



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

Appeal Number: PA/01453/2016

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 1 March 2018**

**Decision & Reasons**

**Promulgated**

**On 8 March 2018**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**NH (IRAQ)**

Respondent/Claimant

**Representation:**

For the Appellant: Ms A Brocklesby-Weller, Senior Home Office Presenting Officer

For the Respondent: Ms A Radford, Counsel instructed by Turpin & Miller Solicitors

**DECISION AND REASONS**

1. The Secretary of State appeals from the decision of the First-tier Tribunal (Judge Gribble sitting at Birmingham on 3 August 2017) allowing the claimant's appeal on the basis that (a) he did not originate from the autonomous Iraqi Kurdish Region (IKR) - but that he originated from Kirkuk, a contested area adjacent to the IKR - and (b) his point of return was therefore going to be Baghdad, where, due to his particular profile (which included being from a minority Kurdish community, being unable to speak Arabic, and being unlikely to be able to obtain a CSID) he would

probably face a real risk of destitution amounting to serious harm, contrary to Article 3 ECHR.

### **The Application for Permission to Appeal**

2. A member of the Specialist Appeals Team settled detailed grounds of appeal to the Upper Tribunal. Ground 1 was that the starting point for considering the claimant's prospective return to Iraq was erroneous. Although the claimant said that he had lived in Kirkuk for a period of time, it was clear that he originated from Bazyan which is located in the Governate of Sulaymaniyah, which in turn is located within the autonomous Iraqi Kurdish region (IKR). Given that the claimant originated from the IKR, his direct return to IKR should have been considered.
3. While this error was relied upon by all sides, any findings of fact had to be based on the correct premise, and to uphold this decision that was factually incorrect would amount to a material mistake of fact and a procedural irregularity. The concession was made in error, arising from a misunderstanding about the area from which the claimant originated. Fairness required that the matter of internal relocation should be properly decided.
4. Ground 2 was that the statement in the refusal letter, at page 10, that Bazyan was in a contested area was contradicted by the statement at page 9 of the refusal letter that the Bazyan was not (my emphasis) in a contested area. Accordingly, the Judge should have satisfied himself as to whether the claimant's home was in a contested area or not. The evidence showed that Bazyan did not fall into any identified contested area: see paragraph 1.2.1 of the Country Policy & Information Note on *Iraq: Security and Humanitarian Situation* (March 2017).

### **The Reasons for the Initial Refusal of Permission to Appeal**

5. On 3 November 2017, First-tier Tribunal Judge Easterman refused permission to appeal for the reasons set out below:

The grounds sought to argue that, notwithstanding that there was an agreed position in relation to the claimant's origin in Iraq - which was that the claimant came from a contested area - that concession by SSHD was in fact wrong, and as a result the decision itself, and the conclusions about internal relocation, were flawed. The Presenting Officer was given time to consult with the Senior Case Worker and the claimant's representative, and they produced an agreed position, which included that the claimant was from a contested area and would have to be returned first to Baghdad: *"In my view it cannot be an error of law for a Judge in adversarial proceedings to accept an agreed position by the parties, even if it subsequently transpires that they were or one of them was mistaken."*

### **The Reasons for the Eventual Grant of Permission to Appeal**

6. In a renewed application for permission to the Upper Tribunal, a member of the Specialist Appeals Team submitted that in the interests of justice,

the correct factual basis of any appeal should be properly ascertained in making findings of fact. The principle of fairness extended to all parties. Had the same error worked against the claimant, the Tribunal would have sought to correct that, even if the position had been agreed upon.

7. On 20 December 2017, Upper Tribunal Judge McWilliam granted permission to appeal for the following reasons: *“The Judge proceeded on the basis that the [claimant] comes from a contested area, whilst this is arguably not the case. The concession made by the Secretary of State was arguably based on erroneous facts, arguably giving rise to procedural unfairness.”*

### **Relevant Background**

#### ***The Relevant Country Guidance on the return of Iraqi nationals from the IKR***

8. In **AA (Article 15C) Iraq [2015] UKUT 544 (IAC)** the Tribunal drew a sharp distinction between the autonomous Iraqi Kurdish Region (IKR) and the remaining territory of Iraq. References to “Iraq” were to be treated as references to the territory of Iraq *excluding the IKR*, unless otherwise stated.
9. In A1 of the headnote guidance, the Tribunal held that there was at present a state of internal armed conflict in certain parts of Iraq (*but not in certain parts of the IKR* – see above), involving Government security forces, militias of various kinds, and the Islamist group known as ISIL. The intensity of this armed conflict in the so-called “*contested areas*”, comprising the Governates of Ambar, Diyala, Kirkuk, (aka Ta’min), Ninewah and Salah Al-Din, was such that, as a general matter, there were substantial grounds for believing that any civilian returned there, solely on account of his or her presence there, faced a real risk of being subjected to indiscriminate violence amounting to serious harm within the scope of Article 15C of the Qualification Directive.
10. At B5 of the headnote guidance, the Tribunal said that the return of former residents of the IKR would be to the IKR, and all other Iraqis would be returned to Baghdad.
11. At section E of the headnote guidance, the Tribunal said that the Secretary of State would only return an Iraqi national (P) to the IKR if P originated from the IKR and P’s identity had been pre-cleared with the IKR authorities. The authorities in the IKR did not require P to have an expired or current passport, or *laissez passer*. The IKR was virtually violence-free, and there was no Article 15C risk for ordinary civilians in the IKR.
12. In **AA (Iraq) [2017] EWCA Civ 944**, the Court of Appeal amended the guidance given by the Tribunal in 2015, but the guidance cited above remained undisturbed.

#### ***The Claimant’s Material History***

13. The claimant is a national of Iraq, whose date of birth is [ ] 1992. He was born and brought up in the village of Bazyan, which is in the Sulaymaniyah Governate. His claim was that he had lived in Bazyan until 2012 when he says that he and the rest of his family left because of problems with his girlfriend's family. They had moved to Allawa Mahmud, outside Kirkuk. Allawa Mahmud was not in the IKR (Decision of Judge Butler, paragraph 17). Two years later ISIL came to the area, and the family moved into Kirkuk *"for their own safety"* (Decision of Judge Butler, paragraph 3). In Kirkuk, he and his cousin were threatened by people in the Islamic group; and so they fled from Kirkuk on 30 May 2015, and made their way to Europe, via Turkey.

### ***The Stance taken in the Decision Letter***

14. On 2 February 2016, the SSHD gave her reasons for refusing the claimant's protection claim. His account of his claimed problems in Iraq was not accepted, as he had given a contradictory account. Initially he said that he had run away from the village because of ISIL, but he then changed his account to say that he had left the village due to problems with his girlfriend's family.
15. On the related issues of internal relocation and the prospective point of return, the refusal letter was muddled and contradictory.
16. At the top of page 9, the case worker referred to the claimant as originating from Baqert, rather than from Bazyan, and asserted that he had not demonstrated a genuine objective fear of return to Baqert, which was an area of Iraq to which he could reasonably relocate. At the bottom of page 9, the case worker stated that the claimant was Kurdish and from Bazyan, which was not a "contested" region of Iraq. The case worker then quoted A1 of **AA**, and commented as follows: *"Owing to this, it is not considered to be sustainable to argue that you can safely return to Bazyan."* At page 11 of the refusal decision, the case worker asserted that the claimant was a Kurd, *"who does not originate"* from the IKR.

### **The Decision of Judge Butler**

17. The claimant's appeal against the refusal of his protection and human rights claims came before Judge Butler sitting at the First-tier Tribunal on 26 August 2016. Both parties were legally represented. In his subsequent decision, Judge Butler held that the claimant was not a genuine refugee. His account was inconsistent, and he believed that it was a fabrication. He did not have a well-founded fear of persecution from ISIL or from his girlfriend's family, or from religious groups in Kirkuk. He found that it would be reasonable for the claimant to relocate to the IKR. There was no reason why he could not return to Bazyan, as it was not true that he had had problems in Bazyan with his girlfriend's family. There was no evidence that his parents were no longer alive and so could not support him in Bazyan.

### **The Application for Permission to Appeal against the Decision of Judge Butler**

18. On 6 October 2016, the claimant applied for permission to appeal against the decision of Judge Butler, arguing that the Judge had erred in law in finding that the claimant could relocate to IKR and that there was no reason that he could not return to Bazyan. His finding was unreasonable, as **AA** had held that only those formerly from the IKR would be returned to the IKR, and all other Iraqis would be returned to Baghdad. The claimant was not originally from IKR. The finding that he could return to Bazyan was an error of law.

### **The Grant of Permission to Appeal from the Decision of Judge Butler**

19. On 20 October 2016, First-tier Tribunal Judge Froom granted the claimant permission to appeal, as the Judge appeared to have assessed internal flight on the basis that the claimant was from either Bazyan or Kirkuk, *“both of which are in contested areas according to the Country Guidance.”*

### **The Rules 24 Response**

20. On 17 November 2016, a member of the Specialist Appeals Team settled a Rule 24 Response opposing the appeal, as the SSHD’s refusal did not accept that Bazyan was in a contested area. He pleaded that the Judge had properly considered that the claimant could relocate to the IKR and that the Judge had applied **AA** correctly.

### **The Decision of the Upper Tribunal**

21. Following an error of law hearing at Field House on 30 January 2017, Deputy Upper Tribunal Judge Juss gave his reasons for finding an error of law in a decision promulgated on 8 February 2017. The first reason was that he was satisfied that both Kirkuk (where the claimant had gone to settle) and the village of Bazyan (where the claimant was brought up) were contested areas. Judge Juss set the decision of Judge Butler aside, and remitted the appeal to the First-tier Tribunal.

### **The Hearing Before, and the Decision of, Judge Gribble**

22. Both parties were legally represented before Judge Gribble. Ms Rutherford appeared on behalf of the claimant, and Ms Houghton appeared on behalf of the SSHD. Paragraph [8] of the subsequent decision contains an account of how the agreed position was arrived at.
23. Before the hearing was called on, Ms Houghton asked for a short break to consult with a Senior Case Worker and with Ms Rutherford. When the case was called on, Ms Rutherford put forward an agreed position that the sole extant issue was the question of internal relocation as Judge Butler’s adverse credibility findings were not challenged. She noted the confusion

in the reasons for refusal letter on the issue of internal relocation. Ms Houghton acknowledged that the letter conceded that the claimant was from a contested area and that return would be first to Baghdad. The Judge asked the representatives to confirm that the issue was return to Baghdad, and then onwards. The representatives agreed that this was the issue.

24. I have consulted the Judge's typed record of proceedings in order to see whether this throws further light on the reasoning behind Ms Houghton's concession. She is recorded by the Judge as conceding that the claimant was from a contested area and conceding that the refusal "*jumps re place of relocation*". She conceded that relocation would be to Baghdad "*on basis it is Kirkuk he is from.*"

### **The Hearing in the Upper Tribunal**

25. At the hearing before me to determine whether an error of law was made out, Ms Brockleby-Weller developed the arguments advanced in the permission application. I took her through the procedural history, and invited her to comment. She submitted that Counsel for the appellant had inadvertently misled the Tribunal when applying for permission to appeal from the decision of Judge Butler. In her permission application, she had asserted wrongly that the claimant was not from the IKR and was therefore not returnable to the IKR.
26. Ms Radford referred me to **E&R [2004] EWCA Civ 49**, and submitted that the requirements for setting aside a decision on the grounds of a mistake of fact were not met on the particular facts of this case, not least because the SSHD was responsible for the asserted error. In addition, it was not clear that the error was material, as the Home Office had suspended returns to Erbil last year, and hence someone in the claimant's position would have to be returned via Baghdad in any event.

### **Discussion**

27. At paragraph [66] of **E&R**, the Court of Appeal said:

In our view, the time has now come to accept that a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in a statutory context where the parties share an interest in cooperating to achieve the correct result. Asylum law is undoubtedly such an area. Without seeking to lay down a precise code, the ordinary requirements for a finding of unfairness are apparent from the above analysis of *CICB*. First, there must have been a mistake as to an existing fact, including a mistake as to the availability of evidence on a particular matter. Secondly, the fact or evidence must have been "established", in the sense that it was uncontested and objectively verifiable. Thirdly, the appellant (or his advisers) must not have been responsible for the mistake.

Fourthly, the mistake must have played a material (not necessarily decisive) part in the Tribunal's reasoning.

28. Having considered all the relevant material which is before me, I am persuaded that three out of the four requirements identified by the Court of Appeal are made out.

### **Mistake of Fact**

29. I am satisfied on the balance of probabilities that until now both the First-tier Tribunal and the Upper Tribunal have laboured under the fundamental misconception that the claimant's village of origin is or was at all material times in a contested area; and that it is in Iraq, as opposed to being in the IKR.
30. The true position is objectively verifiable by consulting a map which shows Bayzan's close proximity to the city of Sulaymaniyah, and the fact that it is on the eastern side of the boundary between the Governate of Sulaymaniyah – which is one of the three governates of the IKR (see paragraph [112] of **AA**) – and the Governate of Kirkuk, which lies to the West.
31. The mistake of fact can be traced back to the refusal decision. It was initially correctly stated that Bazyan was not in a contested area. The case worker then quoted the Headnote Guidance of **AA** at A1 for the contrary proposition. Although it is clear from the maps produced for this appeal to the Upper Tribunal that Bazyan is not located within the same governate as Kirkuk, the case worker appears to have decided that it was, and hence that not only was it in a contested area, but it was also by definition not within the IKR.

### **Whether Mistake of fact established**

32. Ms Radford queried whether the mistake of fact could be said to be "established". I accept that the extrinsic evidence relied on by the SSHD to show that Bayzan is in the IKR dates from March 2017, and so there is the theoretical possibility that boundaries have shifted since February 2016. But this appears to me to be fanciful. The same applies with even greater force to the question of whether Bayzan was a contested area in the past. It is clear from **AA** that the "contested" area designation only applies to certain areas within Iraq *excluding the IKR*. The Governate of Sulaymaniyah was peaceful in 2015, according to **AA**, and so – unless Bayzan was not in the Governate of Sulaymaniyah in 2015 – Bayzan cannot have been in a contested area in 2015 or subsequently.

### **Whether Mistake of fact material to the outcome**

33. The mistake of fact was clearly material to the outcome as, subject to his identity being pre-cleared with the IKR authorities, there is no reason to suppose that the claimant will face destitution amounting to Article 3 ECHR harm in the event of a direct return to the IKR.

## Responsibility for the Error

34. The difficulty for the SSHD is that not only is she responsible for the original error, but she must also carry the primary responsibility for this error being carried forward to, and adopted by, the Upper Tribunal in the appeal against the decision of Judge Butler. For example, when granting permission to appeal against the decision of Judge Butler, Judge Froom held that Bazyan was a contested area according to the Country Guidance. This was erroneous in law, but the error of law was not corrected in the Rule 24 response. Reliance was simply placed on the fact that at one point in the refusal letter the case worker had said that Bazyan was not a contested area. This was not good enough. Evidence ought to have been presented at the hearing in the Upper Tribunal before Judge Juss that Bazyan was in the Sulaymaniyah Governate, and not in one of the contested areas identified in A1 of the Headnote Guidance in **AA**.
35. It was not too late to withdraw the concession made in the refusal letter at the re-hearing before Judge Gribble. But not only was it not withdrawn, but a fresh concession was made. In the light of the decision of the claimant's representative not to "challenge" the adverse credibility findings of Judge Butler, the logical consequence was that the claimant had not given a credible explanation for him and his family leaving Bayzan and relocating to Kirkuk. He had admitted that they had not left Bayzan because of ISIL and Judge Butler disbelieved his claim that they had left because of problems with his girlfriend's family. It was for that reason that he found that the claimant could return to his parents in Bayzan. Nonetheless, the Presenting Officer conceded that the claimant and his family had decamped to Kirkuk, and the claimant gave unchallenged evidence before Judge Gribble that he had been issued with a CSID in Kirkuk, which he had left behind in Kirkuk in the former family home there.
36. There is a duty on all parties to co-operate with the Tribunal in achieving a just outcome. But there is no evidence that the claimant's representatives had superior knowledge to that of the SSHD's representatives. The simple fact is that nobody on either side looked at a map to check whether the case worker in the refusal letter was correct to treat Bayzan as (a) not being in the IKR or (b) as being in a contested area within Iraq. Since the concession was made by the SSHD, the primary responsibility for checking the concession lay with the SSHD, especially as the contradictions inherent in the refusal letter alerted the reasonable reader to the distinct possibility that the concession was misconceived.
37. Thus the SSHD is responsible for the fact that the claimant's protection claim has been consistently assessed on the basis that the only viable point of return is that of Baghdad, and it is not suggested that Judge Gribble erred in law in finding that the claimant would face a real risk of Article 3 harm in that eventuality.
38. Since the SSHD is responsible for the claimant's protection claim being assessed on a mistaken basis which works to the claimant's advantage,



there is no material unfairness in the outcome of this appeal.

**Notice of Decision**

The decision of the First-tier Tribunal did not contain an error of law, and accordingly the decision stands. This appeal to the Upper Tribunal is dismissed.

**Direction Regarding Anonymity - rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a tribunal or court directs otherwise, the Claimant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the Claimant and to the SSHD. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 3 March 2018

Judge Monson  
Deputy Upper Tribunal Judge