Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/02959/2013
AA/02957/2013
AA/02958/2013
AA/02960/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Date Sent**
on 5 November 2013	**On 8 November 2013**
	……

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

I Y H + wife + 2 children

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr A Caskie, Advocate, instructed by Maguire, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellants are citizens of Iraq. They appeal against a determination by First-tier Tribunal Judge Scobbie, promulgated on 13 May 2013, dismissing their appeals on all available grounds.

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2) The First-tier Tribunal determination refers to the first appellant as "the appellant". That was followed in submissions before me, and is generally adopted in this determination.

3) The second appellant came to the UK under Tier 1 of the Points Based System (PBS).

4) The appellant says that a friend introduced him to the leader of Asa'ib Ahl Al-Haq ("AAA-Haq") with a view to recruiting him as a candidate for that party, which was turning from terrorism to electoral aims. The appellant is apolitical, and refused. On 26 January 2013 he was kidnapped, held overnight and beaten. His kidnappers told him that they would have killed him but for his connection to his friend in AAA-Haq. The appellant concluded that his kidnappers were members of AAA-Haq. He reported the matter to the police but there was no outcome to his complaint. He entered the UK on 1 February 2013 as a dependant partner on his wife's visa, and sought asylum shortly thereafter. His credibility was not significantly doubted by the respondent, and was accepted by the judge.

5) In his determination the judge said:

> 21. The main thrust of the refusal letter relates to such matters as sufficiency of protection, internal relocation and humanitarian protection.
>
> 22. … Although there is a large section in the refusal letter on humanitarian protection, the appellant's representative indicated that he was not making a claim in connection with humanitarian protection so I will take this matter no further.

6) The judge found against the appellants on both sufficiency of protection and internal relocation.

7) These are the grounds of appeal to the Upper Tribunal:

> 1 The first two appellants are Iraqi Pharmacists. The other two are their children. The first appellant stated pharmacists are viewed as doctors in Iraq. There was no contradiction of that evidence.
>
> 2 In AA (Petitioner) [2011] CSOH 120 it was successfully argued that in light of the evidence contained in *HM and Others (Article 16(c)) Iraq CG [2010] UKUT 331 (IAC)* and other materials within the knowledge of the Secretary of State that doctors and some other professional groups in Iraq were targeted groups who could meet the 15(c) test in the qualification directive. That argument was made in the context of a Judicial Review relating to a decision of the Secretary of State on an Immigration Rule 353 application.
>
> 3 That case was reclaimed by the Secretary of State but as HM was replaced by HM2 the matter was remitted to the Outer House for reconsideration of the factual material. The Secretary of State then granted Leave to Remain to the Petitioner and the matter did not proceed to a hearing.
>
> 4 The appeal before the Immigration Judge proceeded upon the basis that there serious and individual threat to a civilian's life or person by reason of **discriminate** violence in situations of international or internal armed conflict.

5 In such a situation logically the Immigration Judge required to consider also whether there was a serious and individual threat to a civilian's life or person by reason of **indiscriminate** violence in situations of international or internal armed conflict.

6 The Immigration Judge addressed the general position regarding the sufficiency of protection and internal flight and concluded those were available. At no point does the Immigration Judge refer to the particular dangers faced by medical and other professionals.

7 In HM2 at paragraph 57 when considering the 2009 UNHCR Guidelines it is said:

"As to (1), UNHCR considered that for international protection purposes 'favourable consideration' should be given to persons in the following categories: Iraqis affiliated with political parties in power struggles; government officials and other persons associated with the current Iraqi government, administration or institutions; Iraqis (perceived to be) opposing armed groups or political factions; Iraqis affiliated with the MNF-1 or foreign companies; members of religious and ethnic minorities; certain professionals (academics, judges, **doctors**); journalists and media workers; UN and NGO workers, human rights activists; homosexuals; women and children with specific profiles. It was made clear that the above list was not intended to be exhaustive."

8 At paragraph 138 it is said:

There appears to be a trend towards increasing targets of Iraqi security forces and government employees, although the UNAMI Report for the January to December 2010 period makes clear that in addition to public officials, persons whose jobs are clearly civilian, eg community and religious leaders, journalists, **medical and education professionals**, were the main targets. The UN SIGIR Report dated 26 November 2010 states that with United States forces being less of a target "armed opposition groups have changed tactics, relying more on a long-range weapons that target indiscriminately. It is also clear that the means and methods used in a number of attacks – Vehicle Borne IEDs and Small Arms Fire are frequently carried out in public spaces heedless of the toll on civilian lives …".

9 In the current COI Report at paragraph 8.43 it is said " – When asked about threats against persons of certain professions, eg, judges, doctors, or journalists the international NGO explained that such a person is better protected in case of threats if he or she is linked to a tribe or political network …".

10 At 13:35 it is said:

> A more recent report by the Washington Post entitled Tribal lawsuits, 'fake sheiks' threaten Iraqi doctors had been subjected to extortion and threats, under Tribunal justice, by families and tribal sheiks. According to the source: - … a more recent development was a growth persons claiming to be sheiks and exploiting the lack of a rule of law for their own benefits: by threats and the extortion of money. As noted further: … They are opportunists, like bullies, said Ali Abbas Anbori, a Baghdad doctor who advocates for health care and legal reform. It's all about what kind of force does this person have it has nothing to do with malpractice. If the doctor doesn't pay, they may threaten his life, his family, kidnap his children." … Officials at several Baghdad hospitals said tribal threats are so pervasive that many doctors are leaving the country as they did during the war.

11 At 28.05 it is said "In 2008, it was reported that as a result of the conflict 2,200 doctors and nurses had been killed and 240 kidnapped since 2003 and that many had also been threatened by armed groups and forced to leave their jobs."

12 At 28.10 is a table showing the reduction in number of doctors in Iraq and the percentage murdered. No information is provided on the number injured.

13 At paragraph 29.10 it is said:

> The UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers (UNHCR Guidelines) dated April 2009 explained that the number of doctors kidnapped and/or killed since 2003 was into the thousands and went onto note that : - Many more have left their jobs or fled the country altogether. Some doctors in Baghdad have been virtually shut out from their clinics as they are locate in a neighbourhood that is under control of another sect. Those that continue to work in places like Baghdad, speak of conditions comparable to house arrest as they often live on hospital premises.

14 This material is relevant in two separate ways. Firstly in relation to the appellants' claim to fear discriminate violence it is relevant to his claim that in his situation there would not be a sufficiency of protection or an internal flight option. That was a relevant matter left out of account.

15 Secondly under the sliding scale set out in Elgataji at paragraph 39, HM2 and the respondent's own country of origin information report the Immigration Judge failed to have regard to *HM2* and failed to have regard to that in the context of Article 15(c) (whether or not that was argued). Medical professionals are at the top of that sliding scale. In so failing the Immigration Judge erred in law.

8) "HM2" is a reference to HM and Others Iraq CG [2012] UKUT 00409 (IAC).

9) On 26 July 2013 Upper Tribunal Judge McGeachy granted permission to appeal, saying this:

> The grounds assert that the judge erred in placing insufficient weight on the fact that the principal appellant was a medical professional and that had implications when considering the issue of humanitarian protection. While that is a somewhat odd assertion given what is recorded in the determination at paragraph 22 … it is arguable …

10) Mr Caskie acknowledged that paragraph 22 of the determination is an accurate record of the case put to the First-tier Tribunal. However, he said that it was incumbent on a judge in a case concerning a medical professional to consider Article 15(c) protection even if expressly not argued. If what the judge said at paragraph 51 was traced back in the determination through paragraphs 46, 45, 44, 39 and 36 it becomes apparent that the judge had to resolve the case on the basis of general risk to medical and similar professionals. HM2 was before the First-tier Tribunal, as part of the respondent's bundle. The judge should have addressed the protection and internal relocation issues in the context of the appellant's employment history, as accepted at paragraph 36 in opening his findings. As HM2 was before the judge, therefore there were also before him the 2009 UNHCR guidelines, quoted in the grounds of appeal at paragraph 7, taken from paragraph 57 of HM2. Further relevant background was in the Country of Origin Information Report, as set out at paragraphs 7-12 of the grounds. HM2 was

recently upheld in the Court of Appeal. The assessment in HM2 by the Upper Tribunal was reached one year ago. It is generally well known that the situation has deteriorated significantly in Iraq since then. HM1, paragraphs 253 and 255, tabulates civilian casualties in Iraq to 2009. Paragraph 255 suggests that a level of 24,000 civilian deaths per year, as was the case in the peak year of 2006, was likely to have established general risk. By the time of decision the level was around 4,500, which was insufficient. If error of law were to be found and the present decision remade, the appellant would seek the admission of further evidence. One item would be an article from www.iraqbodycount.org giving a figure of 7,000 fatalities for the year to 28 October 2013, extrapolating to a rate of 8,400 a year. On a broad numbers approach this case therefore required an assessment of where the level of indiscriminate violence falls for purposes of Article 15(c). On the sliding scale described in Elgafaji medical professionals fell near the top. There needed to be a specific evaluation of the risk applying to the appellant and his wife as potential targets. Although the essence of the case as now put was specifically not advanced in the First-tier Tribunal, the judge granting permission must have considered it to be a potentially obvious point. The determination was inadequate in respect of Article 15(c) in a case where the appellants fell at the top end of the targeted group and so the decision ought to be remade. That should be at a further adjourned hearing, with the admission of further evidence. The case might be apt for country guidance on an issue of general importance.

11) Mr Mullen said that the refusal letter rejected any case based on indiscriminate violence, and the respondent placed HM2 before the judge. With these matters in plain view, the judge was entitled to assume that if the appellant expressly did not advance that case it was because it was judged to be one which could not succeed. The country guidance in HM1 and HM2 was not to the effect that doctors or other medical professionals, without more, are at risk and qualify for protection. Although information regarding doctors was contained within UNHCR guidelines quoted in those cases, doctors were not specifically identified within any of the Upper Tribunal's conclusions. Doctors might be a relevant category, to the extent of being more likely to be at risk, but their cases needed individual assessment, and their occupation itself did not amount to risk in terms of Article 15(c). The judge accepted that the appellant had been kidnapped, but found that not any more likely to re-occur in his case than to anyone else. There was no objective evidence referred to support such a case for the appellant. Even if there is a higher "body count" in Iraq this year, approaching 7,000, that did not suggest on previous authority that it was likely to be held that there is a general risk to all civilians in Iraq so as to qualify for international protection, nor such risk for members of the medical profession. There was no error of law and the determination should stand. If further evidence and a developing situation provided the appellant with any case, his course was to make a further claim in terms of paragraph 353 of the Rules.

12) Mr Caskie in reply said that HM1 was overturned on a matter of procedure and not on the facts. Except on a minor aspect, of no importance to the present case, HM1 and HM2 reach the same conclusions, despite changing facts on the ground. AA, referred

to at Ground 2, established that doctors and other medical professionals might meet the Article 15(c) test. The Presenting Officer was "not inevitably wrong in submitting that to be an Iraqi doctor is not enough", but there was enough substance in the case for the appellant to succeed. Mr Caskie had invited the respondent's representative to point to any consideration in the determination of the situation of medical professionals as a group, and no such reference could be found. Given the changing situation in Iraq, the case merited further consideration.

13) I reserved my determination.

14) Neither party referred to any authority on when it is an error for a judge not to discern a case which is not made by a party.

15) The Court of Appeal's observations in Robinson [1997] EWCA Civ 3090 were as follows:

> Because the rules place an onus on the asylum-seeker to state his grounds of appeal, we consider that it would be wrong to say that mere arguability should be the criterion to be applied for the grant of leave in such circumstances. A higher hurdle is required. The appellate authorities should of course focus primarily on the arguments adduced before them, whether these are to be found in the oral argument before the special adjudicator or, so far as the Tribunal is concerned, in the written grounds of appeal on which leave to appeal is sought. They are not required to engage in a search for new points. If there is readily discernible an obvious point of Convention law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but which could be properly categorised as merely "arguable" as opposed to "obvious". Similarly, if when the Tribunal reads the Special Adjudicator's decision there is an obvious point of Convention law favourable to the asylum-seeker which does not appear in the decision, it should grant leave to appeal. If it does not do so, there will be a danger that this country will be in breach of its obligations under the Convention. When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do. It follows that leave to apply for judicial review of a refusal by the Tribunal to grant leave to appeal should be granted if the judge is of the opinion that it is properly arguable that a point not raised in the Grounds of Appeal to the Tribunal had a strong prospect of success if leave to appeal were to be granted.

16) Mr Caskie mentioned that the solicitor for the appellant was making his first appearance in the First-tier Tribunal. Nevertheless, where a representative does not simply fail to mention a possible line of argument but expressly does not rely on it, a judge is entitled to assume that is based on consideration of the proper strength of the case. The duty on a judge to pursue the matter must be less than where there has been an oversight.

17) The line of argument for the appellant based only on his professional status as a pharmacist is stateable. To find it without guidance among the hundreds of pages put before the First-tier Tribunal would not be quite like searching for a needle in a haystack, but it is not blindingly obvious. It requires some ingenuity, is rather novel in its generality, and might well be resolved eventually against the appellant. It is

conceivable that it might have been considered by a representative but eventually not advanced. It does not carry such strong prospects of success that the FtT judge should have called for submissions or examined the materials so as to identify it himself.

18) Any case such as now suggested is for the appellant to raise with the respondent under paragraph 353 of the Immigration Rules. It does not disclose error of law by the First-tier Tribunal, and its determination shall stand.

19) An anonymity order remains in place.

7 November 2013
Judge of the Upper Tribunal