



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/02945/2016

THE IMMIGRATION ACTS

Heard at North Shields Hearing Centre
On 5 December 2017

Decision & Reasons Promulgated
On 7 December 2017

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

B S S

[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the appellant: Ms M Cleghorn, counsel instructed by Halliday Reeves Solicitors
For the respondent: Ms R Petterson, a Senior Home Office Presenting Officer

Anonymity Order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I continue an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Decision and Directions

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse him refugee protection, humanitarian protection or leave to remain in the UK on human rights grounds.
2. The First-tier Tribunal's decision was sent to the parties on 29 December 2016 and the basis of the grounds of appeal is that the judge failed properly to apply the country guidance of the Upper Tribunal in *AA* (Article 15(c)) *Iraq CG* [2015] UKUT 00544 (IAC).

Background

3. The undisputed facts in this appeal are that the appellant is an Iraqi Kurd from Kirkuk and is a Sunni Arab. He is not originally from the IKR and has no sponsor in that area of Iraq. Kirkuk is not in the IKR.
4. The appellant has at present no travel document, having lost his passport in the waters off Greece when travelling to Europe, but he says he has an uncle in Kirkuk who still has his CSID, though he doubts whether it could be posted to him from there.

First-tier Tribunal decision

5. At [55] of his decision, the First-tier Tribunal Judge accepted that the appellant could not be returned to Iraq via Baghdad, for the reasons set out in the refusal letter, that is, because he is a Sunni Arab with no CSID or passport.
6. The First-tier Tribunal Judge rejected the asylum claim on credibility grounds, with reference to the low credibility of the appellant's account of a feud in the home area and/or of the appellant having been kidnapped by Daesh/ISIS in that area before coming to the UK. There is no challenge to that part of his decision.
7. When refusing the claim under Article 15(c), the First-tier Tribunal Judge stated that he was guided by the 2015 country guidance of the Upper Tribunal in *AA (Iraq)*. He did not set out that guidance before purporting to apply it.
8. The First-tier Tribunal Judge's entire reasoning on *AA (Iraq)* and Article 15(c) is as follows:

“55. ...In terms of humanitarian protection, I am guided, with particular reference to Kirkuk, to the Upper Tribunal decision in *AA Iraq CG*, to which I have already made reference. In that regard, I accept that [internal] relocation should be considered. It is clear from paragraph 31 of the reasons for refusal letter that the Respondent would not propose to return the appellant to Baghdad. The reality of relocation would therefore be to the Kurdish region of Iraq, administered by the KRG. ...

57. ...I further find that it is reasonable to expect the appellant to be able to relocate within Iraq, to the Kurdistan Region, rather than being returned to Baghdad. In forming that view, I also find that the requirement would not be unduly harsh. A system of government is in operation within the Kurdistan Region, including the provision of state protection. ... ”

9. The Judge went on also to dismiss the human rights claim.

Permission to appeal

10. Permission to appeal was granted by Upper Tribunal Judge Kopieczek who considered it arguable that the First-tier Tribunal had erred in law in that the Judge's conclusions arguably failed fully to reflect the country guidance decision in *AA (Article 15(c)) Iraq* [2015] UKUT 00544 (IAC).

Rule 24 Reply

11. The respondent's reply asserts that the First-tier Tribunal considered *AA (Iraq)* at [55]-[57] of his decision and that the judge gave adequate reasons for finding that it would not be unduly harsh for the appellant to return to the IKR.

12. That is the basis on which this appeal came before me today for an error of law hearing. I am required to assess whether the grounds of appeal identify a material error of law in the decision of the First-tier Tribunal, such that the decision should be remade. If so, I must consider whether to remake it or to remit it to the First-tier Tribunal for further findings of fact and, where appropriate, credibility.

Upper Tribunal hearing

13. At the hearing today, I heard oral submissions from Ms Petterson and Ms Cleghorn. For the respondent, Ms Petterson relied on the respondent's Country Information and Guidance for Iraq in September 2017 as demonstrating that Kirkuk today is no longer a contested area. She argued that any error by the First-tier Tribunal was immaterial on that basis, as there is no risk to the appellant in Kirkuk today.

14. For the appellant, Ms Cleghorn relied on country guidance in *BA (Returns to Baghdad) Iraq CG* [2017] UKUT 18 (IAC) which confirmed an enhanced risk for Sunni Arab men in Baghdad on which, presumably, was based the respondent's concession that the appellant would not be returned to Baghdad. Ms Cleghorn argued that the appellant could not be returned to Erbil in the IKR as he is not originally from there and has not been pre-cleared for admission to the IKR.

15. Ms Cleghorn asked me to consider allowing the appeal outright, on the basis that the appellant would be disadvantaged on *Devaseelan* grounds if he were to have his appeal reheard in the First-tier Tribunal, because of the negative credibility findings made in respect of his core asylum claim.

The *AA (Iraq)* guidance

16. The country guidance given by the Upper Tribunal in *AA (Iraq)*, so far as relevant to this appeal, is as follows:

“Note: References to Iraq herein are to the territory of Iraq excluding the autonomous Iraqi Kurdish Region ("IKR") unless otherwise stated.

A. INDISCRIMINATE VIOLENCE IN IRAQ: ARTICLE 15(C) OF THE QUALIFICATION DIRECTIVE

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. ...*

B. DOCUMENTATION AND FEASIBILITY OF RETURN (excluding IKR)

5. *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.*

6. *No Iraqi national will be returnable to Baghdad if not in possession of one of these documents. ..."*

E. IRAQI KURDISH REGION

17. *The Respondent will only return P to the IKR if P originates from the IKR and P's identity has been 'pre-cleared' with the IKR authorities. The authorities in the IKR do not require P to have an expired or current passport, or laissez passer...."*

17. On 14 February 2017, the Upper Tribunal gave further guidance in *H, R (on the application of) v The Secretary of State for the Home Department (application of AA (Iraq) CG) [2017] UKUT 119 (IAC)*, as follows:

"A proper reading of the Upper Tribunal's decision in AA (Article 15(c)) Iraq CG [2015] UKUT 544 (IAC) reveals the importance of making findings of fact regarding P's circumstances, in order properly to apply the country guidance in that case. A finding that P cannot currently be returned, owing to a lack of particular travel documentation, will not be determinative of P's claim to international protection if P faces a real risk of serious harm, otherwise than (solely) by reason of P's lack of such documentation."

18. Doubt was thrown on the HF guidance in *AA (Iraq) v Secretary of State for the Home Department [2016] EWCA Civ 779 (21 July 2016)*.

19. In *AA (Iraq) v Secretary of State for the Home Department [2017] EWCA Civ 944 (11 July 2017)*, the Court of Appeal considered and partially recast the *AA (Iraq)* guidance. The recast guidance cannot, of course, establish an error of law in a decision promulgated in December 2016, but it does go to materiality if an error is found. The revised part of the guidance reads as follows:

“B. DOCUMENTATION AND FEASIBILITY OF RETURN (EXCLUDING IKR)

5. *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.*
6. *No Iraqi national will be returnable to Baghdad if not in possession of one of these documents.*
7. *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.*
8. *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.*

C. The CSID

9. *Regardless of the feasibility of P's return, it will be necessary to decide whether P has a CSID, or will be able to obtain one, reasonably soon after arrival in Iraq. 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.*
10. *Where return is feasible but P does not have a CSID, P should as a general matter be able to obtain one from the Civil Status Affairs Office for P's home Governorate, using an Iraqi passport (whether current or expired), if P has one. If P does not have such a passport, P's ability to obtain a CSID may depend on whether P knows the page and volume number of the book holding P's information (and that of P's family). P's ability to persuade the officials that P is the person named on the relevant page is likely to depend on whether P has family members or other individuals who are prepared to vouch for P.*
11. *P's ability to obtain a CSID is likely to be severely hampered if P is unable to go to the Civil Status Affairs Office of P's Governorate because it is in an area where Article 15(c) serious harm is occurring. As a result of the violence, alternative CSA Offices for Mosul, Anbar and Saluhaddin have been established in Baghdad and Kerbala. The evidence does not demonstrate that the "Central Archive", which exists in Baghdad, is in practice able to provide CSIDs to those in need of them. There is, however, a National Status Court in Baghdad, to which P could apply for formal recognition of identity. The precise operation of this court is, however, unclear.”*

20. That is the history of the country guidance in relation to return to Iraq, within and outside the IKR.

Discussion

21. The decision by the First-tier Tribunal Judge to equate Kirkuk with the IKR is a plain error of both fact and law. The appellant is not from the IKR because Kirkuk is not, and never has been, within the IKR. The error is material, because the relevant findings of fact have not been made, and the Judge did not grapple with how the appellant was to return to Kirkuk, given that the respondent accepted that he could not be returned to Baghdad because he is a Sunni Arab, and as a Kurd who did not come from the IKR or have any relative living there, there being no evidence that he had been pre-cleared for admission to the IKR, the country guidance in December 2016 did not suggest that he could be returned via that route. That is a technical obstacle, but a serious one.
22. I have examined the respondent's Country Information and Guidance for August 2016 and September 2017. The August 2016 guidance deals with religious minorities, but defines them as non-Muslim groups. The appellant is a Sunni, and is a Muslim.
23. The September 2017 report, which post-dates the decision of the Court of Appeal in July 2017 that Kirkuk remained a contested area, says this:

3. Policy summary

3.1 Internal relocation

3.1.1 A person cannot be returned or relocated to the areas of Iraq which meet the threshold of Article 15(c) (Anbar (except the parts that Daesh do not control, including the Fallujah, Heet and Ramadi districts), Ninewah, the parts of Kirkuk in and around Hawija, and the north, west and east parts of the 'Baghdad Belts').

3.1.2 In general, a person can relocate to Baghdad (except the north, west and east parts of the 'Baghdad Belts'), the parts of Anbar governorate that Daesh does not control (including the Fallujah, Ramadi and Heet districts), Diyala, Kirkuk (except the areas in an around Hawija), Salah al-Din and the southern governorates (Babil, Basra, Kerbala, Najaf, Muthana, Thi-Qar, Missan, Qadissiya and Wassit).

3.1.3 A person who does not originate from the Kurdistan Region of Iraq (KRI) will be returned to Baghdad in the first instance. There is no real risk of harm to ordinary civilians travelling from Baghdad to the southern governorates.

3.1.4 In general, a Kurd or a person who originates from the KRI can relocate to (or within) the KRI. Non-Kurds generally cannot.

3.1.5 Decision makers need to assess each case on its merits.

3.2 Feasibility of return

3.2.1 A person can only be returned (to Baghdad) if they have an Iraqi passport (current or expired), or a laissez-passer. If they do not have one of these documents then return is not 'feasible'.

3.2.2 A lack of these travel documents is a technical obstacle to return, and is not a reason itself to grant protection.

3.2.3 People who originate from the KRI who have been pre-cleared by the KRI authorities are returned to Erbil Airport and do not require a passport or a laissez-passer.”

There are no findings in the original refusal letter or in the First-tier Tribunal’s decision which indicate whether the appellant comes from the area of Kirkuk around Hawija. Nor is there any evidence to suggest that Kirkuk in December 2016 had divided into two areas, one contested and one uncontested.

24. The decision must therefore be set aside. I have considered whether I can remake it today. I am not satisfied that I can properly do so.
25. The decision in this appeal cannot be remade based on the situation as it was at the date of the First-tier Tribunal decision last December. It must be remade on the basis of the position today. The respondent contends that there has been durable change both in Baghdad and Kirkuk, such that the appellant could now be returned to Kirkuk via Baghdad, if he had a CSID, and that he could get a CSID via his uncle in Kirkuk. That will be a matter for further findings of fact and credibility in relation to Article 15(c) by the First-tier Tribunal in due course.
26. The decision in this appeal, limited to whether the appellant is entitled to humanitarian protection under Article 15(c) of the Qualification Directive 2004/83/EC will be remade in the First-tier Tribunal on a date to be fixed.

DECISION

27. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law. I set aside the previous decision in so far as it relates to whether the appellant is entitled to humanitarian protection.

The decision in this appeal will be remade afresh in the First-tier Tribunal, limited to the issue of humanitarian protection.

Date: 5 December 2017

Signed: *Judith A J C Gleeson*
Upper Tribunal Judge Gleeson