Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00035/2011

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 9 December 2013	**On 12 February 2014**

Before

MR JUSTICE MITTING
UPPER TRIBUNAL JUDGE FREEMAN

Between

DELER KHEDER HOSSAIN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Frost, TRP Solicitors
For the Respondent: Mr P Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. Little about the appellant could be said with any certainty. What can be said with sufficient certainty to be a useful starting point is that he is an Iraqi citizen of Kurdish origin and is probably aged 32. He did arrive in the United Kingdom before he claimed asylum on 8 February 2001 and there is no reason to disbelieve the account that has always been understood, that he arrived clandestinely on or about 1

February 2001. Beyond that little of his history or past circumstances can be established with any degree of certainty. We are aware, and state at the outset that what we are looking for is not certainty or even for facts to be found on the balance of probabilities but whether or not there is a reasonable likelihood that what he has said in various accounts given over the years is true.

2. He has always claimed to have belonged to a wealthy land-owning Kurdish family. He originally said that the family lived in a village called Chiwa Saro in a rural part of the region of Khosnaw in territory controlled since the first Iraq war by the then Kurdish autonomous authority and now Kurdish Regional Government in a part of Kurdistan near to the border with Iran. The claim which he made for asylum was rejected by the Secretary of State by a letter dated 17 May 2001 and on appeal by the Adjudicator in Determination and Reasons promulgated on 29 July 2003.

3. His case then was that his family had become involved in a land dispute with a neighbouring family in 1989, that is to say when he was 8, as a result of which they left their land and moved to Rania in 1994 or 1997. Rania is a small town to the east of Erbil and north west of Sulaymaniyah in Sulaymaniyah province.

4. He said that on 1 June 1999 his father was shot and killed while driving a car in which he was travelling as a passenger. He too was shot and clubbed and left for dead. He was sent to a private hospital where the bullet was removed. Later his kidney became infected and he lost a kidney. He said he then left Iraqi Kurdistan on 1 January 2001.

5. The basis of his claim for asylum was that he and his family were being oppressed by a powerful PUK commander, Anwar Betwata. The Adjudicator was not satisfied that the appellant had been or would be subject to persecution for a Refugee Convention reason or would be at risk of death or ill-treatment sufficient to engage Article 3 ECHR. He found that the appellant had exaggerated his account and could safely be returned.

6. In paragraph 8 of his Determination and Reasons he dealt with the incident in which the appellant claimed that he and his father had been shot and noted that no medical evidence had been put forward on his behalf to substantiate his claim that he had been shot and severely injured except for a letter from a nurse practitioner addressed to a Housing Manager which said that he was currently suffering from asthma and medical and psychological problems. He said that he was not assisted by the absence of supporting medical evidence.

7. Alerted to that very significant omission one might have expected that the two highly competent firms of solicitors who have since conducted the appellant's case would have rectified the omission. They have not done so. Consequently we are in precisely the same position as was the Adjudicator ten years ago of considering an assertion that someone has received a serious physical wound which must have left signs of internal scarring detectable by an MRI scan, of external scarring where the

bullet entered and was removed; but thee is no such evidence. By itself that surprising omission might not have been determinative or anything approaching it but as we shall explain that is not the only difficulty which the appellant faces.

8. His asylum claim having been refused and his appeal dismissed no action was taken to remove him. That is unsurprising in the light of the second Iraq war and of the internal disturbance that then followed. He said he formed a relationship with a British woman in 2005 and went through an Islamic ceremony of marriage with her but did not undertake a civil ceremony. A son was born to her who may or may not have been his son. He at one time asserted with confidence that he was.

9. Of more relevance for the present purposes he also committed a serious criminal offence on 5 August 2007, wounding a man with a knife with intent to cause grievous bodily harm contrary to Section 18 of the Offences against the Person Act 1861. He was tried by a judge and jury and convicted on 14 March 2008. He was sentenced to five years' imprisonment on 10 December 2008. His relationship with the British woman then ceased although he said that she was willing to allow him to maintain contact with the son. Nothing turns on that now because no part of his case today or in recent years has been that he must be permitted to remain in the United Kingdom to sustain his relationship with that boy.

10. On 16 January 2009 the Secretary of State notified the appellant of his liability to automatic deportation under Section 32(5) of the UK Borders Act 2007. On 18 July 2009 the appellant made a fresh claim for asylum. He was interviewed on 11 December 2009. In that interview he claimed, as far as we can tell for the first time to have been born in Gwer, a town near Mosul, in the part of Kurdistan then and now, insofar as it is under anyone's control, controlled by the Central Government of Iraq. His claim was refused on 6 December 2010. On 2 December 2010 a deportation order was served on him. He appealed to the First-tier Tribunal. In a Determination and Reasons promulgated on 4 May 2011, the First-tier Tribunal panel dismissed his appeal.

11. The basis of his claim to international protection had changed. Its origin remained in part at least a feud with another family but the feud was very different from that originally described. The family was that of Jalal Talabani, the 6th President of Iraq. The oppressor was not Anwar Betwata but Anwar Beg Talabani, President Talabani's brother. The feud started with a demand for money which was refused. The appellant's father and uncle killed one of Jalal Talabani's brothers, not Anwar Beg. He described how at some stage, he does not say when or by what means, his family then found itself in Gwer. That was understood, perhaps misunderstood by the panel, to be a suggestion that his family had moved to Gwer. The family then he said moved to Rania in 1997 not to escape the land feud that he had previously described but because of an entirely different feud involving an uncle. The uncle had married a Yazedi woman. A Yazedi military commander then killed his uncle's wife and was in turn killed by members of the appellant's family. The Iraqi regime issued a warrant for his family's arrest, hence their flight to Rania.

12. The flight to Rania however created a difficulty for him which required explanation. His account was that his father and grandfather were senior Ba'athist figures, in other words supporters of the Saddam regime. Consequently the last place that one might contemplate that they would seek refuge was the area controlled by the then Kurdish autonomous authority. A complex explanation was proffered to the effect that Rania was, although under the control of the Kurdish militias, nevertheless a small town away from Erbil and Sulaymaniyah in which it was easier to remain out of the way than had the family moved to either of those two towns.

13. The appellant maintained that his father was killed and he was injured in Rania, in 1999, as before although his description of the precise circumstances in which that event occurred differed in details from his earlier account and contained features which led the panel to disbelieve it.

14. Consistent with his new account that the original feud was with the Talabani family he gave evidence that the killers were PUK supporters, by necessary implication associates or subordinates of Jalal Talabani and Anwar Beg Talabani. He also said that earlier in 1994 a family member had been held by them for ransom. He explained the reason for the drastic change in his account. The interpreter who on behalf of the Home Office had translated his answers at the first asylum interview on 15 May 2001 had told him not to mention Jalal Talabani, for fear that the UK authorities who collaborated with the PUK would in consequence deport him. He claimed to have learned in 2003 that the interpreter was the son of a PUK general and that was why he had been told to advance the account, which by necessary inference he must now accept to have been false. He did. He raised a further bar to removal, the threat which he said would be posed to him by the family of the man who had participated in the stabbing of which they were both convicted on 5 August 2007. No further mention of that has been made in this hearing. He relied then, but not now on his wish to remain in contact with his son in the United Kingdom. He maintained also that he was not guilty of the crime of which he had been convicted.

15. He also relied on three medical report prepared between July 2010 and April 2011 in which he said he was diagnosed as suffering from post traumatic stress disorder, a major depressive episode, psychotic symptoms and some form of epilepsy. He maintained that the facilities for medical treatment in the Kurdish regional zone were inadequate and that he posed a risk of suicide if deported.

16. The panel disbelieved his account of his and his family's experiences in north Iraq. It rejected his explanation for the change of account and concluded that whatever difficulties he had faced in Iraq they were not for a Refugee Convention reason. It concluded that there was no satisfactory evidence that he was at any risk from the family of his fellow criminal. It held that facilities for protection from ordinary criminal conduct were available from the authorities in north Iraq, implicitly at least in the KRG, and that medical facilities for the management of his condition existed there. In the light of those findings it concluded that he was not entitled to humanitarian protection under Article 15C of Council Directive 2004/83/E. It

concluded that he enjoyed no family life in the United Kingdom and that the interference with his private life was justified, implicitly at least, in furtherance of the legitimate aim of the prevention of crime and disorder. By order of Upper Tribunal Judge Coker on 13 March 2012 the panel's decision was set aside and directions were set for hearing before us. It was common ground and in any event Judge Coker determined that the panel had made an error of law. Our task is therefore on the material which was available to the First-tier Tribunal and that which has been produced in addition to us, to determine whether or not the Secretary of State's decision to deport is or is not sustainable.

17. We have been presented with a third detailed witness statement dated 15 January 2013 which expands upon the account advanced before the panel. The explanation for the first untrue statement was that he was told by "Alam", who was not a Home Office interpreter as he previously said, but an interpreter retained by his then solicitors, not to mention anything to do with Jalal Talabani and also not to mention the incident involving the Yazedi woman because "he may end up moving on to what happened with the Talabani family". Consistently with his December 2009 interview, the appellant now maintains that he was born on 2 April 1981 in Gwer where his family had a house and land and where he went to school for two years. He said that his family did not have a house in Chiwa Saro and that he did not live there, all that had happened was that they had owned land there. He claimed to have been issued with an identification card in Mosul. He said that he had spent "years" in Gwer. The problems with the PUK "were going on for years before we left Gwer for Rania... Talabani and his family were trying to extort money from my family because we were quite wealthy". He also said that the Peshmerga demanded food and money "during the time that we lived in Gwer". The account which he now gives suggests that he had spent his childhood in Gwer. He stated explicitly that he and his family had to flee Gwer in 1997 because of the incident involving the Yazedi woman and because a warrant had been issued by the then Iraqi authorities for the arrest of his relatives because his uncle had killed an Iraqi officer during a gunfight at the wedding of the uncle to the Yazedi woman, the wedding at which she too had been killed. He said that it was during his time in Gwer that his uncle had killed one of Jalal Talabani's brothers - some time between 1985 and 1989 - he thought 1987. In fact the objective evidence referred to at the detailed and helpful report of Dr George is that that killing took place in 1987 although Dr George was of course not able to say who the killers were.

18. The contrast between his current account and his original account is striking, not least because he says he was not then given the opportunity to check through and respond to the answers which were recorded in his first asylum interview. In fact a typewritten "response" was prepared in which his account was set out. It contains the following:

> "In 1989 when I was a child my family got into trouble with another family from a different clan about family tribal land. Before 1995 someone from the other family was killed, however this did not have anything to do with our

> family but because of this dispute they blamed us for his death. The animosity between the families dragged on for several years. When the Kurdish forces took over power in north Iraq in 1995 which was our area the Kurdish authorities might to make peace between our families. However the other family refused to make peace before we paid them a ransom."

He then goes on to describe the payment of the ransom and further troubles which his brother experienced at the hands of the other family. He then goes on to describe in detail the escalation of the land dispute which led ultimately to interference with the water supply to the land.

19. That was his response to the answers that were recorded as given in the interview. He states expressly that in 1995 he was living in the area controlled by the Kurdish authorities. By necessary implication he also states that that was the area in which he and his family had their home "which was our area".

20. We have set out the various accounts that he has given over the years about why he fled Kurdistan and what had happened to him before he did to demonstrate beyond possibility of argument that he must, in at least part of the accounts he has given, have lied and done so deliberately. For that reason we approach any account given by him of his circumstances before he arrived in the United Kingdom with scepticism.

21. He faces however a further difficulty. He undoubtedly suffers from mental problems. He has been examined by eminent psychiatrists over the years including recently on at least three occasions Professor Katona. In a report dated 21 April 2013, not that long after the detailed witness statement on which he now relies, Professor Katona records that he asked him why he had come to the United Kingdom. The answer was, "many things happened I had been ill a long time, I don't remember what happened to me". Professor Katona went on to note that he had presented to the mental health team in 2005 as having paranoid beliefs and thoughts that people were out to harm him. He noted that in February 2008 he was "suffering from memory problems and not being able to remember much". He also noted that, on two occasions on which he had administered cognitive tests to him, he had scored 8 or 9 out of 28, a level that indicated significant cognitive impairment. The condition was fluctuating, because on an occasion in between those two tests, on which he had administered the same test, his score had risen to 18 out of 28, indicating mild to moderate impairment only.

22. Further, it is common ground that the appellant is illiterate and yet he claims to come from a wealthy family. We do not know enough about the standards to which wealthy families in Kurdistan aspire to be able to discern with confidence what their attitude to the education of their children might be but it is at least an oddity which raises a query about his general account.

23. Taking all of those things together, the established lies, the dramatic variations in the accounts given, the implausible explanation for the change of accounts involving as it does the astonishing coincidence that the Kurdish interpreter was the son of a PUK general and told him not merely to conceal what he had to say about the Talabani but also about what had happened at the wedding, together with his demonstrated inability to remember anything, all satisfies us that we cannot conclude to the standard of reasonable likelihood that anything bar the fact that he is an Iraqi citizen of Kurdish origin who arrived in this country in February 2001, might be true. We simply do not know. To that low standard we believe it to be more likely that "our area" was within that which is now controlled by the Kurdish Regional Government than in or near Mosul.

24. For those reasons, like the Adjudicator and the First-tier Tribunal panel, we reject his claim to asylum and to humanitarian protection under Article 15C. We are not satisfied that there are substantial grounds for believing that there is a real risk that he will be exposed to ill-treatment of a kind sufficiently serious to engage Article 3 ECHR.

25. Two further issues remain. It is said that he poses a significant suicide risk. It is also said that the mental difficulties from which he undoubtedly suffers which were outlined by the panel in the second decision are such that he could not receive the treatment that he requires for them in the KRG. We accept the evidence of Dr George citing the UNHCR that the facilities for the treatment of psychiatric conditions in the KRG are "limited and reportedly insufficient". We accept that, all other things being equal, Professor Katona and Dr Pourgourides, whose report is dated 27 November 2013, are right in concluding that his mental health requires treatment of a kind which can be provided for him in the United Kingdom but which there is no reason to expect will be provided for him, at any rate to a sufficient standard, in the KRG. We accept also that he has said that in the past that he has attempted to commit suicide although we have no evidence to that effect. We accept that there is some suicide risk and that it is at least possible that in the KRG the management of that risk will be less capable than it might be in the United Kingdom. But his circumstances get nowhere near those which even in the case of someone who was not to be deported for having committed a serious crime would prevent removal. It is now settled law both in the United Kingdom and in Strasbourg that in the case of a physical condition the Convention state in which a person is temporarily resident cannot be required to assume the healthcare burden of managing that condition and that even in circumstances in which life may be shortened by the lack of medical care in the receiving country, it is nonetheless proportionate and legitimate to remove the individual – see **N and the UK [2008] 47 EHRR 885)**. Similar reasoning must apply to mental conditions as well as physical conditions. Accordingly the fact that psychiatric services are "limited and reportedly insufficient" in the KRG cannot by itself prevent removal, still less deportation. As far as the suicide risk goes the risk here is in our judgment not sufficient to engage the United Kingdom's responsibility under Article 2 of the ECHR. Further, neither Professor Katona nor Dr Pourgourides comment upon the steps that can be taken while the appellant is in the United

Kingdom and during removal to eliminate or severely limit the risk. It is unfortunate that they have not done so and accordingly we have been obliged to draw upon evidence given in other cases. Where there is a very serious risk of suicide, eminent psychiatrists have expressed the opinion that it can and should be managed by round the clock observation. Facilities for this exist in mental hospitals. There is no reason in principle why similar arrangements should not be made within the immigration detention estate in the period immediately before removal or deportation. *In extremis*, although we do not claim for this any expert psychiatric support, physical restraints could be used, in addition to the removal of ligatures and other items by which an individual might harm themselves, to avoid the risk that they will.

26. In the end we have to stand back from all of the factors that we have attempted to analyse to reach a conclusion on the basic proportionality issue. This is not a case in which the new Immigration Rules taking effect from 9 July 2012 play a part. The assessment is a straightforward Article 8/3 assessment. In our judgment it is clearly proportionate for the United Kingdom to deport to a territory from which the appellant almost certainly comes, the KRG in the interests of the prevention of crime and the maintenance of order consequent upon his conviction in 2007.

27. In reaching that judgment we have, as will be apparent from what we have said, assumed that the appellant will be deported to the KRG. Were that not to be the case it would have been necessary for us to have undertaken a detailed assessment of the circumstances currently obtaining in the rest of Iraq of which Dr George speaks and about which this Tribunal and the Court of Appeal have pronounced in recent years. We are not however concerned with the mechanics of removal to the KRG nor with the fact that the appellant does not have any identity or other document which establishes, as of now, his right to reside in the KRG. These are matters for negotiation between the British Government and the KRG. Our judgment is given on the assumption that the opportunity to negotiate his return exists and that if the KRG accepts that he can be returned there, then none of the risks of which we have spoken could prevent his lawful deportation. We do not regard as in the slightest degree a realistic obstacle to deportation the possibility that he might have been born in the region of Mosul, both because it seems to us that on the material which we have considered that is very unlikely, but also because if the KRG accept his return to the territory controlled by them, the theoretical possibility that he might be required to go to Mosul to get a ration card will be just that, a theoretical possibility that will play no part in reality in what will happen to him.

28. For all of those reasons this appeal from the decision of the panel is dismissed.

Signed Date

Mr Justice Mitting