Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11576/2019 (P)

THE IMMIGRATION ACTS

Decided Without a Hearing under Rule 34	**Decision & Reasons Promulgated**
On 22 September 2020	**On 28 September 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

N F M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Lifeline Options CIC
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer (written submissions)

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. 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 in 1982. He is Kurdish and comes from Kirkuk City.

3. The appellant claims to have left Iraq on 29 April 2008 and to have entered the United Kingdom on 27 June 2008. He initially claimed asylum on that day. His claim was refused and his subsequent appeal to the First-tier Tribunal (Judge Ford) was dismissed. He was subsequently refused permission to appeal and he became appeal rights exhausted on 17 May 2010.

4. Subsequently, the appellant made a number of further submissions culminating in submissions made on 13 September 2019.

5. On 12 November 2019, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR.

6. The appellant appealed to the First-tier Tribunal. In a determination sent on 20 February 2020 (Judge Perry) dismissed the appellant's appeal on all grounds.

7. The appellant did not pursue his asylum claim before the judge but, instead, relied upon Art 15(c) of the Qualification Directive (Council Directive 2004/83/EC). Judge Perry did not accept that the appellant had established that he would face a real risk of suffering serious harm as a result of indiscriminate violence if he returned to his home area of Kirkuk. Further, the judge found that the appellant would be able to obtain his CSID from the UK which he had left with family members in Kirkuk and so could safely travel to Kirkuk on return to Iraq. The judge also found that the appellant's return would not breach Art 8 of the ECHR.

The Appeal to the Upper Tribunal

8. The appellant sought permission to appeal to the Upper Tribunal on three grounds.

9. First, he contended that the judge failed properly to apply the relevant country guidance case of SMO and Others (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC) in applying the 'sliding scale' in assessing whether he would face a risk of indiscriminate violence contrary to Art 15(c) in Kirkuk. The grounds contend that the judge wrongly found that there was not a "significant presence and control by Shia militia in Kirkuk" which was contrary to the evidence in SMO and Others at [26], [31] and [32]. That issue was relevant to the risk to the appellant as a Kurd.

10. Secondly, the judge also erred in applying SMO and Others by omitting to take into account that the appellant was an army deserter which was a risk factor falling within the category of "humanitarian or medical staff and those associated with Western organisations or security forces".

11. Thirdly, the judge wrongly approached the issue of whether the appellant would have a CSID on return and had departed from SMO and Others in

that regard. Following SMO and Others, it was necessary to consider, first whether the appellant has or could obtain the necessary information to obtain a replacement CSID in the UK; and secondly, whether the appellant has or can obtain the necessary information to obtain a replacement CSID on return to Iraq.

12. Permission to appeal was initially refused by the First-tier Tribunal but, on a renewed application to the UT, on 19 May 2020 the Upper Tribunal (UTJ Finch) granted the appellant permission to appeal.

13. In the light of the COVID-19 crisis, the UT (UTJ Kopieczek) issued directions stating the provisional view that it would be appropriate to determine the error of law issue without a hearing and inviting both parties to make submissions on that issue and also on the substance of the appeal.

14. In response, the Secretary of State made submissions dated 27 July 2020 seeking to uphold the judge's decision.

15. No submissions were made on behalf of the appellant. That remained the case when I caused a check to be made on the UT's database on 22 September 2020.

16. Having taken into account all the submissions, and in the absence of any objection from either party, I consider it just and fair to determine the error of law issue without a hearing and the rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) and para 4 of the Senior President's *Amended General Pilot Practice Direction: Contingency Arrangements in the First-tier Tribunal and Upper Tribunal* (14 September 2020).

The Judge's Decision

17. The appellant's case before Judge Perry was not founded on the Refugee Convention (see para 43 of the determination). Instead, the appellant relied upon Art 15(c) and claimed that he was at risk of serious harm arising from indiscriminate violence in his home area of Kirkuk City.

18. At paras 39–40, the judge summarised the position after SMO and Others as follows:

> "39. In SMO the UT concluded (*Headnote/A1*) that whilst there continued to be an internal armed conflict in certain parts of Iraq, involving government forces, various militia and the remnants of ISIL the intensity of that conflict is not such that, as a general matter, there are substantial grounds for believing that any civilian returned to Iraq, solely on account of his presence there, faces a real risk of being subjected to indiscriminate violence amounting to serious harm within the scope of Article 15(c) QD. Notwithstanding that the circumstances require individualised assessment in the context of the conditions of the area in question.
>
> 40. Based on SMO [*Headnote/D18*] the general conditions within the Formerly Contested Areas do not engage Article 15(c) (at least as to the areas that concern me) but the ethnic and political

> composition of the home area (and if applicable the place of relocation) will still be particularly relevant). In particular, an individual who lived in a former ISIL stronghold for some time may fall under suspicion in a place of relocation. Tribal and ethnic differences may preclude such a relocation, given the significant presence and control of largely Shia militia in these areas. Even where it is safe for an individual to relocate within the Formerly Contested Areas, however, it is unlikely to be either feasible or reasonable without a prior connection to, and a support structure within, the area in question."

19. That self-direction is entirely in accord with the UT's country guidance in SMO and Others. The appellant could not succeed under Art 15(c) merely on the basis that he was a returning civilian to Kirkuk City.

20. The appellant's claim was based, instead, upon a fact-sensitive application of the "sliding scale" assessment approved by the UT in SMO and Others (see paras (3)–(5) of the headnote). The judge recognised this in para 42 when he said:

> "I am thus required to undertake a fact-sensitive 'sliding scale' assessment and in doing so the matters outlined in [Headnote/A4 and A5] are particularly relevant. Amongst them the appellant relays no detail of an actual or perceived association with ISIL, nor does he refer me to any specific ongoing ISIL activity in his home area, Kirkuk, beyond that identified in SMO, instead he indicates his concern is that his home area is controlled by an Iranian backed militia and that he is a Kurd."

21. Then at para 43, the judge set out the way in which the appellant's Counsel put his appeal namely that:

> "When assessing eligibility for subsidiary protection the appellant's Kurdish ethnicity enhanced his risk under Article 15(c) (even though it is insufficient in itself to entitle him to the protection on the basis of asylum pursuant to the 1951 Convention), a potential argument discussed by the court in SMO at [295]."

22. Then, at para 44, the judge referred to some evidence relied on by the appellant which postdated SMO and Others:

> "Of the objective evidence the two documents that postdate the hearing in SMO (24 – 26 June 2019] are a Gardaworld report [A/42 – 47] (a separate report of rockets being launched [A/48] is undated) and about hiring practices being ethnically motivated [A/49 – 51]. The former appears to relay threats to military forces and western personnel and assets but does not identify as such an Art. 15(c) beyond that in SMO. The latter does not demonstrate in Art. 15(c) risk."

23. The judge then went on in paras 45–49, to consider the risk factors, based upon SMO and Others, upon which the appellant placed reliance.

24. At para 45, he dealt with the risk to religious and minority ethnic groups as discussed in SMO and Others:

> "45. Whilst SMO identifies [300] that whilst members of religious and minority ethnic groups are considered by the UNHCR to be likely to be in need of international refugee protection in areas where ISIL retains a presence with respect to the UNHCR, the UT considered it too simplistic to state that religious or ethnic minorities are likely to be at increased risk in areas in which ISIL retains a presence and that whilst membership of an ethnic or religious minority may increase the risks to an individual a contextual evaluation rather than a presumption is required with reference to the composition of the area in question, the local balance of power and the extent of ISIL activity in the area in question."

25. At para 46, the judge dealt with the evidence referred to SMO and Others concerning ISIL and its present and impact in Kirkuk Governorate:

> "46. The UT found in SMO [252 – 275] that ISIL controls no territory as such in Kirkuk governorate but it was certainly present and active. They identified the statistics recorded a sharp fall in the number of civilians killed (the intensity falling from 62.9 civilians deaths per 100,000 population in 2017 to 18.3 in 2018) and that ISIL's main focus in Kirkuk was to attack specific targets, where usually authority figures or those associated with the security services and whilst it was common ground across all commentators that ISIL was attempting to regain control of rural areas in this governorate and the UT determined there was a security vacuum in the rural parts of the governorate it went on to conclude that the level of risks to an ordinary civilian purely on account of his presence in Kirkuk, or any part of it, is [not] such as to cross the Article 15(c) threshold [SMO/257]."

26. I have inserted the word "not" in the final sentence to reflect the clear sense of the judge's conclusion there.

27. At para 47, the judge considered the issue of Shia militia in Kirkuk:

> "The UT in SMO did not find that there was a significant presence and control by Shia militia in Kirkuk. Nor does the objective evidence the appellant relies upon."

28. Then at paras 48–49, the judge considered the risk, if any, arising from the appellant's former membership of the Iraqi Army and that, as Judge Ford had previously found, he had deserted together with the appellant's Kurdish background:

> "48. The other factor of those listed in [*Headnote/A5*] that Mr Forbes drew to my attention was the appellant's former membership of the Iraqi Army. His former links to the Iraqi Army were addressed by Judge Ford in her decision as not giving rise to protection issues. The appellant does not relay in evidence how he is of prominence such that he is likely to be at an enhanced risk nor any links to western forces, personnel and assets. Nor did the appellant relay a current association with local or national government or the security apparatus [SMO/313].
>
> 49. The appellant is a Kurd and his principal language is Kurdish Sorani (followed by English and then Arabic (submissions 11

> January 2019 p.3)). I found he has family in the Kirkuk area and comes from there despite having been in the UK since 2008. They have helped him before and are likely to do so again I find he has a support structure within the area in question."

29. Having set out those findings, the judge concluded at para 50 that the appellant had failed to establish that there was substantial grounds for believing that there was a real risk of him suffering serious harm as a result of indiscriminate violence.

Discussion

30. Grounds 1 and 2 contend that the judge misapplied SMO and Others.

31. First, in para 47 the judge erred in finding that Shia militia did not have a "significant presence" or were not in "control" in Kirkuk (Ground 1). Secondly, the judge failed in para 48 to have regard to the fact that the appellant, as a former member of the Iraqi Army and a deserter, fell within the risk category of "humanitarian or medical staff and those associated with Western organisations or security forces" (Ground 2).

32. The judge undoubtedly approached the application of Art 15(c) in accordance with SMO and Others. First, he correctly noted that a civilian, merely by returning to Iraq, could not establish a real risk of being subject to indiscriminate violence; at least apart from return to small geographical areas not relevant to this appeal (see headnote paras (1) and (2) of SMO and Others). Secondly, the judge correctly identified that in determining whether an Art 15(c) risk existed in relation to a particular individual, a "fact-sensitive" approach was required applying the well-known "sliding scale" assessment (derived from the Strasbourg decision in Elgafaji v Staatssecretaris van Justitie (C-465/07) [2009] 1 WLR 2100 at [39]) (see para (3) of the headnote in SMO and Others). Thirdly, the judge correctly identified, following SMO and Others, that certain personal characteristics must be carefully assessed with particular reference to the extent of ongoing ISIL activity and the behaviour of security actors in "control" of the appellant's home area. Those personal characteristics, which must be considered individually and cumulatively in the sliding scale analysis, are set out in para (5) of the headnote in SMO and Others. The two relevant ones in this appeal are: "Membership of a national, ethnic or religious group which is either in the minority in the area in question, or not in de facto control of that area"; and the second is: "Humanitarian or medical staff and those associated with Western organisations or security forces".

33. The judge, applying SMO and Others, concluded (at [47]) that there was not a "significant presence and control by Shia militia in Kirkuk". That issue arises because of the appellant's contention that as a Kurd he was at an enhanced risk from Shia militia. The evidence in SMO and Others was that Kirkuk (and in particular for the purposes of this appeal Kirkuk City) was in the control of the "ISF, with a significant presence of PMU militia" (see [251] of SMO and Others). The "ISF" is the Iraqi Security Forces, namely government forces. The "PMF" is the Popular Mobilisation Forces. In his evidence before the Tribunal, Dr Fatah explained who the PMF or its

sub-units the PMU were. At [19] of SMO and Others, Dr Fatah's evidence is recorded as referring to the PMF and PMU as "Shia militia". However, it is also clear from Dr Fatah's evidence (at [29] of SMO and Others) that the PMF is not an exclusively Shia militia. There, albeit in relation to Hawija he referred to that being under the control of "Sunni Arab armed groups affiliated with the Popular Mobilisation Forces".

34. At [256] of SMO and Others, the UT, again referring to Dr Fatah's evidence, said this about the PMU in Kirkuk:

> "There is a security vacuum in the rural parts of the governorate, left by the departure of the Peshmerga in late 2017. ISIL has some support in the region and has been able to move freely and expand its operations in the region as a result of that vacuum. It is regarded as one of the core areas for ISIL's rebuilding effort by Joel Wing and other respected contributors. We also accept the evidence given by Dr Fatah about the effect of the PMU in Kirkuk governorate. Whilst they lessen the threat from ISIL in the region, they have also brought renewed sectarian tension, for instance by renaming Sunni sites with Shia names. The fact that Kirkuk remains a Disputed Territory also contributes to the uncertainty experienced by residents of the Governorate."

35. Having gone on to consider the evidence concerning ISIL activity in Kirkuk, the UT at [257] went on to conclude:

> "We take account of indirect forms of violence, as required by HM2 and as described above but we do not consider that the level of risk to an ordinary civilian purely on account of his presence in Kirkuk, or any part of it, is such as to cross the Article 15(c) threshold. The existence and actions of permanently operating attacks cells, the coercion brought to bear on sections of the rural population by ISIL and the other forms of indirect violence from ISIL and other groups (including the PMU) are not at a sufficiently high level to cross the threshold when considered as a whole."

36. As will be apparent, there the UT took into account indirect violence not only emanating from ISIL but also from the PMU.

37. As regards the specific risk factor of being from a minority group, namely being a Kurd, the UT dealt with this at [300] of its decision as follows:

> "Members of religious and minority ethnic groups are considered by the UNHCR to be likely to be in need of international refugee protection in areas where ISIL retains a presence. As we have underlined throughout this decision, we emphasise our appreciation of the UNHCR's unique position and expertise in such matters. There is some danger in applying too broad a brush in trying to describe this cohort, however. The first danger is in the use of the word 'minority' in the context of Iraq. As we have endeavoured to explain, the ethno-religious demography of Iraq is varied by region. Whilst Sunni Arabs are in the minority across the country as a whole, for example, there are areas in which they comprise the majority. The same may also be said in respect of Kurds. The second difficulty is to assume or potentially to assume that an ethnic group is at a disadvantage because it is statistically in the minority in a particular area. Whilst

such an assumption might have been proper in the past, the proliferation of the PMUs has altered the balance of power in particular areas, often to the detriment of the majority. It was a familiar theme in Dr Fatah's written and oral evidence, for example, that the Shia militia had in certain areas renamed buildings and taken down Kurdish symbols. The third danger is in treating the presence or absence of ISIL from an area as a binary concept. As we have explained at length above, ISIL retains a presence in a number of areas but the size and influence of that presence, and ISIL's level of activity, varies significantly. Whenever it is submitted that an individual is at enhanced risk on this basis, therefore, it is necessary to evaluate the submission with particular care, with reference to the composition of the area in question, the local balance of power and the extent of ISIL activity in the area in question. With respect to a UNHCR, we consider it too simplistic to state that religious or ethnic minorities are likely to be at increased risk in areas in which ISIL retains a presence. Membership of an ethnic or religious minority may increase that risk to an individual but a contextual evaluation rather than a presumption is required."

38. Whilst I accept that the judge was wrong (at para 47) to characterise, in effect, the PMF (though not mentioning them by name) as not being a "Shia militia", based both upon SMO and Others and the evidence to which he made reference, I do not accept that any risk of indiscriminate violence to the appellant as a Kurd living in Kirkuk City arising from the actions of the PMF was individually or cumulatively sufficient, when applying the sliding-scale, to establish that there were substantial grounds for believing that he was at real risk of serious harm arising from that indiscriminate violence. Kirkuk City is under the control of the ISF albeit with a significant PMF/PMU presence. The evidence set out in [300] of SMO and Others, (and the substance of which is cited in Ground 1 in the FTT application permission), focused upon Shia militia having "renamed buildings and taken down Kurdish symbols". The UT's consideration of the "Kirkuk Governorate" (at [251]–[257]), did not provide a sound factual, evidential basis for concluding that a breach of Art 15(c) had been established. I, therefore, reject Ground 1.

39. Turning now to Ground 2, this relies upon the risk factor of "humanitarian or medical staff and those associated Western organisations or security forces". The argument, put in the grounds, is that the appellant's previous membership of the Iraqi Army from which he deserted, when the Iraqi Army was "American-led during the two years of A's involvement as a security guard to an American-appointed Iraqi general" brought him within that risk factor.

40. At [310], the UT in SMO and Others dealt with this risk factor as follows:

> "310. Perceived collaborators of Western organisations/armed forces. This group was considered in BA (Iraq) to be unlikely to be at risk in those parts of Iraq which were under ISIL control or had a high level of insurgent activity. The risk was thought to be lower in Baghdad, although there was evidence at that time to show that groups including ISIL were active and capable of

> carrying out attacks there. That assessment must be revisited because of several durable changes. Firstly, ISIL is no longer in control of the swathes of territory in Iraq. Secondly, there is considerably less involvement of Western armed forces in what is accepted by the respondent to be an internal armed conflict in Iraq. Thirdly, there is considerably less evidence of ISIL and other insurgent groups carrying out attacks in Baghdad. We do not consider that this group would be at an enhanced risk in Baghdad as there is insufficient recent evidence to support such a conclusion. In respect of the risk to such individuals in the Formerly Contested Areas, the situation is clearly different to that considered in BA (Iraq). As noted at 1.9 of the EASO report on *Targeting of Individuals* 'working for the coalition was less sensitive than in the past.' In areas where ISIL remains active, its primary target is those associated with central or local governance or the security apparatus and there is little recent evidence to show that those with a current or historical connection to Western organisations or armed forces would be at enhanced risk on that account alone. That is not to say that such an association is irrelevant for the purposes of the sliding scale analysis; were such an association to become known at a fake checkpoint, for example, then such an individual might well be at enhanced risk as compared to a civilian without such an association. We accept, therefore that a past or current association to a Western organisation or allied forces is a relevant factor in Article 15(c) analysis, albeit one with less significance than before."

41. As the judge identified in his determination, correctly based upon SMO and Others, ISIL has some activity in the Kirkuk Governorate but that is largely outside of Kirkuk City. The latter, of course, is the appellant's home area. There is no real risk of a threat from ISIL in Kirkuk City. Even assuming that the appellant's past involvement with the Iraqi Army was somehow to become known, the UT in SMO and Others clearly considered that past association with Western armed forces is likely to be less significant than previously. The appellant's past association is of course with the Iraqi Army itself. The appellant's assertion, in the grounds, that association with the Iraqi Army is to be associated with the Western allied forces previously operating in Iraq is, in my judgment, unsupported by what is said in SMO and Others in particular at [310]. The contention is, in effect, that every former member of the Iraqi Army is at enhanced risk because they will inevitably be associated with the allied forces previously active in Iraq. There is no basis for that conclusion in SMO and Others. However, any such risk is predicated on ISIL activity and knowledge of the appellant's previous military history. The judge, in my view, fully took into account the appellant's military history in assessing the risk to him on return under Art 15(c). In addition, of course, as the judge noted in para 48 of his determination, Judge Ford had previously determined that his asylum claim based upon risk due to his military history was not well-founded. For these reasons, therefore, I also reject Ground 2.

42. That, then, leaves Ground 3. In my judgment, as set out in the initial grounds to the FTT, this ground is misconceived. It appears to contend

that the judge was wrong to approach the risk to the appellant on return on the basis that he would be able to obtain a CSID from his family prior to returning to Iraq and that the real issue was whether he had the information necessary to obtain a replacement CSID either whilst in the UK or when in Iraq.

43. The difficulty with this ground is that the judge found, based upon Judge Ford's earlier decision, that the appellant's family in Iraq had his existing CSID and that he would be able to contact them and obtain it before he returned to Iraq. He would therefore be a returning Iraqi citizen in possession of a CSID. It was irrelevant, therefore, whether he could obtain a new CSID either whilst in the UK or on return to Iraq which, as is clear from paras (11)–(16) of the headnote in SMO and Others does require a consideration of, not least, whether the appellant has access to the relevant information in his family book in order to seek a CSID whether in the UK or on return.

44. At paras 20–32, the judge considered Judge Ford's earlier finding, rejecting the appellant's then evidence, that he had left his CSID in Kirkuk with his family. The judge rejected the appellant's evidence in the present appeal that his family had left Kirkuk, not least because of the vagueness of his knowledge about that issue (see para 30). At paras 31–32 the judge made the following finding:

> "31. I find that the appellant's paternal uncle and his cousin are still in Iraq. I find that the appellant's mother did, as the appellant stated, leave her family's CSIDs with his paternal uncle for safe keeping and I find in the absence of evidence to the contrary being brought forward, on balance they are still with him.
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> 32. That is further supported in that when he needed documents to be provided, albeit what Judge Ford found was the false arrest warrant, they were supplied to the appellant. While that was a decade ago my findings that his family are still [] in Iraq, hold his CSID and contrary to what he asserted, he was able to contact his family in Iraq as the arrest warrant demonstrates, lead me to conclude that documents, including the CSID, could be sent to him in the UK."

45. The reference to the arrest warrant is that the appellant produced, before Judge Ford, an arrest warrant which Judge Ford concluded was fabricated but accepted had been sent to him by his family. That was the contact which the appellant claimed to have with his family at that time.

46. The grounds do not seek to challenge the judge's factual findings in paras 31 and 32. Although UTJ Finch, in granting permission, raised the issue of whether that finding properly took into account events in Kirkuk since his earlier asylum appeal in 2010, that did not arise from the grounds and, in the absence of further submissions, is not a matter upon which the appellant has relied, or developed any argument in relation to, either before the judge in this appeal or subsequently in challenging the judge's decision in the Upper Tribunal. In my judgment, the judge was entitled to reach his findings in paras 31–32 based upon Judge Ford's earlier findings

and the judge's consideration of the appellant's evidence in the present appeal at paras 20–30 of the determination. For these reasons, therefore, I also reject Ground 3.

47. For all these reasons, therefore, the judge did not materially err in law in dismissing the appellant's appeal under Art 15(c) of the Qualification Directive.

Decision

48. The decision of the First-tier Tribunal to dismiss the appellant's appeal on all grounds did not involve the making of an error of law and that decision stands.

49. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
24 September 2020