family members with whom we can live and the likelihood is that he would not gain access to one of the refugee camps there. He has very limited prospects of obtaining employment. He has no family connections which might give him an advantage in obtaining work (AAH section E10). In summary, the appellant is likely to fall into the category of those without access to basic necessities such as food, clean water and clothing.

42. A further and important factor, which must cause concern about the appellant's ability to get to the IKR and relocate there, arises from the evidence of his social worker and foster mother which was not challenged and which I accept. Their evidence makes it clear that he would have difficulty living by himself in an area he knows, let alone in an area he has never been to before. When considering the viability of relocation, I must consider not only the background circumstances but also the appellant's own individual profile and circumstances. Taking these factors together, I am satisfied that for him relocation in the IKR or elsewhere in Iraq, leaving aside the problems about whether or how he could get there, would not be reasonable and would be unduly harsh.

43. In summary, in the light of the evidence before me I find that the appellant is entitled to humanitarian protection in the light of the situation in Kirkuk and that the option of internal relocation, if available, would be unduly harsh.

Decision

44. The First-tier Tribunal erred in law in the decision has been set aside. I remake the decision by allowing the appeal on humanitarian protection and human rights grounds but dismissing it on asylum grounds.

Signed: H J E Latter Dated: 11 April 2019

Deputy Upper Tribunal Judge Latter