Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03434/2019

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
On 13 December 2019	**On 23 June 2020**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

B A M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Aslam, McGlashan MacKay Solicitors
For the Respondent: Mr Clark, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge David Clapham, promulgated on 30 July 2019, dismissing his appeal against the decision of the Secretary of State made on 14 March 2019 to refuse his asylum and human rights claim.

2. The appellant was granted permission to appeal to the Upper Tribunal against that decision, and for the reasons set out below, that decision was set aside, although the findings of fact as to what had occurred to the appellant in Iraq were set aside, with

the decision to be remade without a further hearing, but on the basis of submissions commencing with the appellant, then the respondent and then a reply from the appellant. These were received within time.

3. The appellant's case is that he is at risk on return to Iraq. He is Kurdish and is from Tuz Khurmatu in Saladin (also known as Salah ad Din) governorate. He states that Hashid Shaabi, a Shia-based militia organisation (also known in English as the People's Mobilisation Committee or the Popular Mobilisation Units), came to his village in 2014. Hashid Shaabi compelled the appellant to join them and he underwent training with weapons and was then posted to a village, Gharya Salam. Whilst there, and looking out for ISIS approaching the village, the appellant's colleague was shot in the head and killed. The appellant decided to run away and reached a hill where he went to sleep. On waking he encountered a man and woman who confiscated his weapons and directed him back to his home area. On return, he was told by a neighbour that Hashid Shaabi were looking for him as they thought he had joined ISIS; the family of the dead colleague were also looking for him and they had raided and burnt down his home. His sister had been shot. The appellant fears that if he returns to Iraq he will be killed either by Hashid Shaabi or his dead colleague's family.

4. The respondent did not accept this account and on 6 September 2016 rejected his claim. The appeal against that decision was dismissed on 6 April 2017 by First-tier Tribunal Judge Green in a decision promulgated on 6 April 2017.

5. After that decision, the appellant made further submissions, which the Secretary of State treated as a fresh claim resulting in a fresh decision made on 14 March 2019.

6. In that decision, the respondent noted that the judge had disbelieved the appellant's account of what had happened concluding that he did not accept the appellant's account that his house had burnt down and his CSID destroyed. The judge also found the appellant has family members with whom he is in contact and who could return his CSID to him thus enabling him to secure the necessary travel documents to return to Iraq. The Secretary of State went on to conclude that the appellant would not, coming from Yengejeh in Saladin governorate, that he would be at risk of indiscriminate violence so that he would be entitled to humanitarian protection pursuant to Article 15(c) Qualification Directive. It was noted also [25] that he had failed to provide information as to why he would have lost touch with the family members and that he had not provided proof that he had attempted to trace his family through the Red Cross. The Secretary of State considered also that the appellant would, following the guidance in AAH (Iraqi Kurds – internal relocation) Iraq CG UKUT 00212, be able to relocate within Iraq and he would be able to obtain the necessary documentation from the Iraqi Embassy in London. It was noted he had not provided any documentary evidence that he had attempted to do so [29].

7. The respondent noted that the appellant would be able to fly to the IKR and he would not be required to have sponsorship there. The respondent noted also [38] that the appellant would be able to rely on funds under the Assisted Voluntary

Returns Scheme which would allow him to be accommodated for a few months concluding that he would be able to find employment. The respondent noted also that the appellant would be able to reside in Baghdad [45] and that he had not provided evidence of significant obstacles in his relocation there.

8. On appeal the judge noted [15] the appellant's account as set out in the decision of Judge Green, noting also [17] that the appellant's account had not been believed. Although noting that the appellant had now produced a letter from the Red Cross showing that a tracing request had been made, the judge concluded that this was not evidence as to whether there is or is not family in Iraq, there being no evidence that is materially different from the evidence that was before Judge Green [20]. He noted also [22] that Judge Green had held that it was common ground that the appellant could not return to his home because he fell within the contested area.

9. The judge concluded [23] that there was no reason why he should take a different view from Judge Green of the appellant's credibility, the only additional information that had not been in front of Judge Green being the Red Cross letter.

10. The appellant sought permission to appeal on the grounds that the judge had erred in his application of Devaseelan and in failing properly to apply AAH (Iraq) [2018], in particular failing to note the evidence that the appellant's mother and sister would be unable to assist him in getting further documentation and the difficulties of doing so in what was a contested area. It was further submitted that the judge erred in failing to carry out an assessment on whether life in the IKR was a reasonable option, it having been agreed between the parties that the only place in which the appellant could take up residence was the IKR, there being no proper analysis of his situation; and, had failed to have regard to the ability of Kurds to relocate internally within the IKR notwithstanding the availability of a CSID.

11. On 4 October 2019 First-tier Tribunal Judge Neville granted permission on all grounds.

12. At the hearing before me, I heard submissions from both representatives. Having announced that I was satisfied that the decision of the First-tier Tribunal had involved the making of an error of law, I adjourned the matter pending promulgation of a new country guidance case on Iraq, now reported as SMO, KSP and IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 400 (IAC) and gave directions as to the timetable for making submissions.

Error of law decision

13. I am not satisfied that the judge erred in his application of Devaseelan. The only new evidence supplied by the appellant which was personal to him was the letter from the Red Cross which, as the judge rightly noted, adds little. At best, all the letter says is that enquiries are being made.

14. Given that the appellant would be returned to Baghdad, as he was an Iraqi Kurd originating from outside the IKR, and given that the relevant Country Policy and

Information Note (CPIN) indicated that individuals from the appellant's area could not be redocumented within Baghdad, there was no proper consideration of whether he could be redocumented within a reasonable timeframe. I am satisfied also that the judge erred in his assessment of whether relocation within the IKR was reasonable. I conclude that the judge did not properly assess the feasibility of the appellant being present in Baghdad in the light of the agreement that it would not be in dispute between the parties and it would not be reasonable for him to do so. The judge appears to have conflated this issue with whether he could stay there pending redocumentation in a reasonable timeframe. The judge did not properly assess return to the IKR and in the circumstances the appeal must be set aside owing to the failure to do so.

15. I consider that in the circumstances of this case it is appropriate for the decision to be remade without the need of a further hearing which would consist solely of submissions. I accept the findings of fact as made by the judge and indeed Judge Green as to what had occurred in Iraq. The finding that the appellant would be able to obtain the CSID, and being in contact with family, remains.

Remaking the decision

16. The burden is on the appellant to demonstrate to the lower standard of proof that he has a well-founded fear of persecution in Iraq or that his removal there would be in breach of articles 2 or 3 of the Human Rights Convention; or, that his removal would expose him to treatment contrary to article 15 (c) of the Qualification Directive.

17. It is to be noted in SMO, KSP& IM the Upper Tribunal considered the current situation in terms of article 15 (c), not whether there might be in that area a risk of persecution of any specific minority. The Upper Tribunal set out the scope of the decision as follows:

> 12. We have set out the facts of the appellants' cases and the state of the current guidance at some length in order to explain and contextualise the scope of our task. *In each of the appeals before us, the appellant's claim under the Refugee Convention has been finally determined. It would not be appropriate, in those circumstances, to embark upon a general consideration of risk categories in Iraq under that Convention.*[emphasis added] Although the first and second appellants' written submissions seemed on occasion to range into that territory, Mr Knafler accepted orally that no issues under the 1951 Convention arose before us. He clarified that the risk categories relied upon in the written submissions were relevant to the "sliding scale" question of whether an individual with particular characteristics might be more specifically affected by indiscriminate violence under Article 15(c) of the Qualification Directive: Elgafaji v Staatssecretaris van Jutsitie (C-465/07); [2009] 2 CMLR 45 refers, at [39].

18. The Upper Tribunal also state this at [203]:

> 203. As we have stated above, our enquiry in these cases is confined to Article 15 of the Qualification Directive and Article 3 ECHR. The Refugee Convention does not fall for consideration due to the findings which have been preserved in the individual appeals. Other decision makers will wish to recall the instruction at [154]-[156] of AK

> (Afghanistan) CG [2012] UKUT 163 (IAC), however, and to ensure that *questions of subsidiary protection are only resolved after consideration of any entitlement under the Refugee Convention* [emphasis added].

19. The appeal before the FtT was an appeal on all permissible grounds including asylum, that issue remains live, that is, whether this appellant as a Kurd is at risk of persecution for that reason.

20. The starting point for the assessment of any claim must be the position in the home area. I am satisfied that it was found that the appellant is from Tuz Khurmatu, an area referred to in significant detail in MO, KSP and IM at [85], [94] [263] and [401]. While that relates primarily to the situation in general, I note the strong evidence that there has been a significant displacement of Kurds from Tuz Khurmatu by Shia militia, and while as the respondent submits, there is no generalised article 15 (c) risk in Tuz Khurmatu, it does not follow (a) that Kurds are not at risk of persecution or (b) that, adopting a 'sliding scale approach', this appellant is not at risk of a generalised risk given his particular characteristics.

21. The respondent accepts that there is an ethno-sectarian conflict within the home area, but submits it is a fact that the appellant remains in contact with his family and that there is nothing to suggest they do not still reside in Tuz Khurmatu.

22. Given the level of violence in Tuz Khurmatu, much of it directed against Kurds, I consider that the suggestion that the family are still there is speculative, not least as the evidence is that the area is very hostile for Kurds. I am not satisfied that they are still there, or, even if they were, that this means that the appellant would not be at risk there as a Kurd and/or as a Sunni Muslim. The respondent's case that he could live and support himself in such an area as Tuz Khurmatu as a Kurd is, with respect, fanciful even if he has a CSID.

23. In the circumstances, I am satisfied that the appellant is at risk of persecution on account of his ethnicity and/or religion in his home area.

24. The question then arises of whether he could relocate to Baghdad. The appellant's submissions at [6] assert that the respondent has conceded that it would be unduly harsh to relocate to Baghdad. That point is not challenged by the respondent in her submissions, nor does she submit that he could relocate to Baghdad. I am therefore satisfied that the concession has been validly made, despite what was said in the refusal letter at [45] to [46].

25. I then turn to whether it would be reasonable for the appellant to relocate to the IKR. The starting point for the analysis is that, following the guidance given in SMO, KSP and IM, the appellant would be able to travel there, given the undisturbed finding that he can obtain a CSID through his family.

26. The respondent accepts in her submissions at [14] that the appellant was not a former resident of the IKR, and submits the he would be able to travel there from Baghdad; and, would be permitted to enter and reside. It is also accepted that his

accommodation options as limited; that is in line with SMO, KSP and IM in the headnote at [27] and [28].

27. The finding that the appellant was in contact with family was made in April 2017 by FtTJ A M S Green who found that the appellant was in contact with family and that they could return his CSID to him. That said, he did in his evidence before Judge Green refer to a maternal uncle with whom he was not in contact [7 (v)] as well as his mother and a sister whom he appears to have contacted by mobile phone.

28. Assuming that his family were originally in the Tuz Khurmatu area, and that they are Kurdish, it is likely that they are no longer there given the extent of ethnic cleansing as shown by the background evidence, but there is no reliable evidence as to their current whereabouts. It is of note that the findings on family were made in April 2017 prior to the actions of Shia militia in the area from October 2017.

29. While the appellant has been found not to be credible, and thus that his evidence is not to be believed, it does not follow that this is positive evidence that he in fact does have family in the IKR or that they would be able to support him. The submissions now made by the respondent differ from what was said in the refusal letter of 14 March 2019 in which it was said at [35] that the appellant had not shown that he had no family in Iraq to support him, him as he had not "demonstrated that he did not have family still living in Salahuddin". The letter then goes on at [38] to [44] to conclude that he would be able to relocate to the IKR without family support [36].

30. The difficulty with the respondent's case as now put – that he has not shown that he has no family in the IKR is that there is no positive evidence either way and it is difficult, absent any questions being put to him on the issue, to submit that he has not shown he has no family in the IKR. At best, it could be said to be plausible that his family who were in the Tuz Khurmatu area are not longer there given action taken against Kurds, and that they may have gone to the IKR, but it cannot be shown that he has family established there.

31. In applying the guidance within SMO, KSP and IM in the head note at [21] to [29] I note the distinction between those who have family to assist and those who do not. In the body of the decision much of this is predicated on there being a lack of change since AAH (Iraq) CG [2018] UKUT 212 (IAC) was decided. Although it is no longer Country Guidance which must be followed, that decision formed at [417] to [424] much of the reasoning in the current Country Guidance.

32. At [424] the Upper Tribunal stated this:

> We consider the position to be as follows. … In respect of a Kurdish individual from the Formerly Contested Areas, the UNHCR's stance essentially replicates the guidance given in AAH (Iraq), albeit in a more compressed form. Decision makers must consider whether a Kurdish returnee has a viable support network in accordance with that decision. In the event that they do not, consideration must be given to their individual's specific circumstances with a view to determining their ability to secure accommodation and employment in the IKR. It will be unreasonable for a Kurdish

> individual to relocate from the Formerly Contested Areas to the IKR in the absence of a viable support network or the means to find accommodation and employment in accordance with the guidance in AAH (Iraq), the ongoing application of which is confirmed.

33. I am satisfied given the earlier preserved findings that the appellant will be able to travel to the IKR and would be admitted without difficulty. While there are no express findings as to his education or skills, it is implicit in the first judge's findings at [13] that he was of little education. While he may be able to do unskilled labouring or similar casual work, I am not satisfied that he has acquired any skills in the United Kingdom that would be useful in obtaining employment. I accept that he has been able to adapt in this country but he has had the support of the asylum support network, and that is not in my view an indicator that he would be able readily to obtain work in Iraq.

34. The findings in AAH, at [122] to [132] about family being able to assist are predicated on the assumption that they have some sort of accommodation to share and some sort network of support that would assist a newcomer. The position would be different if they were in an IDP camp. While I do not doubt that the appellant has family in Iraq, I am not satisfied on the evidence that they are based in the IKR or are (together with relatives they may have) in a position to help the appellant. Although some 64% of those who have been displaced to the IKR have family support, that leaves a large number who do not. The suggestion by the respondent that they may be there is speculative.

35. Turning then to the factors identified in SMO, KSP & IM at [26] to [28], I conclude that the appellant will not have the support of family, the suggestion that he does being speculative and not grounded in evidence. I conclude therefore that the options for him are limited in terms of accommodation. I bear in mind that the appellant will have the benefit of a grant of money on departure, but some of that is likely to be spent in travelling from Baghdad to the IKR. He may nonetheless be able to rent accommodation for a short time while he looks for work – it would last at best a few months as accepted by the respondent in the refusal letter at [38]. There is, I find, insufficient evidence that he could rely on remittances from relatives abroad, nor given his very limited skills, is it likely that he would find it easy to find employment, and being from Tuz Khurmatu and its previous associations with ISIL. Viewing the evidence as a whole, I am not satisfied that the area does not, as the respondent submits, have a marked association with ISIL. The evidence cited is taken out of context and if anything, the evidence that "They [ISIL] were able to find support in the area and could be very effective" points in the other direction.

36. I conclude, given the lack of family support and the lack of evidence of being able to rely on remittances from abroad for which there is no evidence, that the appellant would after a short time be compelled to live in a "critical shelter" which I find would be unduly harsh, given that the only likely basis on which he could survive would be adhoc charity or PDS rations. While that would not necessarily reach the article 3 threshold, that is not the applicable test – see Januzi [2006] UKHL 5 and AH

(Sudan) [2007] UKHL 49 at [9]. Applying the test set out in those cases, and the factors set out in SMO, KSP & IM I conclude that it would not be reasonable for this appellant to relocate to the IKR. Accordingly, I am satisfied that he has a well-founded fear of persecution in Iraq on account of his ethnicity and I allow the appeal on that basis.

37. Having allowed the appeal on asylum grounds, I must formally dismiss the appeal on humanitarian protection grounds as, being a refugee, he cannot qualify for humanitarian protection.

38. Having allowed the appeal on asylum grounds, I am satisfied that the appellant's removal would be unlawful under section 6 of the Human Rights Act and I allow his appeal on that basis also.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

(2) I allow the appeal on asylum grounds and on human rights grounds.

(3) I formally dismiss the appeal on humanitarian protection grounds.

(4) Anonymity direction.

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 2 June 2020

Upper Tribunal Judge Rintoul