Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00385/2017

THE IMMIGRATION ACTS

Heard at Manchester	**Decision Promulgated**
On 14 December 2017	**On 14 December 2017**

Before

Deputy Upper Tribunal Judge Pickup

Between

ARKAN ADNAN ALI
[No anonymity direction made]

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr T Hussain, instructed by IAS (Manchester)
For the respondent: Mr G Harrison, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Herwald promulgated 18.2.17, dismissing his appeal against the decision of the Secretary of State, dated 28.12.16, to refuse his protection claim.

2. The Judge heard the appeal on 13.2.17.

3. First-tier Tribunal Judge Peart refused permission to appeal on 22.6.17. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge O'Connor granted permission to appeal on 26.7.17.

4. Thus the matter came before me on 14.12.17 as an appeal in the Upper Tribunal.

Error of Law

5. For the reasons summarised below, I found such error of law in the making of the decision of the First-tier Tribunal such as to require it to be set aside and remade, remitting it to the First-tier Tribunal.

6. In granting permission to appeal, Judge O'Connor considered there to be 'Robinson obvious' arguable grounds in failing to give any, or any sufficient, reasons for concluding that returning the appellant to Kirkuk would not lead to a breach of Article 15(c). "Alternatively, the First-tier Tribunal's conclusion in this regard is arguably irrational, given the terms of the country guidance in AA (Iraq) and the paucity of the evidence produced to the First-tier Tribunal by the Secretary of State on this issue."

7. "It is further arguable that the First-tier Tribunal failed to lawfully apply the guidance given in AA (Iraq), both prior, and subsequent to the amendments made thereto in [2017] EWCA Civ 944 to its conclusions that the appellant could live in the IKR (which ought to have includes a consideration of how the appellant would travel to, and gain entry into, this region). As to the potential internal relocation alternative to Baghdad, once again the First-tier Tribunal arguably failed to provide adequate reasons for its conclusions on this issue."

8. Judge Herwald appears to have misunderstood the country guidance of AA (Article 15(c)) Iraq CG [2015] UKUT 544 by suggesting at [19] that the country guidance provided that Kirkuk was no longer a contested area. That is not what the case held. Kirkuk was a contested area in 2015. Paragraph 1 of the country guidance in fact provides:

> *"1. There is at present a state of internal armed conflict in certain parts of Iraq, 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 governorates of Anbar, Diyala, Kirkuk, (aka Ta'min), Ninewah and Salah Al-din, is such that, as a general matter, there are substantial grounds for believing that any civilian returned there, solely on account of his or her presence there, faces a real risk of being subjected to indiscriminate violence amounting to serious harm within the scope of Article 15(c) of the Qualification Directive."*

9. That part of the Country Guidance remains unchanged following the Court of Appeal decision of 2017 amending other parts of the guidance in relation to a CSID. I note in passing that that some recent decisions of the Secretary of State have suggested that with the demise of IS, which is no longer in control of Kirkuk, it is no longer a contested area. However, more recent country information suggests that an internal armed conflict continues, with the Iraqi Army in battle against Kurdish Peshmerger forces, so that it remains a contested area.

10. Despite the Rule 24 response, dated 8.8.17, suggesting that the First-tier Tribunal could not have taken into account case law not promulgated until some 5 months after the appeal was heard, Mr Harrison accepted that there was a clear error in regard to the judge's findings about Kirkuk. He also accepted the submission that the judge failed to provide adequate reasons as to how the appellant could reach the IKR.

11. I find that this part of the decision of the First-tier Tribunal was made in error of law and, given the country guidance, is irrational.

12. Mr Hussain sought to make additional points not within the grant of permission, including that the appellant would face difficulty gaining entry to the IKR. However, the country guidance on that issue remains unchanged, pointing out that a person not from the IKR will be able to gain temporary admission and that no such persons have been required to leave the IKR. It is also known that there are regular multiple flights from Baghdad to Erbil on a daily basis and background information from the IRC suggests that IDPs have been arriving regularly.

13. I find that the decision of the First-tier Tribunal is devoid of adequate reasoning as to whether the appellant, who is from Kirkuk and not from the IKR, if he is not to return to Kirkuk or settle in Baghdad, will manage to access the IKR from Baghdad. In the circumstances, the decision cannot stand.

Remittal

14. When a decision of the First-tier Tribunal has been set aside, section 12(2) of the Tribunals, Courts and Enforcement Act 2007 requires either that the case is remitted to the First-tier Tribunal with directions, or it must be remade by the Upper Tribunal. The scheme of the Tribunals Court and Enforcement Act 2007 does not assign the function of primary fact finding to the Upper Tribunal. Where the findings are unclear on a crucial issue at the heart of an appeal, as they are in this case, effectively there has not been a valid determination of those issues.
15. The appellant was until recently unrepresented and has only just obtained legal representation. His solicitors had applied for an adjournment, but I saw no reason why the error of law appeal could not proceed. However, it was clear that the case was far from ready for remaking of the decision and there was no interpreter present.
16. In all the circumstances, at the invitation and request of both parties to relist this appeal for a fresh hearing in the First-tier Tribunal, I do so on the basis that this is a case which falls squarely within the Senior President's Practice Statement at paragraph 7.2. The effect of the error has been to deprive the appellant of a fair hearing and that the nature or extent of any judicial fact finding which is necessary for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 to deal with cases fairly and justly, including with the avoidance of delay, I find that it is appropriate to remit this appeal to the First-tier Tribunal to determine the appeal afresh.

Conclusions:

17. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remit the appeal to be decided afresh in the First-tier Tribunal in accordance with the attached directions.

Signed

Deputy Upper Tribunal Judge Pickup

Dated

Consequential Directions

18. The appeal is remitted to the First-tier Tribunal sitting at Manchester;
19. The ELH is 3 hours;
20. The appeal may be listed before any First-tier Tribunal Judge, with the exception of Judge Herwald and Judge Peart;
21. The appellant is to ensure that all evidence to be relied on is contained within a single consolidated, indexed and paginated bundle of all objective and subjective material, together with any skeleton argument and copies of all case authorities to be relied on. The Tribunal will not accept materials submitted on the day of the forthcoming appeal hearing;
22. The First-tier Tribunal may give such further or alternative directions as are deemed appropriate.

Anonymity

I have considered whether any parties require the protection of any anonymity direction. No submissions were made on the issue. The First-tier Tribunal did not make an order pursuant to rule 13(1) of the Tribunal Procedure Rules 2014.

Given the circumstances, I make no anonymity order.

Fee Award **Note: this is not part of the determination.**

In the light of my decision, I have considered whether to make a fee award pursuant to section 12(4)(a) of the Tribunals, Courts and Enforcement Act 2007.

I have had regard to the Joint Presidential Guidance Note: Fee Awards in Immigration Appeals (December 2011).

I make no fee award.

Reasons: No fee is payable and thus there can be no fee award.

Signed

Deputy Upper Tribunal Judge Pickup

Dated