



IN THE UPPER TRIBUNAL

Given orally at Field House on 5th December 2016

JR/2426/2016

Field House,
Breams Buildings
London
EC4A 1WR

5th December 2016

**THE QUEEN
(ON THE APPLICATION OF SA)**

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE PETER LANE

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Mr R Khubber, instructed by Turpin & Miller LLP, appeared on behalf of the Applicant.

Mr Z Malik, instructed by the Government Legal Department, appeared on behalf of the Respondent.

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JUDGMENT
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JUDGE PETER LANE: This is an application for judicial review of the respondent's decision of 4th December 2015 not to treat his submissions of January 2013 as a fresh asylum or human rights claim. Permission was granted by Upper Tribunal Judge Eshun on 12th May 2016.

2. The immigration history of the applicant is essentially as follows. In November 2007, he arrived in the United Kingdom claiming to be an unaccompanied minor. He also claimed asylum at that time. In June 2008, his application for asylum was refused and he appealed to what was then the Asylum and Immigration Tribunal, which heard his appeal in July 2008 and in August of that year dismissed it.
3. In April 2012, the applicant made further submissions and those were rejected by the respondent in July 2012. Further submissions were made in 2013 and 2015, leading to the decision letter of 4th December 2015.
4. The decision letter is a long and relatively detailed document. It describes the submissions as contending on the applicant's behalf that he feared returning to Iraq because he would be subjected to persecution; and that, if he were removed, both Articles 3 and 8 of the ECHR would be breached, on the basis that he would be undocumented. He also said that there was a level of indiscriminate violence in Iraq and that his life would, accordingly, be in danger there.
5. The respondent noted that, in the 2008 determination of the AIT, the applicant had been found not to have a well-founded fear at that time. Indeed, the Immigration Judge in that case found that the applicant's claim was not credible and that no weight should be given to it.

6. Pausing there, it is helpful at this stage to turn to the determination. The judge declined to believe the applicant's account that he would suffer religious discrimination as being a member of what is called the Kaka'I faith. The judge regarded the applicant's account of how he had been removed from Iraq as not credible. It seems that the judge was not persuaded that the applicant might be of the age he claimed, although no formal finding was made and the judge certainly assessed the applicant on the basis that he was a minor.
7. There was also doubt in the judge's mind that the applicant was without family members in Iraq. On the contrary, it is reasonably apparent that the judge thought the converse was likely to be true. What does appear to be common ground, however, is that the judge did not dispute the fact that the applicant came from Kirkuk. That is a matter of some significance, to which we will turn in due course.
8. The decision letter continued by rejecting the challenge based on an alleged failure to comply with the respondent's obligations relating to tracing. It is common ground that that particular aspect of the matter is no longer in issue.
9. The writer of the decision letter referred to the issue of Article 15(c), in the context of the case in the Upper Tribunal's country guidance in AA (Article 15(c)) Iraq CG [2015] UKUT 544 (IAC). It is significant that the decision in AA found no place in the submissions made to the respondent which led to the decision letter. That is unsurprising because when those submissions were made, and for some time thereafter, AA had not been promulgated. So, the respondent's decision quite rightly engaged with AA, notwithstanding that it did not form part of the submissions made by the applicant or those advising him.
10. The decision letter considered the issue of internal relocation in the context of AA. It noted that internal

relocation might be a viable option but only if the risk is not present in the place of relocation and it would not be unduly harsh to relocate.

11. There was also consideration made of the significant issue, which featured in AA, regarding documentation and the effect that the presence or absence of documentation might have on ability to return and, indeed, on risk on return. As to that last issue, permission to appeal to the Court of Appeal has been granted in respect of the decision in AA but I do not consider that that has any material part to play in the proceedings before this Tribunal.
12. The letter accepted that the applicant came from Kirkuk. It was noted that Kirkuk was a contested area, as found by the Tribunal in AA. That meant, of course, that internal relocation loomed large because it could not be said that Kirkuk was a safe place for the applicant to return. However, the conclusion drawn by the respondent was that the applicant could internally relocate, either to Baghdad or to the IKR area; that is to say, the so-called Kurdish Autonomous Zone of Iraq.
13. Mr Malik points out in that regard and, indeed, in relation to relocation generally, that the writer of the decision noted the absence of any evidence from the applicant to make good a claim that internal relocation could not reasonably be undertaken. For example, we see references to the absence of evidence at page 16 and also at page 17 of the decision.
14. Regarding assistance from others, it was noted at page 20 that the applicant had a mother and two sisters, who were said to be living near Kirkuk, and that he also had an uncle who had helped him. All those matters persuaded the respondent that, in the light of the case of AA, the submissions would not give rise to a fresh claim.

15. The challenge to the decision is mounted on two bases. Mr Khubber contends first that it appears from the decision letter that the respondent did not ask herself the correct question, as expressed in the well-known case of WM (DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495.
16. This essential question is whether there would be a reasonable prospect of success before a hypothetical judge. That is a different matter from the respondent asking herself whether she would or would not conclude that a claim to international protection could be made good.
17. So far as that challenge is concerned, I have no hesitation in rejecting it. Mr Malik has pointed to various passages in the decision letter, for example at the bottom of page 18 and the top of page 19, where the correct question is expressly posed. As I mentioned to Mr Khubber in the course of argument, I do not consider the penultimate paragraph on page 24 of the decision letter (which he said was indicative of the respondent displacing the hypothetical judge) falls to be read as heretical or problematic in any way.
18. The issue, therefore, comes down to the sole question of whether the respondent has demonstrated the requisite degree of anxious scrutiny. In this regard, Mr Khubber took me in some detail through the relevant decisions, in particular the decision in AA, and it is necessary to look at that case with some care.
19. The country guidance in AA may perhaps be summarised very briefly as follows. First, there was at the relevant time an internal armed conflict within the scope of Article 15(c) of the Qualification Directive taking place in various parts of Iraq, largely but not entirely as a result of the activities of an Islamist group known as ISIL. Amongst the places where

problems arose was the area within which the applicant's home was located.

20. Various findings were then made relating to documentation. In particular, the issue of the so-called CSID was examined by the Tribunal. As for this:

"A CSID is generally required in order for an Iraqi to access financial assistance from the authorities; employment; education; housing; and medical treatment. If P shows there are no family or other members likely to be able to provide means of support, P is in general likely to face a real risk of destitution, amounting to serious harm, if, by the time any funds provided to P by the Secretary of State or her agents to assist P's return have been exhausted, it is reasonably likely that P will still have no CSID" (Guidance, B11).

21. What emerges, I think, from AA is that the presence of family members in Iraq and the ability of those members to contact and be of use to the applicant are issues of general significance in determining not just whether the proposed returnee may be able to acquire certain documentation but also whether he or she may be assisted financially or in other ways. That assumes particular significance where, as here, the issue comes down to whether it would be reasonable in Januzi [2006] UKHL 5 terms for the applicant to relocate from the contested area of his home to some other part of Iraq. In practice, that would be Baghdad, at least initially, and possibly later on the Kurdish Autonomous Area.
22. That, then, was the essence of the country guidance, so far as it relates to the applicant. Mr Khubber rightly pointed out that the issue of internal relocation, insofar as it features in the country guidance, was emphasised by the Tribunal in AA to be of a fact-sensitive nature.
23. Mr Khubber then drew attention, importantly in my view, to the way in which the actual appellant in AA had been dealt with by

the Upper Tribunal in the country guidance case. He sought to draw relevant parallels between the individual, AA, and his client, the applicant. Thus, for instance, we see in paragraph 3 of AA that AA was a minor at relevant times, as was the applicant in the present case.

24. We also see that AA's credibility had been rejected by an Immigration Judge. That is to be found at paragraph 4 of AA. AA came from Kirkuk, which was subject to Article 15(c) risk, and that is the position of our applicant. AA was assumed hypothetically to be bound for Baghdad initially. So too is the present applicant.
25. There was no evidence of AA's having, or having access to, a passport or a laissez-passer. We see that from paragraph 206 of AA. The same, Mr Khubber says, is true of the present applicant.
26. The passages of particular significance referred to by Mr Khubber are to be found at the very end of the decision in AA. Having made the various findings that I have just summarised, the Tribunal concluded that further fact-finding was necessary in order to determine whether AA himself was or was not at real risk, applying the country guidance that was given by the Tribunal in the determination.
27. In particular, the Tribunal said this:

"209. The Tribunal last undertook a fact finding exercise in relation to this appellant as long ago as April 2011 i.e. over four years ago. Whilst the findings of fact made by Designated Judge Wynne have been preserved, he did not make findings on all of the matters that have subsequently become relevant to assessment of the appellant's claim. It is equally clear that as a consequence of the passage of time the situation in Iraq for the appellant's family may have changed. Findings are required in this regard.

210. In light of all that we have said above, we conclude that the most appropriate course, given the extent of the fact-finding necessary in this appeal, is to remit the matter to the First-tier Tribunal for it to make the further necessary findings of fact. The Tribunal is hereby directed to thereafter apply the relevant country guidance."

28. Mr Khubber says that this is a conclusion of the Tribunal in AA, which should have been, but was not, taken into account by the respondent when she came to arrive at her decision regarding the present applicant. In effect, what the respondent did was to concentrate on the country guidance and then, in Mr Khubber's submission, make excessive and inappropriate use of the negative credibility findings of the Immigration Judge who had heard the applicant's appeal, some eight years previously, when the applicant was said to be 16 years old.
29. Mr Khubber supported his submissions in that regard by pointing to passages of recent guidance from the respondent. Insofar as it is necessary to summarise that guidance, it reiterates problems arising from internal armed conflict in various areas of Iraq and focuses attention on the fact-sensitive nature of any approach to internal relocation.
30. Mr Khubber highlights passages in the respondent's own guidance, which make it plain that all of the evidence must be looked at in the round when concluding whether internal relocation is appropriate.
31. Mr Malik submits that the decision letter is not flawed. He submits that the applicant did not say anything in his submissions about internal relocation and, insofar as the submissions had any meat in them, the complaint being made was about the now discarded challenge, based on an alleged failure in respect of tracing family members. Mr Malik says that if

one looks at the letters that form the submissions, they were otherwise entirely generic in nature.

32. The problem for Mr Malik, I find, is, as I have already indicated, that the point at which the respondent chose or to make her decision in this case was shortly after the appearance of the country guidance case of AA.
33. The decision letter rightly concentrated on that country guidance; but, given that the applicant had had no prior ability to refer to aspects of the case that might favour his position, it was plainly incumbent on the respondent to look at the country guidance case as a whole, stand back and consider what it might say about this applicant. I find that she did not do so. The fact that she did not emerges very powerfully from the submissions made by Mr Khubber regarding the approach taken by the Tribunal to the actual appellant in that case and the striking factual similarities between AA's case and this applicant's case.
34. If the Upper Tribunal had considered that a decision in AA's appeal could have been made without further fact-finding, then plainly, it would have done so. Had the Secretary of State approached the entirety of the case of AA in that light, I do not consider that the decision to reject the applicant's submissions as a fresh claim would inexorably have followed.
35. As Mr Khubber said, the situation in Iraq, as we all know, has changed markedly over the intervening eight years, following the dismissal of the applicant's appeal. Fighting in the contested areas may well have disrupted means of communication, such that even if the applicant might in the past have been in touch with family members who were in a position to help him, this could by no means be assumed still to be the position. In that regard, the adverse credibility findings of the kind made by the Immigration Judge in 2008

clearly needed to be looked at with considerable circumspection and I find that the respondent did not do so.

36. As Mr Khubber said in reply to Mr Malik, the letter before action, or "pre-action protocol" letter, which the applicant's solicitors wrote in the light of AA, echoes many of the points Mr Khubber has made and underscores the findings that I have just reached. The respondent failed properly to consider the significance of that case, in rejecting the submissions of the applicant.
37. For this reason, the application for judicial review succeeds and I quash the respondent's decision. Mr Khubber did not press his request for a mandatory order and, indeed, I think he was right not to do so. One must assume that the respondent will reconsider the matter, in the light of what is said in this judgment, and then decide how to proceed.