



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/04942/2016

THE IMMIGRATION ACTS

Heard at Field House  
On 5 December 2017

Decision & Reasons Promulgated  
On 7 December 2017

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

R O

[ANONYMITY ORDER MADE]

Respondent

Representation:

For the appellant: Ms R Petterson, a Senior Home Office Presenting Officer  
For the respondent: Ms V Adams, Counsel instructed by Halliday Reeves Law Firm

DECISION AND REASONS

**Anonymity order**

*I make an anonymity order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall identify, whether directly or indirectly, the appellant below (the respondent in this appeal, described in my decision for clarity as 'the claimant'). This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.*

## Decision and reasons

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against the Secretary of State's decision to refuse him international protection under the Refugee Convention or humanitarian protection grounds, or leave to remain on human rights grounds.
2. The claimant is a citizen of Iraq and an ethnic Kurd from Kirkuk, whose appeal was allowed on humanitarian protection grounds pursuant to Article 15(c) of the Qualification Directive 2004/83/EC. The only area of internal relocation relied upon by the Secretary of State was the IKR, both in the refusal letter and at the hearing.
3. The First-tier Tribunal Judge did not make an anonymity order, but as this is an asylum appeal, it is appropriate to anonymise this decision and the Upper Tribunal has made an anonymity order of its own motion.

## Background

4. The First-tier Tribunal accepted that the claimant came from the area where he said he originated, near Kirkuk in northern Iraq, where he worked in agriculture. The claimant was educated until about 10 years of age, speaks some Arabic as well as Kurdish, and has previously held a CSID card, which he no longer has in his possession. He has family in Iraq, but in Kirkuk, not the IKR. The Judge found as a fact that the claimant had no family members or alternative support network within the IKR.
5. Kirkuk is not in the IKR: the Secretary of State considers that the claimant has an internal relocation option to the IKR.

## First-tier Tribunal decision

6. The First-tier Tribunal Judge considered that the Secretary of State had not shown how the claimant would get to the IKR from Baghdad, if returned by that route, that no accommodation was available to him in the IKR, and that in the absence of family or a support network there, he would be likely to be an IDP with limited prospects, if any, of employment.
7. At [35] the Judge found that the claimant had no CSID with him in the United Kingdom and that it was 'unlikely to be practical for him to obtain a replacement in his home area in Iraq given the current situation there'. He applied *AA (Iraq)* (in context, *AA (Article 15(c)) (Rev 2) [2015] UKUT 544 (IAC)* as this decision was promulgated on 29 November 2017, not the later revision of that guidance in July 2017 by the Court of Appeal) and found that return was currently not feasible but that, applying the guidance in *AA (Iraq)* at [169]-[170] it remained necessary to consider whether, if returned, the claimant would be in a position which entitled him to international protection in the United Kingdom.
8. The First-tier Tribunal rejected the core asylum claim, but at [39] the Judge found that the claimant was entitled to humanitarian protection 'because he cannot return to his

home area [Kirkuk] and it would be unduly harsh for him to relocate to those areas relied upon by the [Secretary of State]’.

### **Permission to appeal**

9. The Secretary of State appealed to the Upper Tribunal. She argued that, while some reasons had been given for finding that the claimant could not be returned to the IKR, there were no reasons in the decision why the claimant could not return to Erbil, Sulaymaniyah, or Dohuk, and that in addition, he had an uncle in Iraq who could provide support for him on return.
10. At a hearing on 6 April 2017, the Secretary of State sought leave to amend her grounds of appeal and Deputy Upper Tribunal Judge Holmes gave directions requiring her to make a written application to amend, which she did, on 13 April 2017.
11. In her amended grounds, the Secretary of State incorporated the original grounds of appeal, but in addition, argued that her Country Information and Guidance reports of August 2016 concerning the security situation in the ‘contested’ areas and in Baghdad, the south, and the Kurdistan region of Iraq, demonstrated improvements in Diyala, Kirkuk (except Hawija and the surrounding areas) and Salah al-Din, all of which were now considered to fall below the Article 15(c) level of risk, and that the claimant’s appeal should have been dismissed.
12. The Secretary of State accepted that without a CSID, the claimant’s return to Iraq was not feasible at the date of hearing, but argued that if he could not be returned, no international protection was needed and that humanitarian protection should not have been granted. The Secretary of State relied on *AA (Iraq)* at [206]-[207].

### **Rule 24 Reply/Claimant’s Response**

13. The claimant responded to the Secretary of State’s grounds and to her amended grounds, in a combined Response which I treat as a Rule 24 Reply. Much of the Response deals with the manner in which the amendment came about, coupled with observations that Judge Holmes should not hear the resumed hearing. The allegation of bias against Judge Holmes (relying on *Magill v Porter* [2001] UKHL 67 and *R on the application of B v X Crown Court* [2009] EWHC 1149 (Admin)) is not made out.
14. Judge Holmes did not hear the resumed hearing. The question of bias by him at the directions hearing in April 2017 was not relied upon in the Upper Tribunal hearing and I do not consider it necessary to spend any further time on that part of the Response.
15. The claimant opposes any order permitting the Secretary of State to amend her grounds of appeal, arguing that the Secretary of State never said at the First-tier Tribunal hearing that Kirkuk had ceased to meet the Article 15(c) risk level.
16. In relation to the tension between the Upper Tribunal’s country guidance in 2015 and the later Country Information and Guidance relied upon by the Secretary of State, the claimant notes that the First-tier Tribunal’s decision is in line with *AA (Iraq)* [2015]. The Secretary of State did not provide any reason for departing from that guidance at the

First-tier Tribunal hearing and should not be heard to say that such reasons existed now.

17. The claimant contends that 'bold assertions by the Home Office' are not equivalent to 'credible fresh evidence' as the basis for divergence, as set out in the *UTIAC Chamber Guidance Note 2011 No 20* at [12]. He relies on the procedural guidance given in *DSG & Others (Afghan Sikhs: departure from CG) Afghanistan [2013] UKUT 148 (IAC)* at [20]-[25] as to the circumstances when it is possible to depart from current country guidance.
18. The claimant also disagrees with the assertion on behalf of the Secretary of State that if return is not feasible, applying *AA (Iraq) [2015]*, the appeal must always be dismissed.
19. That is the basis on which this appeal came before the Upper Tribunal.

### **Upper Tribunal hearing**

20. At the Upper Tribunal hearing, I considered whether I should grant leave to amend. I have regard to the claimant's contention that the Secretary of State's application should not be considered by the Upper Tribunal. However, permission to make an application to amend having been given, I am not persuaded that it would be appropriate to refuse to consider that application. I consider it to be in the interests of justice to allow the amendment and deal with the additional grounds, and the claimant's response thereto.
21. Before the Upper Tribunal, Ms Adams contended that the Secretary of State's position now was an attempt to withdraw a concession made at the hearing that return could be only to the IKR. She relied on [30] in the refusal letter and [36] of the First-tier Tribunal decision, which made it clear that such had been the Secretary of State's position throughout and asked that I uphold the decision.
22. Ms Petterson accepted that the contents of [36] are inconsistent with the Secretary of State's case as now advanced:

"36. Relocation to the IKR. It is important to note that notwithstanding the [Secretary of State's] guidance of August 2016 entitled 'Country Information and Guidance - Iraq: return/internal relocation' the [Secretary of State] has only relied on the IKR as an area of potential relocation. This was the case as put in the refusal letter and at the hearing. As that is the way the [Secretary of State] has put her case, and in particular, *as it was conceded that he could not return to his home area*, I do not consider it appropriate to seek to revisit the areas in *AA* that were deemed to be safe for returns."

[*Emphasis added*]

While not withdrawing the Secretary of State's appeal, Ms Petterson did not press the appeal beyond the grounds.

## Discussion

23. I begin with the original grounds of appeal. There was no need for the First-tier Tribunal to give reasons why the claimant could not return to Erbil, Sulaymaniyah or Dohuk in addition to a finding that he could not return to the IKR. All those cities are within the IKR and do not represent additional possible areas for internal relocation. That ground has no merit.
24. Turning next to the Secretary of State's reliance on her August 2016 Country Information and Guidance, it is clear from [36] in the First-tier Tribunal's decision that the Judge did consider that document but discounted it as it had not been relied upon by the Secretary of State in her refusal letter or at the First-tier Tribunal hearing to support any argument that there was another area, outside the IKR, where the claimant could reasonably be expected to go.
25. At the First-tier Tribunal hearing, the Secretary of State conceded that the claimant could not return to his home area (Kirkuk): it is not open now to her to seek to rely on material in the August 2016 CIG suggesting that part of Kirkuk, or indeed Diyala or Salah al-Din might be suitable as internal relocation sites, as this did not form part of, nor was it relevant, to the Secretary of State's case as advanced at the hearing, which focused exclusively on return to the IKR.
26. I consider next the argument that where return is not feasible, that is dispositive of the appeal and that it should have been dismissed. That approach is not supported by the passage relied upon by the Secretary of State in *AA (Iraq)* [2015] at [205] - [206]. At both [169] and [205] of *AA (Iraq)*, the Upper Tribunal makes it clear that lack of feasibility does not mean necessarily that there is no need make a protection assessment:

"169. On one reading of *HF (Iraq)* - particularly the highlighted passage in paragraph 101 - the impossibility of return could be said to make it unnecessary to hypothesise any risk to an appellant in the country of proposed return, whether or not stemming from a lack of documentation or similar problem. We do not, however, consider that the Court can be taken to have intended such a reading. There may be cases where it will be evident that the person concerned would be at real risk of persecution or serious harm irrespective of lack of documentation. Were Nazi persecution of the Jews occurring today, it would clearly subvert the purpose of the Convention to deny refugee status on the basis that, regardless of what might happen to appellants on return because they are Jewish, they cannot in practice be returned (whether because of documentation or mere refusal to admit Jews to Nazi Germany). For this reason, we consider that the judgment in *HF (Iraq)* does not preclude a claim to international protection from succeeding, insofar as the asserted risk of harm is not (or not solely) based on factors (such as lack of documentation) that currently render a person's actual return unfeasible. ...

207. Given that the appellant's return is not currently feasible it could be said that it is unnecessary to hypothesise any risk to him upon his return to Iraq. However, as identified in paragraphs 169 and 170 above, there may be cases where it will be evident that the person concerned would be at real risk of

persecution or serious harm irrespective of the lack of documentation and that an applicant should not be precluded from pursuing a claim to international protection in circumstances where the asserted risk of harm is not (or not solely) based on factors (such as lack of documentation) that currently render a person's actual return unfeasible.”

27. In this case, the risk on return to Kirkuk, or to Baghdad, both of which were conceded, were not based on unfeasibility but on Article 15(c) armed conflict: the question of unfeasibility affected only the question of internal relocation to the IKR. The Judge therefore did not err in fact or in law in seeking to examine the risk on return in those areas or in deciding that humanitarian protection was available to the claimant.
28. For all of the above reasons, the Secretary of State’s appeal cannot succeed. I dismiss her appeal and uphold the decision of the First-tier Tribunal.

## DECISION

29. For the foregoing reasons, my decision is as follows:  
The making of the previous decision involved the making of no error on a point of law  
I do not set aside the decision but order that it shall stand.

Date: 6 December 2017

Signed *Judith AJC Gleeson*  
Upper Tribunal Judge Gleeson