



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: UI-2021-000435

PA/52032/2020; IA/01589/2020

THE IMMIGRATION ACTS

**Heard at Cardiff Civil Justice Decision & Reasons Promulgated
Centre**

On the 15 September 2022

On the 17 October 2022

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

MBS

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L King, instructed by Migrant Legal Project

For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Introduction

2. The appellant is a citizen of Iraq who was born on 20 December 1998. He is Kurdish and comes from Tuz Khurmatu in Salah Al-Din Governorate.
3. The appellant arrived in the United Kingdom on 31 January 2017. On 1 August 2019, he claimed asylum. The appellant claimed that, whilst in Iraq, he and his father were asked to pass information to the Iraqi Army by a neighbour. They suspected he was a member of ISIS and they reported him to the police. The appellant claimed that he received a threatening letter from ISIS and that on 19 April 2018 he left Iraq with the help of an agent arranged by his father. He was arrested in Greece and was returned to Iraq. When he returned, his father had been kidnapped and there was a second threatening letter as he was suspected of being involved with ISIS. His family, he claimed, left their home and the appellant came to the UK. The appellant claimed that on return he would be at risk from ISIS.
4. On 15 October 2020, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and on human rights grounds.

The Appeal to the First-Tier Tribunal

5. The appellant appealed to the First-tier Tribunal. In a decision dated 6 August 2021, Judge Suffield-Thompson dismissed the appellant's appeal on all grounds.
6. First, the judge made an adverse credibility finding and rejected the appellant's account of what he claimed had occurred to him in Iraq and which had caused him to leave Iraq. As a consequence, the judge dismissed the appellant's appeal on asylum grounds.
7. Secondly, the judge found that the appellant's ID documents (his CSID and passport) were at home in Tuz Khurmatu and that he could obtain those documents by asking his family to send those documents to him in the UK or to meet him on return. As a consequence, the judge dismissed the appellant's appeal under Art 3 of the ECHR on the basis that he would not be at risk on return to Iraq as a result of not being in possession of a CSID.
8. Thirdly, the judge found that the appellant had not established his humanitarian protection claim under Arts 15(b) and (c) in his home area. In particular, as regards the latter, the judge found, applying SMO and others (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC) ("SMO and others"), that the appellant had failed to establish that there was a real risk of him being subject to indiscriminate violence amounting to serious harm.
9. Finally, the judge made no findings in relation to internal relocation as that was not material given her findings that the appellant had not established risk on return in his home area and she noted that the

appellant had not relied upon Art 8 of the ECHR and so dismissed his appeal on that ground.

The Appeal to the Upper Tribunal

10. The appellant sought permission to appeal to the Upper Tribunal on the basis that the judge had erred in law in dismissing his appeal under Art 15(c) of the Qualification Directive (Council Directive 2004/83/EC). No challenge was brought to the judge's findings and decision to dismiss the appellant's appeal on asylum grounds or under Art 3 of the ECHR.
11. Permission to appeal was initially refused by the First-tier Tribunal but, on 1 February 2022, a renewed application to the Upper Tribunal for permission was granted by UTJ Bruce.
12. The appeal was listed for hearing on 15 September 2022 at the Cardiff Civil Justice Centre. The appellant was represented by Ms King and the respondent by Ms Rushforth. I heard oral submissions from both representatives for which I am grateful.

The Judge's Decision

13. The judge's consideration of Art 15(c) and Art 15(b) is found at [50]-[61] of her decision as follows:

"Article 15(c) and (b) Risk

50. Having found that he is not at risk on return due to his family circumstances and that he has the appropriate documents that he can access I now turn to the second limb of his claim which is that there is a general Article 15(b) and (c) risk in his home area.
51. The Appellant did not give oral evidence about this aspect of his claim. He submitted a country expert report and a large amount of objective background evidence in relation to the area of Iraq where the Appellant comes from.
52. Part A of SMO deals with indiscriminate violence in Iraq and Article 15(c). The Tribunal found that there are still internal armed forces in conflict in certain areas of Iraq. However, in general the intensity of the conflict is not such that a civilian returned to Iraq 'solely on account of his presence there, faces a real risk of being subject to indiscriminate violence amounting to serious harm within the scope of Article 15(c) QD'.
53. Ms. Masih submitted that there is no such risk in Tuz Khurmatu where the Appellant would be returning to and the court agrees with her has no reason to go behind the findings of SMO. Mr. Galliver-Andrews, in his skeleton argument and his oral submissions, stated that there is copious evidence before the Tribunal to show that there is such a risk in his home area and that relocation to another area is not feasible for this Appellant.
54. I turn now to the country expert report and the objective evidence that I had before me submitted by the Appellant.55. The country expert report (AB, page A7-A17) was prepared by Dr. Alison Pargeter. I have read her reports in other appeals and seen her qualifications and I do accept her as an expert for the purposes of these proceedings. She states that

- (para.3.1) Tuz is a contested area and is a 'flashpoint' as it is claimed by both Kurds and the federal government. She states that from 2011 it is an area that has been the subject of many and regular attacks. In 2017 the Peshmerga pulled out and it was taken over by the federal forces and this violence prompted many Kurds to flee.
56. However, the expert goes onto say that in 2018 the government sent in a rapid response force and families began to move back to Tuz (para.3.9). Some families did not go back as their houses had been destroyed. However, this is not the evidence that the Appellant gave about his family. He said he left because of issues with ISIS and not because his home had been destroyed. At no stage in his account did he suggest that he did not have a home to go back to. Dr. Pargeter states that inter-communal tensions still exist between the Kurds and Turkoman but I find that this is the case throughout much of Iraq. She states (para.3.16-3.17) that in 2020 and 2021 Tuz still continues to be susceptible to attacks by ISIS remnants, there have been kidnaps, suicide bombs and mortar attacks in which children as well as adults have been killed. Again, this was recognized in SMO but did not mean that people could not safely return to certain areas.
 57. The background evidence does confirm that it is a contested area but it is still occupied and people are moving back to reclaim their homes and rebuild the area.
 58. Dr. Pargeter goes onto say that as well as the issue of violence there are serious problems with employment for those returning to Tuz and there are not even labouring jobs (para.3.21). However, if there is so much damage to Tuz as stated I cannot see how there would not be the need for large scale rebuilding in the area and fit and healthy young men like this Appellant will be needed for that work. I have already found that his father owns half a business and had no evidence before me that this was not still in existence and so the Appellant could work there on return or at least benefit from the proceeds of that business. The Appellant now speaks very good English and has benefitted from time in the UK so he will have advantages in finding work that other of his age and background will not have.
 59. Dr. Pargeter has concluded that he could fall into destitution but she has not been informed of the father's business as she has only had the Appellant's account which I have found not to be credible.
 60. I had before me many items of objective evidence which Mr. Galliver-Andrews referred to in his skeleton argument and oral submissions and I have read them all. He submitted in his skeleton argument (para 49) that the Appellant has no support network on return but I have found that he does have his family there who can support him on return.
 61. Despite the objective evidence and the country expert report I do not find that I have sufficient evidence to go behind SMO in this appeal and although I accept that Tuz has been and still is to an extent a contested area I do not find that looking at this Appellant's particular circumstances, as I must, that there is a 15(b) or (c) risk to him."

The Submissions

The Appellant

14. On behalf of the appellant, Ms King relied upon her skeleton argument which she developed in her oral submissions.

15. First, Ms King submitted that the judge's assessment of Art 15(c) (at [50] – [61]) conflated issues relevant to the real risk, if any, to the appellant under Art 15(b) with the issue of whether there was a real risk of indiscriminate violence under Art 15(c). She submitted that issues such as whether the appellant had a home to return to, which the judge found the appellant did at [56] and his employment prospects (at [58]) were irrelevant to Art 15(c).
16. Secondly, Ms King submitted that the judge failed to apply the correct approach to Art 15(c) set out, for example, in SMO and others namely a fact-sensitive, “sliding scale” assessment having regard to certain personal characteristics of the appellant in accordance with the ECJ's decision in Elgafaji v Staatssecretaris van Justitie (C-465/07) [2009] 2 CMLR 45 at [39], in particular that he came from an ethnic minority group (as aa Kurd) in his home area.
17. Thirdly, Ms King submitted that the judge, in effect, failed properly to consider the background objective evidence which she had not set out but had simply stated at [60] that she had read the many items of such evidence.
18. Fourthly, Ms King submitted that the judge wrongly (at [61]) treated the decision in SMO and others as setting a country guidance position which the appellant was seeking to “go behind” in establishing his case. Ms King submitted that the judge was being invited to apply SMO and others, namely that in the appellant's home area there was no risk in general to civilians so as to engage Art 15(c) as it was no longer a “contested area” as found by the Upper Tribunal AA (Article 15(c)) Iraq CG [2015] UKUT 544 (IAC) subsequently approved by the Court of Appeal ([2017] EWCA Civ 944) (“AA(Iraq)”), but that applying the ‘sliding scale’ there was a real risk of serious harm to him falling within Art 15(c).

The Respondent

19. On behalf of the respondent, Ms Rushforth submitted that the judge had dealt with the issues in relation to Art 15 of the Qualification Directive under Art 15(b) and Art 15(c) in precisely the way she had been invited to do so in para 19 of the appellant's skeleton argument before the First-tier Tribunal by taking into account the appellant's “ethnicity, education, work history and sparse support network”. She submitted that the judge did not fall into error by considering Arts 15(b) and 15(c) together given that invitation.
20. Secondly, Ms Rushforth accepted that the judge did not refer to the “sliding scale” approach set out in SMO and others. Nevertheless, Ms Rushforth submitted that the judge had considered the principal relevant characteristic of the appellant namely that he was of Kurdish ethnicity and that there was no need, therefore, to specifically refer to the “sliding scale”.

21. Thirdly, Ms Rushforth accepted that the judge had wrongly referred to the appellant's home area as being a "contested area" (see [57]), but that was not a material error as the judge had, in substance, considered Art 15(c) in accordance with SMO and others.

Discussion

22. It is accepted by the appellant, through Ms King, that the judge's adverse credibility finding and rejection of the appellant's appeal on asylum grounds stands. Likewise, the judge's finding stands that the appellant would be able to obtain his CSID and so could safely, without a breach of Art 3, return to Iraq.

23. The sole issue concerns the judge's assessment of whether the appellant, in his home area, would face an Art 15(c) real risk of indiscriminate violence arising from internal conflict.

24. Prior to SMO and others, the country guidance in AA (Iraq) established that such a real risk of indiscriminate violence did exist for all citizens in the appellant's home area when it was a "contested area" by which the cases meant there was a conflict between the Iraqi government (and supporting militia) and ISIS. In SMO and others, the Upper Tribunal concluded that, inter alia, the appellant's home area was no longer a "contested area" in that sense and so solely on account of being a citizen living in that area, it was not established that there was a real risk of serious harm arising from indiscriminate violence contrary to Art 15(c) of the Qualification Directive. The position is set out at para (1) of the judicial headnote as follows:

"There continues to be an internal armed conflict in certain parts of Iraq, involving government forces, various militia and the remnants of ISIL. Following the military defeat of ISIL at the end of 2017 and the resulting reduction in levels of direct and indirect violence, however, the intensity of that conflict is not such that, as a general matter, there are substantial grounds for believing that any civilian returned to Iraq, solely on account of his presence there, faces a real risk of being subjected to indiscriminate violence amounting to serious harm within the scope of Article 15(c) QD."

25. In para (2) of the judicial headnote, the UT recognised that there was a single exception in a small mountainous area north of Baiji in Salah al-Din. That, however, is not the appellant's home area.

26. Nevertheless, the Upper Tribunal recognised that in the "formally contested areas" whether an Art 15(c) risk existed had to be determined on a fact-sensitive approach applying a "sliding scale" assessment:

"The situation in the Formerly Contested Areas (the governorates of Anbar, Diyala, Kirkuk, Ninewah and Salah Al-Din) is complex, encompassing ethnic, political and humanitarian issues which differ by region. Whether the return of an individual to such an area would be contrary to Article 15(c) requires a fact-sensitive, "sliding scale" assessment to which the following matters are relevant. "

27. This approach reflects that of the ECJ in Elgafaji (at [39]) where it recognised that Art 15(c) contained a “sliding-scale” such that:

“The more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.”

28. At paras (4) and (5) of the headnote, the UT set out a number of personal characteristics which required careful assessment in applying the ‘sliding-scale analysis’:

“4. Those with an actual or perceived association with ISIL are likely to be at enhanced risk throughout Iraq. In those areas in which ISIL retains an active presence, those who have a current personal association with local or national government or the security apparatus are likely to be at enhanced risk.

5. The impact of any of the personal characteristics listed immediately below must be carefully assessed against the situation in the area to which return is contemplated, with particular reference to the extent of ongoing ISIL activity and the behaviour of the security actors in control of that area. Within the framework of such an analysis, the other personal characteristics which are capable of being relevant, individually and cumulatively, to the sliding scale analysis required by Article 15(c) are as follows:

- Opposition to or criticism of the GOI, the KRG or local security actors;
- Membership of a national, ethnic or religious group which is either in the minority in the area in question, or not in de facto control of that area;
- LGBTI individuals, those not conforming to Islamic mores and wealthy or Westernised individuals;
- Humanitarian or medical staff and those associated with Western organisations or security forces;
- Women and children without genuine family support; and
- Individuals with disabilities.”

29. It can be immediately seen that Judge Suffield-Thompson did not adopt this approach in her decision at [50]-[61] set out above. Whilst the threshold of Art 15(c) remains throughout as a “real risk” of serious harm arising from indiscriminate violence, the “sliding scale” approach identifies that that standard may be more easily reached with a lower level of indiscriminate violence where a person’s personal circumstances result in him being “specifically affected”. It was, in my judgment a misdirection by the judge not to approach the threshold in Art 15(c) with this “sliding-scale” in mind.

30. Further, the judge appears at [61] to have considered that the appellant was seeking to invite her to “go behind” (by which I take her to mean ‘depart from’), SMO and others. On the contrary, the appellant was inviting the judge to apply SMO and others. The appellant recognised that he could not succeed simply on the basis that all civilians faced a real risk of serious harm arising from indiscriminate violence in his home area.

That was the new position taken by the UT in SMO and others in the light of the evidence concerning the change in the conflict in Iraq since the earlier decision of AA (Iraq). That is precisely the point made in para (1) of the judicial headnote in SMO and others. In addition, the appellant was inviting the judge to apply the “fact sensitive” “sliding-scale assessment” set out by the UT in SMO and others at paras (3) – (5) of the headnote. That is clear, not least, from para 19 of the appellant’s skeleton argument before the First-tier Tribunal where it was said:

“While not everyone returning to Tuz Khurmatu is likely to suffer conditions amounting to inhuman or degrading treatment or punishment, or other serious harm, we submit that the Appellant’s ethnicity, education, work history and sparse support network would result bring him up to that threshold, applying the fact-sensitive, sliding-scale assessment required by SMO.”

31. It is unfortunate that the judge referred to Art 15(b) in her reasons (at [50] and [61]) as she was, in substance, only considering Art 15(c). That was not, however, material to her decision. She plainly was seeking to apply Art 15(c).
32. Further, whilst I do not accept Ms King’s submission that the judge wrongly conflated Arts 15(b) and (c) in her decision at [50]–[61] by considering the very factors which the appellant’s legal representative invited her to do, I do accept Ms King’s submission that the judge misdirected herself in applying the approach to the threshold under Art 15(c) without considering the “sliding-scale” approach, in particular the risk to the appellant having regard to the fact that he is Kurdish and the extent to which the background evidence disclosed a level of indiscriminate violence which, having regard to that factor, sufficiently lowered the level of indiscriminate violence so as to establish, in his particular circumstances, whether there was a real risk of serious harm to him.
33. In my judgment, the judge failed to apply the two-pronged approach to Art 15(c) (referred to in SMO and others at [32]) of asking: (a) whether the level of violence is so high that there is a general risk to all civilians; and, if not, (b) to ask that even if there is no such a general risk, there is a specific risk based on the ‘sliding-scale’ notion.
34. I do not accept Ms Rushforth’s submission that, in effect, that misdirection is immaterial as the judge did, in fact, consider the risk to the appellant given that he is Kurdish. That submission is not sustainable for two reasons.
35. First, it is impossible to know what level of risk the judge considered would suffice applying the sliding-scale given that the appellant is Kurdish because she never directly addressed that issue.
36. Secondly, the judge failed to set out the objective evidence, relied upon by the appellant, concerning the risk to him on return. At [60] the judge referred to the “many items of objective evidence” referred to by the appellant’s legal representative in his skeleton argument and submissions

and that she says she has “read them all”. However, the judge did not set out that evidence and it is not possible, therefore, to know whether her reasons for her adverse finding in relation to Art 15(c) are, in fact, supported by the objective evidence. I accept, of course, that the judge referred to the country expert’s report in some detail at [55]–[59]. However, more background material than this was relied upon by the appellant and it was incumbent upon the judge, in giving her reasons, to explain why the evidence, as a whole, resulted in an adverse finding in relation to Art 15(c).

37. I would also add, by way of addendum, that it is not clear to me why the judge referred to the expert as saying that the appellant’s home area was a “contested area” (at [57]) and that she accepted that it was “to an extent a contested area” (see [61]). Dr Pargeter did not state in her expert report that the appellant’s home area was a “contested area” in the sense that it was used in AA (Iraq) and SMO and others. She said (at para 3.1) that it was a “disputed area” claimed by both the Kurds and the federal government. That is an altogether different statement from the categorisation in AA (Iraq) of “contested areas” which refers to the armed conflict between the Iraqi government (and militia) and ISIS as to the control of particular areas.
38. For the above reasons, I am satisfied that the judge materially erred in law in reaching her finding in relation to Art 15(c).

Decision

39. The decision of the First-tier Tribunal involved the making of an error of law. That decision cannot stand and is set aside.
40. The judge’s findings in relation to the appellant’s asylum claim and risk (under Art 3) arising from a lack of ID documentation in [23]–[49] are, as was agreed by both representatives, preserved as they are not challenged.
41. The decision must be remade solely in relation to Art 15(c). In addition to the issue of whether the appellant’s return to his home area will engage Art 15(c), an additional issue may arise of internal relocation if such a risk is established which may require further evidence and findings.
42. Although, Ms Rushforth invited me to retain the appeal in the Upper Tribunal, I agree with Ms King that the proper disposal of this appeal is to remit it to the First-tier Tribunal to remake the decision in relation to Art 15(c).
43. In the light of the nature and extent of fact-finding required, and applying para 7.2 of the Senior President’s Practice Statement, the proper disposal of this appeal is to remit it to the First-tier Tribunal to remake the decision in relation to Art 15(c). The appeal to be heard by a judge other than Judge Suffield-Thompson.

Signed

Andrew Grubb

Judge of the Upper Tribunal
21 September 2022