



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00404/2012

THE IMMIGRATION ACTS

Heard at Field House

On 12 October 2015

**Decision & Reasons
Promulgated**

On 16 October 2015

Before

UPPER TRIBUNAL JUDGE WARR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

AK

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr C Avery, Home Office Presenting Officer

For the Respondent: Ms V Easty, of Counsel instructed by Kesar & Co Solicitors (Bromley)

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the appellant, a citizen of Iraq, born on 7 July 1981 as the appellant herein.
2. The appellant arrived in May 2002 at the age of 20. He is a Kurd from Kirkuk. His father had been a member of the Iraqi army and had fought in battles against Kurdish fighters in the 1980s. His father had been killed in

1991 outside his home and it was the appellant's case that this was because he had been in the Iraqi army. The appellant had been a military reservist in 2002 and had been abused by other soldiers because he was Kurdish and because of his disability. Photos of an opposition leader had been found in his room and he had been ill-treated and he had been able to escape and his uncle had made arrangements for him to leave the country.

3. The appellant had been granted refugee status in July 2002 and indefinite leave to remain.
4. The appellant was convicted of rape of an 18 year old male. The appellant was sentenced to five years' imprisonment. The judge observed that the appellant had been of good character and was relatively young and that he was not dangerous within the meaning of the legislation.
5. The appellant was granted immigration bail in March 2012 but was recalled to prison for breaching a licence condition on 12 April 2013.
6. The Secretary of State decided to deport the appellant on 12 June 2012 under Section 32(5) of the UK Borders Act 2007. The Secretary of State also found that in the light of the fact that the appellant had been convicted of a particularly serious crime within the meaning of Section 72 of the Nationality, Immigration and Asylum Act 2002 it was appropriate that his refugee status be revoked and that he constituted a danger to the community.
7. In the event that the certification under the Borders Act was not upheld the circumstances in connection with which the appellant had been recognised as a refugee had ceased to exist and accordingly it was appropriate to revoke or not renew the grant of asylum under paragraph 339A(v).
8. The appellant appealed against the decision and the appeal came before First-tier Tribunal Judge Canavan on 23 July 2014. In paragraph 26 of the decision the judge directed herself as follows:

"In IH (s.72, 'Particularly Serious Crime') Eritrea [2009] UKAIT 12 the Tribunal made clear that the presumptions contained in section 72 must be read to be rebuttable in order to be compatible with the Qualification Directive and Article 33(2) of the Refugee Convention. The Court of Appeal in EN (Serbia) v SSHD [2009] EWCA Civ 630 found that there was no need to put an express gloss on the wording of Article 33(2). The phrase 'particularly serious crime' is clear and drastically restricts the number of offences to which the Article would apply. South Africa far as the 'danger to the community' is concerned the danger must be real. If a person is convicted of a 'particularly serious crime', and there is a real risk of its repetition, he is likely to constitute a danger to the community. Section 72 expressly applies for the purpose and construction of Article 33(2) so where there is any ambiguity it should be construed so as to accord with the provisions

of the Convention. The court concluded that in order to construe section 72 in accordance with provisions of the Refugee Convention and the Qualification Directive both presumptions must be rebuttable i.e. in relation to the seriousness of the crime and the danger to the community.”

9. The UNHCR had also made submissions in the case which the judge takes into account.
10. The judge found that the appellant had been convicted of a particularly serious crime for the purpose of Section 2 of the 2002 Act and Article 33(2) of the Refugee Convention. There has been no challenge to that aspect of her decision.
11. The judge then turned her attention to the question of whether the appellant was able to rebut the presumption contained in Section 72 that he constituted a danger to the community of the UK. Having directed herself at some length over four pages of her determination she concluded as follows:

“43. The current risk assessment does raise concern as to whether the appellant poses a risk of reoffending and might therefore constitute a ‘danger to the community’. However, in line with the guidance relating to the interpretation of the Refugee Convention that I have outlined above (paragraphs 24-30), there are a number of other factors that I have taken into account in considering whether the appellant is able to rebut the presumption that he constitutes a ‘danger to the community’ under section 72 if it is construed to be compatible with Article 33(2) of the Refugee Convention.

- (i) The offence is a particularly serious one but is the appellant’s only conviction. He does not have a history of previous convictions for sexual offences, or any other crimes, which suggest a propensity to commit such offences.
- (ii) The appellant was on licence for a period of 13 months during which time he committed no further offences.
- (iii) Although there are concerns about the appellant’s failure to accept responsibility for the offence, which lie at the heart of the risk assessment as it relates to ‘males against whom he might sexually offend’, the appellant has shown some limited progress. The Parole Board was satisfied that the risk that the appellant poses could be adequately managed in the community.
- (iv) The appellant appears to be willing to engage in further treatment and has now been assessed to be suitable for a treatment programme in the community. He has not yet

had the opportunity to engage with the programme because he has been held in immigration detention.

- (v) The appellant has been able to conduct some rehabilitation work on other issues that might have had a part to play in the offence such as his use of alcohol.
- (vi) The fact that the appellant has no criminal associates, has generally led a stable lifestyle and has a good work ethic have been identified as potential 'protective factors' against reoffending.
- (vii) Whilst I take into account that the test the sentencing judge had to apply was a slightly higher threshold he did not consider the appellant to be sufficiently 'dangerous' to the community to require an indeterminate sentence.

44. After having considered all the circumstances in the round I conclude that despite the fact that the appellant is only now taking limited responsibility for the offence, which increases the risk of reoffending, the appellant's background, taken as a whole does not appear to show that he poses the kind of serious level of risk that is envisaged would engage the operation of Article 33(2) of the Refugee Convention. The evidence indicates that the risk that he poses could be managed in the community and it could not be said that the risk can only be managed only by his *refoulement* to Iraq. The appellant's continued failure to take full responsibility for the offence makes this a very borderline decision but I conclude that the evidence, taken as a whole, shows that he is able to rebut the presumption that he constitutes a 'danger to the community' within the meaning of section 72 and Article 33(2) of the Refugee Convention."

- 12. In relation to the appellant's refugee status the judge acknowledges that the political situation had moved on since the appellant had been recognised as a refugee in 2002. She took into account the then prevailing country guidance in **HM (Iraq) [2012] UKUT 00409**.
- 13. The judge however found that the political and security situation in Iraq had taken a dramatic turn for the worse in the course of the previous few months (the hearing was in July 2014). There was an increase in violence as a result of ISIS insurgency. ISIS had taken positions as close as 45 miles from Baghdad and militias were in effective control of much of Baghdad. The appellant's home area (near Kirkuk) was an area of longstanding conflict and there was a report that the Iraqi army had abandoned posts in and around Kirkuk and had been replaced by the Peshmerga.
- 14. The judge concluded her assessment of the appellant's asylum claim as follows:

- “49. I find that there is nothing inherently implausible about the appellant’s claim to have received threats from his family members in the name of family ‘honour’. The appellant denies that he is gay but fears that he will be perceived as a gay man because of the nature of the crime for which he has been convicted. I accept that it is at least reasonably likely that the appellant’s close family members are aware of the nature of the crime of which he has been convicted. The appellant has produced a copy of an Internet print out from the Great Yarmouth Mercury dated 14 January 2009, which names him as having been arrested for the rape of a man (pg.75 AB5). Although it seems unlikely that anyone would go directly to that particular website the information is available on the Internet if any serious enquiries were made about the appellant’s background on return to Iraq. The background evidence shows that societal attitudes towards actual or perceived gay men in Iraq could give rise to a risk of serious harm (pg.B23-24 AB1 & pg.B93-94 AB2). Although the evidence does not appear to show systematic abuse it does support the appellant’s claim that his family is likely to see the nature of his conviction as something deeply shameful. The Home Office Operational Guidance Note on Iraq dated 31 December 2013 states that ‘honour’ killings remain a serious problem throughout all parts of the country and that the penal law permits ‘honour’ considerations to mitigate sentences (pg.69 AB5).
50. After having considered all the evidence in the round I conclude that the appellant has raised a current ground for fearing to return to his home area of Iraq that could still engage the operation of the Refugee Convention. The evidence shows that the authority of the Iraqi state appears to have dissolved in his home area of Kirkuk and as such there is unlikely to be effective protection from the threat of ‘honour’ killing posed by his family. When the appellant first made his claim for asylum in 2002 he asserted that he would not be able to relocate to the Kurdish region because his family background in the Iraqi army would place him at risk there as a perceived traitor to the Kurdish cause. Although his father was killed more than 20 years ago the appellant’s own involvement in the Iraqi army was more recent. Issues relating to family honour and revenge can be remembered for many years.
51. The background evidence before me shows that the Kurdish Peshmerga is now likely to be in control of the appellant’s home area of Kirkuk. If the appellant is returned to his home area or directly to the KRG area it is likely that enquiries would be made about his background, especially in view of the fact that he would be returned as a criminal deportee. Although the appellant still had an outstanding appeal against the decision to cease his refugee status there is evidence before me to show that the respondent made a referral to the KRG authorities on 24 June

2014 to 'secure an agreement' for his return to that area (Monthly Progress Report in bundle RB2). Despite the long history of this appeal previously there had been no suggestion that the appellant would be returned to the KRG area. The respondent has now given the KRG authorities his details and they are likely to be in a position to make checks on his background. Aside from the passage of time the respondent has given no reason why the appellant would no longer be at risk in the Kurdish area when in the past it appeared to have been accepted that his family history would make it unreasonable for him to relocate to that area. No response had been received from the KRG authorities as to his admissibility to that area at the date of the hearing.

52. At the hearing the Home Office representative was unable to clarify whether there was even a realistic prospect of removal to Iraq at the current time. The location of his proposed removal appeared to shift from Erbil to Baghdad over the course of the hearing. It seemed that the respondent was unclear where she is proposing to deport the appellant. I consider that it makes little difference whether the appellant's removal is to Erbil or Baghdad. The appellant is likely to be at risk in his home area near Kirkuk where the Iraqi state is unable to provide effective protection. The appellant's family history indicates that relocation to the KRG area could place him at risk. In any event, the volatile conflict situation in the north of Iraq does not necessarily ensure the security of the KRG area from continuing advances by ISIS. The insurgent group has stated that it also intends to take Baghdad and although it hasn't done so at the current time the background evidence shows that it is within striking distance of the capital.
53. In Baghdad there is a major political crisis and the security situation is very poor. The appellant has no family support or other connections to Baghdad that would assist him to survive. It is reported that violence in Iraq has reached similar levels to 2008 and Baghdad is said to be one of the areas with the highest levels of indiscriminate violence (pg.64 & 116 AB4(i)). Thousands of Iraqis have been displaced by the violence and many are forced to survive in squatter settlements without access to basic necessities such as clean water, electricity and sanitation (pg.96 AB4(i)). Despite the efforts of the government and the international community the majority of Internally Displaced Persons (IDPs) in Iraq are said to face extremely harsh living conditions with limited access to utilities, inadequate sanitation and limited education and employment opportunities (pg.131 AB4(i)). Baghdad hosts the largest number of IDPs. The government failed to stem egregious and increasing violence by non-state actors against Iraqi civilians (pg.40 AB4(i)). For these reasons I find that the conditions in other areas of Iraq would either make internal relocation from his home area unfeasible or

that it would be unreasonable or unduly harsh given the current security conditions: see *AE and FE v SSHD* [2003] INLR 475, *Januzi v SSHD* [2006] 2 WLR 397 and *SSHD v AH (Sudan)* [2007] UKHL 49.

54. For the reasons given above I find that there is evidence to show that there is still a reasonable degree of likelihood that the appellant would be at risk of serious harm in his home area of Kirkuk for reasons of his perceived membership of a particular social group (Gay men). The background evidence shows that at the date of the hearing the Iraqi state is not in a position to provide effective protection and that internal relocation is not a reasonable option. I make those findings because the nature of the appellant's claim to fear returning to Iraq has now changed.
 55. The appellant had already been recognised as a refugee and the core issue is whether Article 1(C)(5) is engaged. The burden is upon the respondent to show that there has been a significant and non-temporary change in the country situation such that the circumstances that gave rise to the grant of protection no longer subsist. I find that it is insufficient to state that the regime that gave rise to his original fear of persecution is no longer in power. In order to cease the appellant's existing status as a refugee the situation on the ground in Iraq needs to be sufficiently stable and durable to ensure that his removal would not give rise to a risk of persecution. In light of the recent developments in Iraq and the rapidly worsening political and security crisis I find that it could not possibly be said that the situation in Iraq could justify the cessation of the appellant's existing refugee status within the meaning of Article 1(C)(5) of the Refugee Convention.
 56. In view of my finding that Article 1(C)(5) of the Refugee Convention does not apply it is not necessary to go on to consider whether the appellant would qualify for Humanitarian Protection. I do not propose to make any more detailed findings about the overall security situation and the risk to civilians save to observe that the background evidence shows that the conclusions of the Tribunal in *HM2* might have been overtaken by events on the ground in Iraq."
15. The judge did not find it necessary to consider Article 8 of the ECHR in the light of her findings and concluded by stating that the appellant had been able to rebut the presumption in Section 72 and that removal would be incompatible with the United Kingdom's international obligations.
 16. Permission to appeal was granted on 6 January 2015 by Upper Tribunal Judge Kekić. The respondent argued that the presumption had not been sufficiently rebutted by the appellant and the judge had erred in failing to look at the evidence in totality.

17. In relation to the asylum claim the judge had erred in failing to have regard to established case law on the country situation in Iraq. The judge had expressed a subjective view about the political and security crisis in Baghdad. The conclusion that the appellant would be known as a gay man in Kirkuk was informed by a single internet article. The appellant's case that his family were aware of his conviction was self-serving and uncorroborated. The appellant had been found to have manipulated agencies with a view to achieve his own goals. This had not been taken into account.
18. Mr Avery submitted that the judge had directed herself correctly in paragraph 26 of the decision by reference to **EN (Serbia)** and the position had been indicated in a straightforward manner in that paragraph. While the judge had correctly found in paragraph 31 that the appellant had been convicted of a particularly serious crime she had erred in her analysis thereafter and the reasoning had come unstuck, as Mr Avery put it, in paragraph 43.
19. It was quite clear that the appellant had acted deviously in the light of what the appellant's offender manager, Mr Cooper, had been told by the appellant and this undermined the assessment of Mr Cordwell who had conducted an independent forensic psychological assessment of the appellant. The appellant still posed a risk as had been found in the OASys assessment. The judge had made an over-complicated analysis in paragraph 43.
20. In relation to the asylum claim the appellant had been recognised as a refugee in the era of Saddam Hussain. The issues were now fundamentally different. There was no reason why the appellant would be of interest today. In making positive findings about the appellant's case the judge had not taken into account the assessment that had been made about the appellant's manipulative behaviour. The judge had not properly analysed the risks in the autonomous area or in Baghdad. The judge had depicted matters in the worst possible light. There was more recent country guidance that had been promulgated on 5 October 2015: **AA (Article 15(C)) Iraq CG [2015] UKUT 00544 (IAC)**.
21. Article 8 had not been dealt with adequately.
22. Ms Easty submitted that the judge had made no decision in Article 8 in the light of her conclusions on the other issues. She pointed out that the appellant's asylum claim had been considered in paragraph 59 of the decision letter as raising three separate grounds - Kurdish ethnicity, family involvement with the Iraqi army and fear arising from his criminal conviction. The judge grappled with the way the case had been put. She was caught between the old and the new case law. Ms Easty submitted she had got it absolutely right. She had been referred to background information and a skeleton argument and many bundles of evidence.
23. It was plain that the judge had taken into account the appellant's manipulative behaviour as appeared from paragraph 37 of the decision.

24. The UNHCR had intervened in the case and the judge had not overcomplicated matters as was claimed in paragraph 43 of the determination.
25. Mr Avery in reply submitted that the judge had erred in finding this to be a finely balanced case – it was not. All the evidence pointed to the appellant being a risk to the community. In relation to asylum, the situation had changed beyond all recognition. The determination was not sustainable.
26. At the conclusion of the submissions I reserved my decision. I have carefully considered the points made on both sides. The appeal is on a point of law only.
27. In my view the determination is very well structured and the judge dealt with each issue fully and fairly and it was necessary, as Ms Easty points out, for the judge to acknowledge the contribution made by the UNHCR submissions. No issue was taken with the judge’s self-direction in paragraph 26 of the determination which I have set out above. It is said that the judge neglected to take into account the appellant’s devious or manipulative behaviour but as Ms Easty points out a full account of this behaviour is set out in the decision. The judge found the issue of risk to be a difficult assessment to make (paragraph 42) and it was a borderline decision. However I am quite unable to find that the decision to which the judge came was not properly open to her. She approached the issues with extreme care and meticulous consideration and what she said in paragraph 43 is perfectly appropriate in the circumstances of this case and by no means an overly elaborate analysis. She was entitled to find that the appellant had rebutted the presumption within the meaning of Section 72 and Article 33(2) of the Refugee Convention.
28. The judge when making her decision in relation to the country situation could not ignore what was happening in northern Iraq at the material time and she had been equipped with a lot of information about it. I do not find it arguable that she was focusing on the most bleak picture so far as Baghdad was concerned. It was open to her to take the view that she did about the security situation in the appellant’s home area and Baghdad. Again in my view the judge’s analysis was very careful and thorough. In the particular circumstances it was open to the judge to find that the respondent had failed to show that there had been a significant and non-temporary change in the country situation such that the circumstances that gave rise to the grant of protection no longer subsisted. She went on in paragraph 60 to observe that the appellant in any event was still likely to have a well-founded fear of persecution albeit on different grounds to the ones that gave rise to his original grant of refugee status. I note that at paragraph 52 of the decision the judge was given no clear response as to where the respondent was proposing to remove the appellant. The judge observes in paragraph 56 that the background evidence shows that the conclusions of the Tribunal in **HM** “might have been overtaken by events on the ground in Iraq”. This appears not to be inconsistent with the respondent’s position in **AA (Iraq)**: the Tribunal at paragraph 68

record the respondent accepting in the skeleton argument that the overall security situation in Iraq had deteriorated since **HM**. I do not find that the judge erred in her approach and she made what Ms Easty submitted was a prescient analysis. It was not necessary for her to deal with Article 8 in the light of her findings.

Notice of Decision

29. For the reasons I have given the determination is not materially flawed in law and the appeal of the Secretary of State is dismissed. The decision of the First-tier Judge stands.

Anonymity Order

30. The judge noted that the appellant was concerned he would be at risk if identified on return to Iraq and that the appeal involved consideration of the welfare of a young child (the appellant's daughter) and she decided that it was in the best interests of the child to make an anonymity direction. I have not been invited to discontinue this direction.

31. Accordingly, no report of these proceedings shall directly or indirectly identify the appellant or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings.

Funding Order

32. No fee is paid or payable so there can be no fee award.

Signed

Date 15 October 2015

Upper Tribunal Judge Warr