IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02050/2017**

THE IMMIGRATION ACTS

Heard at George House, Edinburgh	**Decision & Reasons Promulgated**
On the 8 June 2022	**On the 19 July 2022**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Aslam, Solicitor
For the Respondent: Mr J Mullen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the Secretary of State made on 10 February 2017 to refuse the appellant refugee status or leave to remain in the United Kingdom on human rights grounds.

2. On 23 August 2017, the First-tier Tribunal (Judge Agnew) dismissed the appellant's appeal. Permission to appeal to the Upper Tribunal was granted in relation to the issue of internal relocation and on 22 January 2019, Upper Tribunal Judge Macleman upheld the decision of the First-tier

Tribunal. The appellant then sought permission to appeal to the Court of Session which by an Interlocutor dated 4 May 2020 allowed the appeal and set aside the decision of the Upper Tribunal, directing that the Upper Tribunal find that the First-tier Tribunal decision of 23 August 2017 involved the making of an error of law.

3. By a decision dated 7 September 2020, the Vice-President of the Upper Tribunal set aside the decision of the First-tier Tribunal, that decision being made "purely in accordance with the interlocutor and implies no consideration of, or agreement with, any of the grounds of appeal adduced by the appellant".

4. Owing to the Covid pandemic and adjournments caused by the lack of interpreters on 5 October 2021, the matter did not come before me until 8 June 2022.

Scope of the Appeal

5. The grounds of appeal to the Upper Tribunal lodged on 30 November 2017 state:-

> "Ground of appeal
>
> 3. The sole ground on which this application is renewed to the UT is that the FtT has misdirected itself with reference to the tests of reasonableness of return to Iraq".

6. Reference is then made to the applicable tests set out in AA (Article 15(c)) Iraq CG [2015] UKUT 544 (IAC), as modified by AA (Iraq) v SSHD [2017] EWCA Civ 944. It was asserted that the FtT had to decide whether the applicant has a "civil status identity document" (CSID) or would be able to obtain one shortly after arrival and, on the basis that he may be returned to Baghdad and be expected to travel to the IKR it was necessary for it to assess the practicality of that journey, the likelihood of the appellant securing employment or the availability of assistance from family or friends.

7. There are, however, no challenges to the findings of fact in respect of the underlying asylum claim, in particular the reasons why the appellant had felt compelled to leave his home area.

8. The petition to the Court of Session states at 4:-

> "4.1 The applicant claimed to be a national of Iraq of Kurdish ethnicity from within one of the so-called contested areas in Iraq. He claimed asylum on the basis that he was at real risk of persecution due to events in Iraq. The FtT found that the applicant's account was not plausible and that the applicant was not a credible witness. The applicant's asylum claim was refused. No challenge is taken to that decision".

9. Neither the decision of the Vice-President nor the Joint Minute attached to the Interlocutor address directly the scope of the error of law which was found and is the basis on which the decision of the First-tier Tribunal was set aside.

10. The re-making of the decision requires findings of fact to be made on how the appellant could obtain a CSID, and there is a requirement to make further findings with respect to the circumstances the appellant would find himself in the IKR. While the basis of the asylum claim made – risk in the home area owing to a risk from ISIS and/or being perceived to be a collaborator is not in issue, that does not preclude consideration of the risks to the appellant flowing from his ethnicity and faith elsewhere in Iraq.

11. Given not least the passage of time and the changing circumstances in Iraq, a substantial amount of new material has been submitted, in particular the report of Dr Fatah. The appellant was also permitted to adduce evidence and a witness statement.

12. It is evident from the manner in which the appellant's current representatives have dealt with the case that they understood that in effect the hearing was to be de novo. It is also apparent from the submissions of both representatives made before me that they were proceeding on that basis.

13. The judge found [69] that the appellant had not established his credibility or that he was at real risk of persecution from any particular individuals including the Peshmerga for the reasons he claimed if he returned to Iraq, nor that he had lost contact with his family or that he does not have the necessary documentation or could not obtain it in order to return to his country of nationality. The judge accepted [71] the appellant could not return to Diyala if that was where he was living before he left Iraq but that [72] there was no Article 15(c) risk to an ordinary civilian in the IKR and that he would be able to enter it and it is likely that the appellant's family was living in Kalar [73]. She found also that the appellant would with the necessary identifications which she found he could obtain get entry to the IKR and obtain employment, nor had it been established that he could not travel from Baghdad to Erbil by air.

14. At the very least, the findings with regard to the appellant's possession of or ability to acquire a CSID needed to be re-made as were the findings as to the documentation he would require. Similarly, the findings as to whether the appellant could travel to Erbil fall to be set aside as were the findings as to what support he could obtain there.

15. In the light of these observations, while there is no direct challenge to the findings made by the FtT it is nonetheless necessary to make additional findings in the light of the changes that have taken place, not least in Diyala.

The Hearing

16. I heard evidence from the appellant as well as an additional witness. Both of them gave evidence in Sorani with the assistance of an interpreter who appeared by video link as it was not possible to obtain the services of an interpreter in person. The appellant adopted his witness statements of 25 May 2017 and his remote witness statement taken in 2021.

17. In cross-examination, the appellant said that ISIS were still in control of Jalawla, his home town. When questioned why that was so his friend was able to go back to try to find family, he said it was an unstable area, his problem was with ISIS and the Peshmerga and that he had also been attacked by Hashd al-Shaabi. He had said he did not know if his town was safe in it when he left, that ISIS still exist in Iraq but he did not really know what was going on in his home area. The appellant said he did not have relatives or family left in Jalawla since he left and the only relative he had was a paternal uncle who was with the Peshmerga and who had helped him to leave. He had not been able to make contact with him as his phone no longer connected.

18. Regarding his mental health the appellant said that he had telephone conversations with his doctor due to Covid. He did recall speaking to Dr Ross in April 2021, after some prompting, but did not recall her name. He had not had any referrals to a specialist but had spoken to his doctor roughly once a month but was not receiving support from community nurses or anything similar to that.

19. The appellant said he had not been in contact with the Iraqi Consulate to get new ID documents. Asked why he said “why should I contact them”. He said he did not have any ID documents with him at present. There was no re-examination.

20. I then heard the evidence of Mr Rostam who adopted his witness statement. He confirmed he was from the same home town as the appellant but had not known him in Iraq. He said he had returned to their home town in July 2020, that it was safe at that time and that that was his most recent visit. He said he had not heard any evidence that ISIS had returned to Jalawla and that he had simply gone for a holiday. He said he had relatives in Jalawla who he spoke to on a regular basis but they had not mentioned to him anything about the safety of Jalawla. He said that there were some problems in the area in response to my questions which could be seen by things on Facebook. He said he did not socialise with the appellant and it was only a coincidence that they had met.

21. Mr Mullen submitted that the appellant had not made out a risk in his home area, nor was there a risk of an Article 3 mistreatment owing to his mental ill health in his home area. He submitted the appellant had been evasive and had affected uncertainties of the current conditions in Jalawla and there was nothing to show that there was a current danger in Diyala, just fake statements about incidents mentioned on social media. He submitted further that the witness’s relatives did not appear to be at risk and so it was unlikely the appellant would be perceived as a collaborator

and that that showed that his claim to be at risk of persecution had not made out. He submitted further that there was insufficient evidence to show the appellant was at risk of committing suicide, there was limited evidence of that attempt in December 2020. There was no follow-up treatment since the consultation with Dr Ross and that the appellant had had received phone calls and prescriptions of medication. He submitted that there was insufficient evidence to show a significant deterioration or distress caused by returning him to Iraq which would result in intense suffering, that his condition was insufficiently severe for that to happen.

22. Mr Mullen submitted, relying on SMO and his reference to the earlier decision in HA (Iraq) it is not possible to make out a claim solely on access to documents if return is not feasible. He submitted that if the appellant had no identity documents and return was not feasible and that he had made no attempt to get documents thus return was not feasible and thus the appeal fell to be dismissed. He submitted it was not impossible for the appellant to get documents to return so the appeal fell to be dismissed on all grounds.

23. Mr Aslam relied on his skeleton argument, submitting that nothing had been put to the appellant about his personal risk and that there was nothing inherently implausible about his account. He submitted further that on balance the appellant's evidence was consistent and there was nothing to show that he was not telling the truth other than the submission that he was being vague and evasive.

24. Mr Aslam submitted further that the appellant's account that his uncle, mother and sister were missing was corroborated now by the Red Cross and by the witness. He submitted that if credible the appellant was at risk from the government as being pro-ISIS and also at risk from the Peshmerga.

25. Turning to the report of Dr Fatah, he submitted the objective shows that ISIS are active in the area around Diyala and, applying the sliding scale analysis, as the appellant's ethnic group, that is Kurds, is not in control of the area and he suffers from mental ill health even if not to the level to engage Article 3, this was also an additional factor in his favour. Mr Aslam submitted further following the guidance that the appellant would not be able to obtain a CSID within a reasonable time of returning to Iraq, that a laissez-passer was not a solution that it was unlikely that the appellant, who had limited education, was unlikely to recall the page number so that it would not be possible for the appellant to relocate within Iraq.

Sub-heading

26. The burden is on the appellant to establish his claim to the lower standard in respect of his protection claim.

27. In assessing the appellant's claim I have done so in the light of the background evidence, and in particular with regard to the most recent

guidance SMO and KSP (Civil status documentation; article 15) Iraq CG [2022] UKUT 00110.

28. The starting point in this case is whether the appellant would be at risk in his home area, Jalawla in Diyala, and if so, whether it would be reasonable to expect him to relocate elsewhere within Iraq, in this case the IKR. I take that approach, the FtT's findings notwithstanding, as the situation in Diyala has clearly changed since 2017.

29. In reaching findings of fact in this case, I must start by considering the decision of the First-tier Tribunal given the scope of the appeal. I bear in mind that it is possible for somebody to tell the truth in some aspects of their claim but not in others. I bear in mind also the unchallenged findings of fact reached by the First-tier Tribunal.

30. I accept the appellant is an Iraqi Kurd. I accept also on the basis of the unchallenged evidence of Mr Rostam, that the appellant is from his home town, Jalawla. I accept also that Mr Rostam made enquiries of the appellant's family in Jalawla and was unable to trace them. Similarly, it had not proved possible through tracing via the Red Cross to discover the whereabouts of the appellant's relatives. The most recent evidence from the Red Cross postdates the decision of the First-tier Tribunal by a significant period. The confirmation is there is an open file in respect of the uncle but that the files in respect of the mother and sister have been closed.

31. I am satisfied from the background evidence and also the report of Dr Fatah which is not challenged that there was significant fighting in Jalawla and Diyala in 2014 in which the town was overrun by ISIS. A significant percentage of the population was displaced and in that context it is not implausible that the appellant's relatives are no longer there.

32. The appellant's evidence regarding the situation in his home area was inconsistent with the background evidence. It is also inconsistent with Mr Rostam's evidence that there appeared to be no particular difficulty in the area other than the odd incident but this did not prevent him from going to visit relatives. Bearing in mind the appellant's continued mental ill health, as confirmed by the report of Dr Ross, I drew no inferences from the inconsistency but I consider that in reality the appellant simply does not know what the situation is in his home area.

33. In his report dated 30 November 2020, Dr Fatah notes continuing attacks in Jalawla and at Section 6.2 that there has been an increase in tensions between the different Sunni, Shia, Kurdish and Turkman inhabitants, and continued instability inhibits attempts for rehabilitation [122]. He concludes at section 6.4 that Diyala is vulnerable to ISIS attacks but could not determine that there was indiscriminate violence there [132] and that whilst there was still a risk of violence from ISIS in Jalawla, particularly for security personnel and farmers, not all of the residents were at risk of persecution although a high profile person known to be fighting against

ISIS would be at heightened risk. He considered that non-political Kurds may face pressure from Hashd al-Shaabi [133] but that it was unrealistic to assume that they would persecute every Kurd in the area. He accepted that if the appellant was associated with ISIS it would put him at risk of ill-treatment, objective suggesting that ISIS members or suspected ISIS members had been detained by sectarian militia groups. There does not, however, appear to be any suggestion that as a Kurd the appellant was more or less likely to have been a collaborator with ISIS willingly.

34. It was submitted on behalf of the appellant that he is at risk in his home area of being identified as a former collaborator. I am not satisfied that that is so. It is now many years since the appellant left the area, he has no relatives there on his own account, and given the sheer levels of displacement and the extent to which situations have changed, there is no proper evidential basis for the submission that he is at risk of being identified as somebody who had worked for ISIS, even were to accept that I should disregard the findings on this matter by the FtT.

35. Mr Rostam's evidence, unchallenged, is that the imam to whom Mr Rostam had given the family details had confirmed that they had not been seen since ISIS had invaded as indeed did the local mukhtar. This is unchallenged evidence that the family had been present in the area, confirming the appellant's claim as to where he lived and his family. It indicates that they are no longer in the area.

36. This evidence does not extend to the appellant's uncle who lived in the IKR.

37. Having accepted the appellant has no family in his home area, that he is a Kurd and of the Sunni faith, which is unchallenged, I must then consider how he is likely to be able to return to Iraq, following the guidance set out in SMO.

38. In assessing whether return to Iraq is "feasible" following AA (Iraq) v SSHD [2017] EWCA Civ 944, it is important to note that feasibility of return does not depends on the possession of a CSID: see paragraph [39]:

> 39. The position with a CSID is different. It is not merely to be considered as a document which can be used to achieve entry to Iraq. Rather, it may be an essential document for life in Iraq. It is for practical purposes necessary for those without private resources to access food and basic services. Moreover, it is not a document that can be automatically acquired after return to Iraq. In addition, it is feasible that an individual could acquire a passport or a *laissez-passer*, without possessing or being able to obtain a CSID. In such a case, an enquiry would be needed to establish whether the individual would have other means of support in Iraq, in the absence of which they might be at risk of breach of Article 3 rights.

39. The most recent guidance set out in **SMO** at section B is as follows:

B. DOCUMENTATION AND FEASIBILITY OF RETURN (EXCLUDING IKR)

> *7. Return of former residents of the Iraqi Kurdish Region (IKR) will be to the IKR and all other Iraqis will be to Baghdad. The Iraqi authorities will allow an Iraqi national (P) in the United Kingdom to enter Iraq only if P is in possession of a current or expired Iraqi passport relating to P, or a Laissez Passer.*
>
> *8. No Iraqi national will be returnable to Baghdad if not in possession of one of these documents.*
>
> *9. In the light of the Court of Appeal's judgment in HF (Iraq) and Others v Secretary of State for the Home Department [2013] EWCA Civ 1276 , an international protection claim made by P cannot succeed by reference to any alleged risk of harm arising from an absence of a current or expired Iraqi passport or a Laissez passer, if the Tribunal finds that P's return is not currently feasible on account of a lack of any of those documents.*
>
> *10. Where P is returned to Iraq on a Laissez Passer or expired passport, P will be at no risk of serious harm at the point of return by reason of not having a current passport.*

40. This does not mean that a claim for asylum can succeed only if a person's return is "feasible". If, for example, it is a well-founded fear of persecution whether or not they can return to their home country is not relevant, it is not a question of whether it is feasible or not.

41. Although the appellant might be safe in his home area, the question arises as to whether he can get there and what the risks would be in trying to do so. Applying the relevant guidance set out in SMO at section C, I consider that there is a combination of factors such that he would not be safe in Baghdad, as a Sorani speaking Kurd of Sunni faith and, as I accept, no family or other support there. I find that there is, in the light of that guidance, no realistic prospect of him being able to obtain the necessary documentation that would allow him to travel to Diyala province within a reasonable time. That is not because of the lack of a laissez-passer or 1957 document because of the difficulty, if not impossibility of him getting a CSID (or INID) in Baghdad.

42. In that regard, I am satisfied that CSID cards are no longer issued in Diyala, and that he would therefore need to travel there to obtain an INID. Further, and in any event, I find it unlikely give the appellant's limited education, that he would remember the relevant page number or that he could obtain that from relatives.

43. Thus, I find that the appellant would not be able to get to his home area where I accept he would not be at risk. And, further, I am not satisfied that he would, on the basis of the guidance in SMO be able to relocate elsewhere in Iraq having arrived in Baghdad and requiring an INID or CSID. The risks that would occur would inevitably flow at least in part from his ethnicity and religion.

44. I find that, viewed as a whole, the difficulties the appellant would face on return to Baghdad are so severe, when viewed cumulatively, as in his particular circumstances, taking into account his mental ill-health which would exacerbate his difficulties, amount to persecution.

45. For similar reasons, and applying the guidance in SMO at section E it would be very difficult for this appellant to get to the IKR. Even were he to get there, it is unclear what his situation would be. Given the information that the appellant has given about family members to Mr Rostam, which turned out to be correct, given that the mukhtar and imam were aware of the members of the family, it is surprising that the Red Cross was not able to trace the members anywhere in Iraq including IKR.

46. In the circumstances and given the lapse of time since this decision was first made some five years ago, I consider reading the evidence as a whole that whatever the situation may have been in 2017, the appellant is no longer in contact with an uncle. Thus, I am not satisfied the appellant has anybody upon whom he can rely in the IKR.

47. The guidance set out in SMO is relevant also to the assessment of whether it would be unduly harsh to expect him to relocate there. I find that there is little evidence to suggest that the appellant would be at risk simply for being an ethnic Kurd from a formerly contested area.

48. 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.

49. Turning then to the factors identified in SMO, I conclude that the appellant will not have the support of family, the suggestion that he does being. 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. 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 Diyala and its previous associations with ISIS.

50. I conclude, given the lack of family support and the lack of evidence of being able to rely on remittances from abroad, 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, I conclude that it would not be reasonable for this appellant to relocate to the IKR.

51. Accordingly, I am satisfied that the has a well-founded fear of persecution in Iraq on account of his ethnicity, and that while there may be areas where he would not be at risk, he is either unable to reach them or it

would be unreasonable and unduly harsh to expect him to relocate there. I therefore allow the appeal on that basis.

52. In the alternative, I find that removing the appellant to Iraq would be a breach of his rights under Article 3 of the Human Rights Convention for the same reasons.

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 re-make the appeal by allowing the appeal on asylum and human rights grounds.

(3) The anonymity order is preserved.

Signed Date 22 June 2022

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul