Upper Tribunal
(Immigration and Asylum Chamber) Number: PA/03793/2019 (P)

THE IMMIGRATION ACTS

Decision under Rule 34 without a hearing on 7th September 2020 and following a 'remote' Case Management Hearing on 5th October 2020

Decision & Reasons Promulgated On 20 October 2020

Before

UPPER TRIBUNAL JUDGE COKER

Between

AM
(anonymity order made)

Appellant/Respondent

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent/Appellant

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant/respondent in this determination identified as AM. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

1. FtT Judge Turner dismissed AM's appeal against the refusal of his international protection (asylum and humanitarian) and human rights (Article 8) claim for reasons set out in a decision promulgated on 22nd October 2019 but allowed his claim on Article 3 grounds. Permission to appeal was granted to AM

by FtT judge Osborne on the grounds that it was arguable the judge erred in "failing to recognise the appellant as a refugee or in the alternative someone who qualifies for humanitarian protection" on 19th February 2020. The SSHD was granted permission to appeal by UTJ Kekic on 16th January 2020 on the grounds that it was arguable the FtT judge had erred in finding there was no cogent evidence to depart from the 2015 Country Guidance on Iraq and failed to take account of country evidence which suggested that AM would be able to obtain identity documents.

Procedural matters

2. Although initially listed for hearing on 12th March 2020, that hearing was adjourned because of the illness of the Senior Presenting Officer. UTJ Plimmer directed that both parties file and serve a skeleton argument with authorities. On 24th April 2020, further directions were sent, following the pandemic COVID19 and, in the circumstances surrounding COVID 19, provision was made for the question of whether there was an error of law and if so whether the decision of the FtT Judge should be set aside, to be determined on the papers.

3. On 7th September 2020 I was under the impression that neither party had complied with directions; that neither party had objected to a decision being taken on the papers on whether there is an error of law in the decision by the FtT judge such that the decision is set aside to be remade; that neither party had filed and served skeleton arguments or submissions, that neither party had filed and served a bundle of authorities and that neither party had filed and served a Rule 24 response. I proceeded to reach a decision on the basis of the documents were before me, the conclusion of which was:

   (A) That the First-tier Tribunal judge had erred in finding that AM was entitled to Article 3 protection as oppose to Article 15(c) ie humanitarian protection; and

   (B) That the First-tier Tribunal judge had erred in finding that AM could not redocument and thus relocate. The finding that he has family and friends in Iraq who could support him on return to Iraq and that he does not have any ID documents in the UK stood.

4. My decision was thus promulgated, with reasons for those conclusions, and sent to the parties who received the decision on 24th September 2020. On 29th September 2020, AM's legal representatives made an application to set aside my decision because I had failed to take into account and consider submissions made by them, receipt of which had been acknowledged by the Upper Tribunal prior to my decision on 7th September. I directed a remote oral hearing for Case Management on 5th October 2020.

5. At the remote oral hearing, the Secretary of State was represented by Mr C Bates and AM was represented by Mr C Holmes. I acknowledged, and apologised, for having taken a decision in ignorance of AM's submissions on the Secretary of States grounds. Both parties accepted that I could and should set aside my conclusions on the grounds relied upon by the Secretary of State but that my setting aside of the decision that AM should be given Article 3 protection was maintained.

6. Mr Bates confirmed that there had been no written submissions made regarding the Secretary of States grounds. He sought to make oral submissions and I deal with this below.

7. In so far as AM's grounds are concerned, Mr Holmes clarified that he was not seeking to set aside the whole of my decision, as set out in the application to set aside but simply my decision on the Secretary of State's grounds. Mr Bates accepted that clarification and very helpfully confirmed that if I were to find against the Secretary of State in connection with her grounds of appeal, then AM's appeal should be allowed in full ie he should succeed under Article 15(c). He reiterated however that the Secretary of States position was that the First-tier Tribunal judge erred in his findings regarding Diyala, redocumentation and relocation.

8. Both parties acknowledge that the caselaw referred by both parties had been overtaken in some sense but that the essential conclusions of the case law remained relevant for the purpose of this appeal; i.e. it made no material difference.

9. I have considered the documents before me including the detailed grounds upon which each party applied for permission to appeal[1] and the oral submissions made on 5th October 2020 and I am satisfied there is sufficient information to enable me to be able to take a decision on whether there is an error of law in the decision of the FtT and if so whether the decision should be set aside.

FtT Decision

10. The first tier Tribunal judge set out in detail and comprehensively the basis of AM's claim and the Secretary of State's rejection of that claim. He identified the issue in the appeal before him as whether the AM could re-document for the purpose of returning to Iraq; whether AM was credible when he claimed he had no documentation and had lost all contact with friends and family who could assist him and whether AM's home village remained a contested area. Neither party took issue, in the grounds seeking permission to appeal, to that brief summary of the issues to be determined.

11. The judge set out in detail his findings regarding contact with family and re-documentation. The judge identified the oral and documentary evidence before him and considered that evidence in the context of the previous evidence given by AM. The judge concluded that he did not accept that AM was not in contact with Hashim or his family or friends in Iraq. He concluded that there was no doubt that AM had not been a truthful or credible witness in the appeal, and he had not given a truthful account of events.

12. At paragraph 60 the judge states that given the initial concessions made by AM's counsel, he did not consider the initial asylum claim any further and was satisfied that AM did not face a real risk of persecution on return to Iraq for a Convention reason. The judge then went on to consider whether he could return

[1] (a) the SSHD's bundle; (b) the two bundles filed on behalf of AM received by the Tribunal on 15th August 2019 and 3rd October 2019; (c) the decision of FtT Judge Turner; and (d) the submissions made on behalf of AM on 15th May 2020; and (e) the application to set aside on 29th September 2020.

to his home village in Diyala. He set out extracts of evidence relied upon by the Secretary of State as to why he could depart from the country guidance of *AA (Iraq) (Article 15c) (Rev 2)* [2015] UKUT 544 (IAC). He concluded that on the basis of the evidence before him he was not satisfied that he had been provided with cogent evidence such as to allow him to depart from the Country Guidance of *AA (Iraq)* and therefore concluded that Diyala remained a contested area and is in an area that met the threshold as set out in article 15(c) of the Qualification Directive.

13. The judge then went on to consider internal relocation and concluded that AM could not internally relocate to Baghdad because he is Kurdish, does not speak Arabic, has no CSID currently, has no family or friends in Baghdad to accommodate him or sponsor him for a room and was unlikely to be able to secure employment. The judge concluded that in those circumstances it would be unreasonable and unduly harsh for him to relocate to Baghdad.

14. The judge went on to consider whether AM could have obtained a new CSID card and accepted that he did not have any ID documents with him in the UK. The judge concluded that because AM and his family were from a contested area he could not conclude that the family would still have possession of documents if they have been kept in Diyala by AM's family.

15. The judge then considered the possibility of re-documentation whilst in the UK. The judge concluded that it would not be possible for AM to re-document in the UK to a large extent because Diyala remains a contested area and that although there was evidence that suggested that the maternal uncle was still in Iraq and he could locate his own family page and then locate by way of cross-reference the relevant page for AM, but that because the register was held in a contested area it was questionable whether the register was accessible or whether it even exists. The judge concluded that without a CSID card, AM would not be permitted to leave the airport in Baghdad. The judge also concluded that if AM had a CSID card he could have internally relocated to another area within Iraq that was not contested given that it was not accepted that AM had lost contact with family and friends. The judge also concluded that AM could not relocate to the IKR.

16. In paragraph 74 of the decision of the judge clearly held that the appeal was allowed only on the basis that AM could not re-document because he came from a contested area. The judge did not accept his original claim that he was at risk on return for a Convention reason and he found that he had family and friends in Iraq who could support him on return

Error of law

Secretary of State

17. The Secretary of State relied on two grounds of appeal. Firstly the Secretary of State submitted that there was, contrary to the first tier Tribunal judge's findings, strong cogent evidence to depart from *AA(Iraq)* in the light of the CPIN November 2018. The Secretary of State relied on paragraphs 2.3.30 and 2.3.32 which, she states, refer to a consistent and significant decline in security incidents and that the current numbers are typically tens of times lower

than they were in mid-2014. The Secretary of State also submits that the judge wrongly concluded that the Evidence and Knowledge for Development 30 April 2019 article, although referring to ISIS having concentrated attacks in the Diyala region, fails to provide information on the number of casualties such as to suggest they would reach the required Article 15(c) threshold. The Secretary of State refers to the Rule of Law in Armed Conflict June 2019 document relied upon by the FtT Judge which, she submits, in fact provides a contrast to the position in *AA (Iraq).* In *AA(Iraq),* she submits, there was systematic and widespread violence in the contested area whereas, the Secretary of State submitted, the threat of violence has not disappeared but is confined to small pockets as mirrored in the June 2019 document. The Secretary of State submits that the judge misapplied the law and evidence such that his findings were perverse and which were also material to AM's ability to obtain a CSID. She submitted that it followed that findings by the judge regarding redocumentation were infected by that error of law and could not stand.

18. The second ground relied upon by the SSHD was the CPIN note at 6.1.10 that an alternate Directorate of Civil ID had been established in a subdistrict of Diyala and another Directorate located in the centre of Baquba which received IDPs from, inter alia, Jalawla – AM's home area. The SSHD submits that "had Judge Turner consulted the CPIN, he would have found that the Appellant was in fact able to get documentation given the existence of the alternate Directorate of the Civil ID in parts of Diyala."

Consideration of Secretary of States grounds

19. Neither the first tier Tribunal judge nor the Secretary of State and indeed the CPIN in February 2019 provide the full citation for the case they rely upon. The only citation referred to *AA (Article 15(c)) Iraq CG* [2015] UKUT 00544 (IAC). This case has been overtaken by *AA(Iraq)* [2017] EWCA CIV 944 and *AAH (Iraqi Kurds internal relocation) Iraq CG* [2018] UKUT 00212 (IAC). It is not clear why the first tier Tribunal judge did not refer to *AA Iraq* [2017] and *AAH Iraq* [2018] given that both decisions were in AM's bundle. Nor is it clear why the Secretary of State relies on a case that had been replaced. But as expressed before me on 5th October, the references to since superseded caselaw did not, in fact, make a difference given the factual matrix in this appeal.

20. The Secretary of State had not made any written submissions. Mr Bates sought to make brief submissions on her grounds. There was some discussion before me whether I could or should hear submissions given that Mr Holmes had not had any time to consider this. It was not possible to put the hearing back for listing as a remote "error of law" hearing. Although initially reluctant, Mr Holmes did respond to the short submissions made by Mr Bates. I have taken these submissions into account and am grateful for both their endeavours.

Ground 1

21. In order to succeed on this ground, the Secretary of State is seeking to challenge the factual findings of the First-tier Tribunal Judge and that the evidence that was before the First-tier Tribunal judge was such that it was perverse for the judge to follow country guidance. This is a high threshold. The grounds themselves refer to there being "cogent evidence" to enable a

departure from country guidance; that the evidence "suggests that there is remote violence". The fact that there is cogent evidence does not mean that a failure to depart from country guidance is perverse, nor does a 'suggestion' of an alternate interpretation mean that a conclusion is perverse.

22. The FtT judge set out the respondent's position with clarity; such summary not being the subject of challenge. The judge identified factors adverse to the appellant. He makes detailed reference to the submissions before him including that he was referred to the 2018 CPIN and considers that submission in the context of the later dated documents in the appellant's bundle.

23. It cannot be said that the finding by the judge on the evidence before him at that time was perverse. It is of course open to a judge to pursue investigation of material relied upon that is in the public domain but there is a limit to the investigation that a judge both can and can be expected to undertake. If a judge were to follow up every hyperlink in every document before him/her that would be a mammoth and unreasonable task. It is incumbent upon the representative to ensure that the judge's attention is drawn to relevant evidence. The documents relied upon by the appellant were in his bundle of documents; the respondent was aware of the import of those documents but failed to identify to the judge why they should not be relied upon and why they cast significant doubt upon the country guidance conclusion that Diyala remained a contested area that met the Article 15(c) threshold.

24. The judge has not, on the evidence and submissions before him, reached a perverse conclusion that Diyala remained contested and met the relevant high threshold.

25. If the finding that Diyala remains an area that meets the Article 15(c) threshold is maintained, the issue then arises on relocation. The respondent does not in her grounds seek to challenge that but rather that the findings on internal relocation are infected because of the appellant's ability to obtain a CSID which forms the basis of challenge under Ground 2.

Ground 2

26. Mr Bates submitted that although a complete copy of the CPIN had not been before the FtT Judge, the judge had not taken issue with the fact that he had not been provided with a fully copy. Given the full document is a document in the public domain, it was, he submitted, available to the judge; there were hyperlinks and signposts to the relevant evidence. The judge had not, he submitted, objected to the manner in which evidence was presented so it could not be said that the judge had not had relevant material before him which he should have considered and taken into account.

27. Mr Holmes referred to his submissions in response to the 'COVID19' directions and submitted that the grounds relied upon by the Secretary of State upon which permission had been granted referred to passages from the CPIN which had not been before the FtT Judge and in any event the CPIN was a policy statement and not evidence *per se*. He submitted, reiterated orally before me, that it was "wrong" for the judge to be expected to have to look up evidence arising from passages that were not brought to his attention either at the

hearing or in written submissions. He reiterated that the argument raised in the grounds regarding the possibility of obtaining a replacement CSID from an alternate Directorate was raised for the first time in the grounds seeking permission to appeal and was not put in issue before the First-tier Tribunal Judge.

28. The FtT judge is clearly not impressed with the appellant as a witness. He finds him neither credible nor reliable and that he should not be given the benefit of the doubt. He considers such matters to be significant factors supporting the respondent's position. He finds the appellant has friends and relatives both in Iraq and in the UK who could assist him. The judge identifies doubt that a register exists after such a lengthy period of time or whether any family would still have possession of relevant documents given the instability of the area and destruction of property. He notes that

> "replacement CSA offices have been established for Mosul, Anbar and Salah al-Din but not for Diyala. Given the unrest in the area, it is questionable whether the register is accessible or whether it even exists."

29. The judge has plainly set out the evidence that was before him. The reference in the CPIN to an alternate Directorate in Diyala was not before him. From the decision, reference was made to alternate directorates in some areas but not to that which, it is now asserted, exists for Diyala. Although a judge may investigate links to evidence that is relied upon, the reliance has to be signposted to the judge and it is apparent that it was not in this appeal. A judge cannot be expected to trawl through all the links in all the background material to establish whether something does or does not exist.

30. The judge has not erred in law in failing to take account of something that was not before him.

Conclusion re SSHD submitted error of law.

31. The first tier Tribunal judge has not erred in finding that Diyala remains a contested area and meets the threshold of Article 15(c). The judge has not erred in finding the appellant cannot re-document and thus relocate.

AM

32. AM relies on two grounds of appeal: firstly that the first tier Tribunal judge erred in dismissing the appeal on humanitarian protection grounds and secondly that the judge acted *ultra vires* by making an improper and unenforceable direction. Dealing with the second ground first, AM takes issue with the comment by the first tier Tribunal judge that once there was cogent evidence that the situation in Iraq had improved and that he could access his family record in his home area then his status should be reviewed. This was not a direction by the first tier Tribunal judge but a comment. It is clear that had the SSHD not sought to appeal the First-tier Tribunal decision she would have had to comply with the decision to allow the appeal on article 3 grounds and not in accordance with that comment. There is no merit in that latter ground of appeal, which in any event stems from an obiter and unenforceable comment by the judge.

33. AM's grounds again rely on *AA(Iraq)* [2015] rather than *AA (Iraq)* [2017] and *AAH (Iraq)* [2018]. Nevertheless the substance of the ground is that the judge had found that Diyala was a contested area and AM could not reasonably relocate because of his inability to re-document, it therefore followed that the appeal fell to be allowed on humanitarian protection grounds because the risk in AM's home area was a risk of article 15(c) harm. It was submitted that the risk of article 3 harm in the place of relocation served only to make relocation unreasonable not to convert the basis of claim into a risk centred on article 3 harm.

Consideration of AM's grounds

34. If the risk in Diyala is an Article 15(c) risk, the lack of ability to redocument does not convert that risk into Article 3 risk but results in a finding that the appellant should receive humanitarian protection.

35. Mr Bates conceded that if the judge's findings that the Article 15(c) threshold was met and that it was unreasonable for the appellant to relocate because of lack of documentation or access to documentation were upheld, then the finding by the judge that the appellant met Article 3 rather than humanitarian protection threshold was an error of law and should be set aside and could be remade allowing the appeal on humanitarian protection grounds.

Conclusion on AM's grounds

36. The FtT judge erred in law in finding AM was entitled to Article 3 protection as oppose to Article 15(c) protection.

Remaking the decision

37. The First-tier Tribunal judge erred in finding that the appellant was entitled to Article 3 protection. The fact that Diyala was, on the basis of the evidence before the judge at the time, a contested area such that the Article 15(c) threshold was met and the fact that the appellant could not, on the basis of the evidence before the First-tier Tribunal judge at that time, re-document, results in the clear conclusion that the appellant is entitled to humanitarian protection.

38. I allow his appeal accordingly.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law in so far as (a) the finding that the appellant was entitled to Artice 3 protection was concerned; and (b) that the appellant was not entitled to humanitarian protection.

I set aside the decision to that extent to be remade.

I remake the appeal and allow the appeal on humanitarian protection grounds only.

Anonymity

The First-tier Tribunal made an order pursuant to rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Jane Coker
Upper Tribunal Judge Coker Date: 13 October 2020