



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HX/00914/2005

THE IMMIGRATION ACTS

Heard at Field House
On 27 January 2014

Determination Promulgated
On 4 February 2014
.....

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

ASSO HAMA ABDULLAH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Vidal, for Duncan Lewis Solicitors

For the Respondent: Mr S Whitwell, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals with permission against the determination of Immigration Judge Pugh (as she then was) promulgated as long ago as 4 August 2008 dismissing his appeal against the respondent's decision made on 20 December 2004 to refuse him asylum and to refuse him leave to enter the United Kingdom.

2. The appellant is a citizen of Iraq, and of Kurdish ethnicity. His account of what happened to him in Iraq has been accepted by the respondent. In May 1996, he joined the Workers Communist Party of Iraq (“WCPI”), and became an active member. This brought him into conflict with the PUK who in August 1996 detained, interrogated and tortured him. He was released only when the KDP overran the place where he was being held. The WCPI were not favourable to the KDP and so he fled first to Sulemaniyeh, then to Arbil then under KDP control. While there, on 15 September 1997, a play highly critical of both the PUK and the KDP which he had written and directed, was produced. This led to his arrest and detention by the KDP security forces. He was released, having promised not to involve himself in such activities again, but was on 6 November 1998 arrested with others who were rehearsing a play. His father obtained his release on “life bail”, and he was told that he would be killed if he engaged in such activities again.
3. In 2000 the WCPI launched a campaign against the KDP’s involvement with the Turkish government. Two of the appellant’s friends were arrested, and he fled, fearing that if arrested, he would be executed given that he had breached the conditions of his bail. He left Iraq on 14 September 2000 and fled to the United Kingdom, arriving on 8 October 2000. He claimed asylum on arrival.
4. The appellant remained active in politics after his arrival, and on 2003 attended a meeting in Hull in 2003 to which he brought the head of the WCPI from London. He claims that his brother was arrested by the PUK and interrogated about his activities as a result; the brother was also told to contact the Appellant to tell him to cease such activities.
5. The Appellant fears that if returned to Iraq, he will be at risk from both the KDP and the PUK; that he would not be safe anywhere in Iraq; and, in the alternative that it would be unreasonable or unduly harsh to expect him to relocate anywhere within Iraq.
6. The respondent refused the appellant’s application on 20 December 2004. In summary, he accepted the appellant’s account of his activities in Iraq but concluded that his fear related only to certain areas within Iraq, and that he could return to Kurdish areas in Baghdad or elsewhere in central or Southern Iraq. An appeal against that decision was lodged in January 2005.
7. The unfortunately long procedural history is set out in the decision promulgated on 9 August 2012 in which the Upper Tribunal (Upper Tribunal Judge Dawson and Deputy Upper Tribunal Rintoul). That decision is set out in an annex to this determination.
8. In summary, we concluded that her decision did involve an error of law, and we therefore set it aside to be remade on the issues of relocation and internal flight, it not being in issue that the appellant is at risk of persecution in the KRG.

9. It is unfortunate that there were further delays in resolving this issue, in part due to the timing of the promulgation of country guidance cases, and a later appeal to the Court of Appeal on the case which was promulgated.
10. At the reconvened hearing I heard evidence from Dr Fatah; I also heard submissions from both representatives. Dr Fatah adopted his reports of 19 July 2008 and 4 March 2013. He added that he would be speculating if he said that the appellant would be targeted but that when the general level of tension rises, particularly where there are accusations levelled against Kurdish groups, and the level of violence against Kurdish groups increases, the level of risk for the appellant would also, as a result, rise. He said that the situation in Syria has complicated matters in Iraq and that there is a tendency when Kurdish politicians in Iraq make statements suggesting that the Kurdish area is not part of Iraq, that the Kurds in the Government of Iraq ("GoI") areas come under more chance of being targeted.
11. Dr Fatah said that the appellant would have difficulty settling in certain Kurdish areas given that he may not speak the same dialect. He said the suggestion that he could perhaps settle in Nineveh was perhaps a bad example as the province was very much polarised; Kurds were not welcome there although there was a Kurdish area and that it was more likely that the appellant would find it easier to "fit in" in Baghdad given the overwhelmingly Sunni orientation of Nineveh. Dr Fatah said that, assuming that the appellant was able to relocate safely to Baghdad, he would be able to find somewhere to live and to do that he would need to have a social network and then, if he was able to find a room, he would need to get a job. He said that if the appellant does not speak Arabic, given the unemployment rate, there was not much chance of a job and that adding all the factors together it would be challenging even for somebody who spoke Arabic to establish themselves. He said that he thought that the appellant might be able to stay in a hotel until he developed some links and becomes familiar with the environment.
12. Turning again to Nineveh Dr Fatah said that it now appears from the statistics that Nineveh is more violent than Baghdad and that for historical reasons, given that there are a lot of other minorities, of a non-Kurdish origin there, that the area is unstable leading to attacks on them. He said that the main area of difficulty in Baghdad was the Shia versus Sunni.
13. Turning to the documents required to live and travel around in Iraq, Dr Fatah confirmed the important documents the CSID and the Iraqi nationality certificate. The former showing birth in Iraq is important as Iraqi political groups now accuse each other of bringing people in from outside and giving them these documents and thus it is harder now to get them than before these accusations were levelled. He said that if you have the main document, CSID, then the nationality certificate is obtainable. He confirmed the evidence that if you have the page and file number of the registers in which births are registered, it is possible to get copies of this; if an individual were returned to Baghdad Airport, then a father, brother or uncle, that is someone from the father's family, could attend and vouch for him as all people from

the same family are registered on the same page and even if an individual then gets married, there is a link from that page to the new page.

14. Dr Fatah said that he assumed that if someone had no family then on arrival it would be possible to get a special letter and that although there are checkpoints between the airport and Baghdad, it might be possible for him to get a laissez-passer. That said, to move around Iraq one would need an ID card. This had to be obtained from the home area and although the Iraqi Embassy said that one needs to go there in person, he believed from information he had gleaned that it is possible if someone has a legal representative in their home town who has power of attorney then the ID may be obtained.
15. Dr Fatah said that as far as he was aware it would still be policy of the Iraqi Parliament to refuse to accept involuntary returns. He said that if someone has no ID card, it would be very, very difficult to move around the country and whilst it might be able to bribe one post, it would not be possible to rely on bribery all the time. Dr Fatah said that even with an ID, it is not that easy to move around as you need to know which areas are dangerous and to which you cannot go; that requires local knowledge and the appellant would need the assistance of somebody who knows the area. In addition, the appellant would be at risk not speaking Arabic. He pointed out also that the country was now very different from what it had been in the past and certainly when the appellant was there.
16. Dr Fatah said that Iraq is still a collective society by which he meant that people live in communities and neighbourhoods and if you have family and friends, as well as connections, that would help. He said that it was also nepotism whereby the President's family are all in power and the Prime Minister's son is very prominent, not because he is qualified but simply because he is the son of the Prime Minister.
17. Dr Fatah attributed the recent spike in the number of civilian deaths partly due to the insurgent groups coming out of Syria partly because these groups were now very well armed unlike before. He said another factor was the general situation which was degrading for several reasons, among them a failure of the government to provide security, housing and so on and also because the Shia and Sunni coalitions were themselves splitting open and breaking down into smaller groups. This all led to people losing faith in all central authority and particularly because of the economy. There was also substantial growth in the gap between the poor and the wealthy primarily to do with oil which is controlled by a small group of people.
18. In cross-examination, Dr Fatah said that the appellant should know the page and file reference relating to his personal status. He also confirmed that his enquiries as to how it was possible to get an ID by using a local agent was new information subsequent to his report and was contrary to what the Iraqi Embassy were saying. He said it was his understanding that if one wishes to return with an expired passport the Consulate would assist to get a one trip laissez-passer although one would still needed a civil ID.

19. Dr Fatah said that he had still not found any evidence that there is a central archive, adding that Quandil, the Swedish NGO which had said that this existed had not replied to any of his queries and that in any event, from 1991, when the Kurdish region went its own way it is unlikely that any records would then have been passed from that area to Baghdad.
20. Dr Fatah accepted that the unemployment rate in Iraq was about the same as that in southern Europe and that the most practical difficulties the appellant would have would be language, employment and accommodation.
21. Dr Fatah said there are Kurds who are in the police and the armed forces partly because they have been recruited there individually, partly because they are there to undertake specific tasks at specific units for example guarding the President and also because in the past political groups have contributed certain forces to the army and police and this included Kurdish leaders.
22. Dr Fatah said that there are two different Kurdish groups in Baghdad. The Shia Kurds who had returned from Iran who had previously been expelled and who speak their own dialect; there are also Kurds originally from the north of Iraq, the KRG, although there are now fewer of them because of the pressure that is for them on that area since 2003. He said he accepted that there are many judges who are Kurdish and politicians but it is now very difficult for Kurds to continue to live in Iraq unlike the breakdown.
23. In re-examination Dr Fatah said that those originally from Kurdistan had their clubs, a community, and were established but this has all gone since 2003. He was not able to put a number on the existing community adding that like Christians now in Iraq, they just "live" rather than living in communities. He said that the security vacuum had not helped and the situation does become harder from time to time when Kurdish leaders make irresponsible statements for example saying they are not part of Iraq which is increasing tension and makes Kurds more vulnerable.
24. In response to my questions Dr Fatah said that many of the prominent Kurds from the north live in the "Green Zone" and do not move around in the usual way. In many cases the family of these individuals live in the KRG and they return there at weekends and for holidays.
25. Dr Fatah said also it is difficult for somebody in the appellant's position of returning to Iraq as he would need somebody local to guide him to avoid the areas where he might face hostility and being targeted by his ethnicity.
26. I then heard submissions.

Discussion

27. It is not in issue that the appellant is at risk within the KRG area. While the appellant is a Kurd from the KRG, it is not suggested that he would be at risk of persecution for that reason per se, at least not in large areas of Iraq; the question remains as to

whether he would be at risk elsewhere; and, whether it would be reasonable to expect him to relocate or whether it would be unduly harsh to expect him to do so.

28. In this context I note from **AH (Sudan)** [2007] UKHL 49 at [5]:

5. In paragraph 21 of my opinion in *Januzi* I summarised the correct approach to the problem of internal relocation in terms with which all my noble and learned friends agreed:

"The decision-maker, taking account of all relevant circumstances pertaining to the claimant and his country of origin, must decide whether it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so . . . There is, as Simon Brown LJ aptly observed in *Svazas v Secretary of State for the Home Department*, [2002] 1 WLR 1891, para 55, a spectrum of cases. The decision-maker must do his best to decide, on such material as is available, where on the spectrum the particular case falls. . . . All must depend on a fair assessment of the relevant facts."

Although specifically directed to a secondary issue in the case, these observations are plainly of general application. It is not easy to see how the rule could be more simply or clearly expressed. It is, or should be, evident that the enquiry must be directed to the situation of the particular applicant, whose age, gender, experience, health, skills and family ties may all be very relevant. There is no warrant for excluding, or giving priority to, consideration of the applicant's way of life in the place of persecution. There is no warrant for excluding, or giving priority to, consideration of conditions generally prevailing in the home country. I do not underestimate the difficulty of making decisions in some cases. But the difficulty lies in applying the test, not in expressing it. The humanitarian object of the Refugee Convention is to secure a reasonable measure of protection for those with a well-founded fear of persecution in their home country or some part of it; it is not to procure a general levelling-up of living standards around the world, desirable though of course that is.

29. It is at this point worth noting what was said in **HM and Others (Article 15 (c)) Iraq CG** [2012] 00409 (IAC) about its scope, given that this appeal is concerned with internal relocation. The panel stated [259]-[260]:

Confinement to the Article 15(c) issue

259. The burden of proof in these appeals rests on the appellants, albeit the standard of proof is relatively low and the seriousness of the issues at stake requires us to apply anxious scrutiny. In deciding this case we have to have regard to the entirety of the evidence. This being a CG case we have set out the enormous amount of evidence with which we have been presented in Appendix A.

260. Our primary focus in these appeals is strictly confined to Article 15(c) of the Qualification Directive, and a discrete issue relating to risk on return to BIAP. However, since this case deals with the current situation in Iraq it will inevitably be a reference point for decision-makers deciding asylum-

related appeals brought by Iraqis that are not confined to the Article 15(c) issue. In this context we would reiterate the observations made recently by the Tribunal in *AK (Afghanistan)* at [154]-[156] that in the general run of appeals decision-makers should ordinarily deal first with the issue of refugee eligibility and only deal with the issue of subsidiary protection (including Article 15(c) second. They should not deal with Article 3 until last:

30. Thus, it is necessary to consider first internal relocation and the relevant factors before going on to consider article 15 (c), but bearing in mind that the current situation in Iraq was considered in extensive detail in HM where the panel heard evidence from Dr Fatah and others. They attached significant weight to the evidence both of Dr George and Dr Fatah [267].

“267. In the present appeals we wish to make it just as clear throughout that our concern is to assess the current level of Article 15(c) risk in Iraq. Of course, for such purposes evidence as to the historic situation is relevant and the previous findings of fact made by the Tribunal in both *KH* and *HMI* do afford helpful reference points in certain respects; particularly as we know precisely what body of background evidence they had before them when reaching their decisions. But plainly the fact that both were overturned by the Court of Appeal means that their findings on the evidence before them cannot be treated as starting points. The effect of the Court of Appeal decisions is that we must approach this case on the basis that there is no previous binding country guidance case on the application of Article 15(c) to Iraq.”

31. At [104] – [106] the Upper Tribunal recorded Dr Fatah’s evidence (in relation to relocation) as follows:

“104. He was asked how broad would support networks be for a person relocating and he said that political groups were the best example and that it was all around political groups. If he were Sunni and wanting to leave, for example, Kirkuk, then he would look to go where there were other Sunnis if you were from a big tribe. Family was important. You would look for the tribe initially, which would be Sunni or Shi’a. He was asked whether, if a person was not influential in the tribe, the latter would feel obliged to help him and he said not the tribe but more a political organisation. If a person had no influence, then they would look for a job. It was put to him that his [705] was very general and he said that if he were from a city the neighbour would be like a social network and like the tribe might help with connections for jobs, etc. It was put to him that although there were job problems for IDPs, there was no evidence of starvation or a humanitarian crisis and he said he accepted that there was not a humanitarian crisis, but life was harsh. It was put to him that most IDPs lived in houses and not in apartments or towns and he said there

were people living in camps. HF was single and of working age and would have to find a job.

105. There were no more Kurdish neighbourhoods in Baghdad after the Shi'a Kurds were deported by Saddam Hussein. Kurds in Baghdad would live in mixed neighbourhoods. Some had become Arabised. He agreed that if you were a Kurd you would know where to go. There were checkpoints to avoid. With regard to the examples he gave immediately after [181] of his report, it was suggested to him that it was often unclear who had attacked and why and who the victim was and he said you could tell from the figures. Dr George had given an example of a sectarian attack.
106. He said the Shi'a militia was powerful in Baghdad. As regards risk to a Sunni Kurd who was a failed asylum seeker in Baghdad, he had to know his way around and if he was in the wrong neighbourhood he would be at more risk. There was more violence where there was a greater population. He could not say how the first appellants could avoid violence in Kirkuk. As regards the departure of the US troops, it had not reduced the exposure of civilians to high levels of violence."

32. Also of note is Dr George's evidence at [162] - [164]:

- "162. According to January 2009 statistics cited in the COIS, 30 August 2011, unemployment in Iraq is 18% and a further 10% of the labour force are part-time workers. According to the UNSG Report, 7 July 2011, the country's poverty index remains high (22.9%). The UNICEF Humanitarian Action for Children, 2011 report states that 23% of Iraqis reportedly live on less than US \$2 per day (cited in 2012 UNHCR Guidelines, p.165). Illiteracy is also high. There are ongoing problems with the delivery of essential services. Public services continue to be plagued by severe deficiencies, notably widespread corruption. Iraq's crime rate is high. According to Dr George, the great majority of Iraqis depend heavily on subsidised rations ([224]).
163. In the 30 June 2012 issue of Measuring Stability and Security in Iraq, a New York consulting firm is quoted as ranking Baghdad as last of 221 cities in a survey of quality of life and personal security, describing it as 'the world's least safe city'.
164. According to Dr George, there is an economic crisis and housing shortage afflicting Iraq. Persons without a family support network would encounter difficulties finding a means of supporting themselves and places to live (at [221], [61]-[71]). Access to jobs relies on corruption, patronage, nepotism or being a political appointee: a Wasta (person of influence) is needed."

33. In his second report at [50] – [51] prepared for this appeal, Dr Fatah expands on the collective nature of Iraqi society:
50. It is in the nature of Middle Eastern communities that individuality does not exist; individuals are treated as part of the community to which they belong. The identity that most poses a threat is the one that could be recognised most easily. For example, in a Shia community, a Kurd's religion might be labelled as Sunni, overshadowing their Kurdish ethnic identity: in a Sunni Arab community, Kurds would be identified by their Kurdish ethnicity, linking them en masse to the Kurds who generally supported the coalition forces in ousting the Sunni-Arab-dominated government in Iraq.
 51. This question of identity, collectivism, and belonging has an obvious impact on anyone removed from their place or community of origin. A number of issues should be addressed while considering relocation an Arab to a predominately Kurdish area or vice versa. These may be considered as soft issues but they nonetheless can accumulate to form substantial pressure on the individual on question. By way of a helpful hypothetical example, it could be argued that a Kurd could relocate more easily to a European capital, where he might find a community with his own culture, sect, and belief that to an Arab city where none of these elements are available. These are issues that ought to be considered, and as the objective evidence has shown, there are strong tensions between Kurds and Arabs, and security in the 'disputed territories' cannot be guaranteed. As a Kurds, Mr Abdullah could be affected were he relocated to an Arab-dominant or ethnically mixed area.
34. This, combined with the extent to which people in Iraq depend on their family, connections, and community for protection and in getting accommodation and employment, are important factors to bear in mind.
35. The starting point for considering whether the appellant is at risk on return to Iraq outside the KRG is the findings of fact made by Judge Pugh who broadly accepted the appellant's claims. She accepted that the appellant was active within the United Kingdom; what she did not accept was that the KDP/PUK had become aware of that in Iraq.
36. I do not understand it to be Dr Fatah's opinion that the conclusions reached in HM are incorrect, but that the situation has deteriorated to a degree, with a large spike in civilian deaths, partly due to the destabilising effect of the insurgency in Syria, and partly due to the fracturing of the Sunni and Shia coalitions into smaller factions.
37. Dr Fatah's evidence is not that Kurds face persecution in Iraq, but that they are at more risk (although not sufficiently to cross either the article 15 (c) threshold or engage the refugee convention) when anti-Kurdish sentiment rises, usually when a

Kurdish politician has made a comment about Kurdistan not being part of Iraq or expressed a similar sentiment.

38. I bear in mind also, that in addition to his ethnicity, the appellant was also active as a communist, and it is implicit in Judge Pugh's findings that he had been active within the United Kingdom; that said, she did not accept those activities had come to the attention of the PUK/KDP in the KRG.
39. In his first report Dr Fatah says,

"At Section 8.2 the WCPI has been condemned by Kurdish groups and various Iraqi groups with the Shia sect itself, being as an Islamic ideology, is not compatible to communist ideas which may lead to persecution of WCPI in Shia parts of Iraq."
40. In this context it must be borne in mind that as the COI Report indicates, political parties in Iraq tend to be organised either along religious or ethnic lines [17.22].
41. Whilst it appears on the evidence of Dr Fatah that the appellant is not at risk per se on account of his political views, there would, on Dr Fatah's oral evidence be enhanced risk were he openly to voice communist views which are inimical to Islamic concepts of the state. I deduce from this that simply being a communist would not put him at greater risk although being identified as one and speaking out as one would enhance risk.
42. This is not a situation in which the appellant has given evidence nor has it been submitted that he would keep his political views silent only out of fear of the consequences.
43. In the light of Dr Fatah's evidence regarding the mechanisms by which an individual can obtain the necessary documentation to return to Iraq, and assuming that the appellant would be able to obtain an ID card given that he still has links with his home area, I consider that he would be admitted to Iraq if he returned voluntarily.
44. I bear in mind that if the appellant were to return to Iraq, he is an ethnic Kurd which is evident from his name, as Dr Fatah confirmed. That cannot be hidden. Further, he is originally from the KRG, as would be clear from his papers, and I accept that he does not speak Arabic. While there is a sizeable Kurdish community in Baghdad, this is formed, according to Dr Fatah, from two distinct groups. Those returned from Iran who are Shia (and with whom the appellant has no common language or faith); and those who are originally from the KRG area but are no longer a coherent community. There is, therefore, limited scope for the appellant to forge ties with other Kurds who speak his language, and on whom he could hope to depend.
45. The appellant would be returning to a country after an absence of fourteen years and returning to a part of the country in which he had not lived. As noted above, many areas outside of Baghdad are particularly polarised. It is also evident from what is said by Dr George and Dr Fatah in **HM** that an ability to obtain accommodation, a

job and some degree of security is dependent on an individual's connections, be it family, ethnicity or religious affiliation. I accept Dr Fatah's evidence that it would be easier for the appellant to relocate to Baghdad than anywhere else which is perhaps unsurprising given that it is a large mixed city. Equally, I note that there are areas within that city which would not be safe for him due to his ethnicity and/or religious affiliation which is likely to be assumed once it is known that he is Kurdish. I accept that there would be significant difficulties in this case given the appellant's lack of any connections with Baghdad, his inability to speak Arabic and even with a relocation package staying in a hotel as envisaged by Dr Fatah is not a long term proposition. I accept also that it would be difficult for him to adjust and that he would need assistance in avoiding those areas where he would be at risk.

46. In this case, the appellant would be without family links and would not be able to rely on informal social links. Given his ethnicity and inability to speak Arabic, he would be particularly disadvantaged in obtaining employment. Whilst I accept that the level of employment in Baghdad appears to be relatively low I bear in mind that the situation is such that one needs connections and contacts to be able to access the job market which the appellant does not have having had no connections with Baghdad and having spent fourteen years out of the country. The language problems would make it difficult for him to live a relatively normal life in Baghdad and it is speculative whether he would be able to find somebody to guide him to avoid the areas to which he should not go. While he would be entitled to a relocation package, and that is taken into account, it would not last for any significant length of time and would not meet many of the problems identified. In any event, being identified as someone who has returned with such a package, is unlikely to enhance his safety.
47. In summary, the appellant would be disadvantaged by a lack of community ties which are essential in Iraq; would have, as a result, and as a result of his lack of Arabic and being an ethnic Kurd, real difficulties in earning a living; would, given his lack of knowledge of the area, an enhanced risk of simply straying into the wrong area; would be unable to express his political views freely, given that they are inimical to Islamic traditions; and, would have difficulty in obtaining accommodation. All of these factors are interrelated, and no single one is determinative, but taken together, and following AH (Sudan) I am persuaded that on the facts of this case, given the unusual number of factors specific to him, that it would be unduly harsh to expect this appellant to relocate to Baghdad, and, given Dr Fatah's evidence that relocation would be even more difficult outside of Baghdad, and which I accept, that it would be unduly harsh to expect him to relocate anywhere in Iraq outside the KRG.
48. On that basis, and as it is not in doubt that the appellant has a well-founded fear of persecution in the KRG, I find that the appellant has established a well-founded fear of persecution on return to Iraq and I allow his appeal on that basis.
49. Accordingly, I remake the decision of the First-tier Tribunal by allowing the appeal on refugee convention grounds. I also allow the appeal under the Human Rights

Convention on the basis that requiring the appellant to return to Iraq would be in breach of the United Kingdom's obligations pursuant to article 3 of the Human Rights Convention.

SUMMARY OF CONCLUSIONS

1. The decision of the First-tier Tribunal did involve the making of an error of law, and I set it aside.
2. I remake the decision by allowing the appeal on asylum grounds and on human rights grounds.

Signed

Date

Upper Tribunal Judge Rintoul

ANNEX - ERROR OF LAW DECISION



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HX/00914/2005

THE IMMIGRATION ACTS

Heard at Field House
On 6 August 2012

Determination Promulgated
On 4 February 2014
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Before

UPPER TRIBUNAL JUDGE DAWSON
DEPUTY UPPER TRIBUNAL JUDGE RINTOUL

Between

ASSO HAMA ABDULLAH
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Vidal of Counsel, instructed by Duncan Lewis & Co
For the Respondent: Mr G Saunders, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

- 1 The appellant appeals with permission against the determination of Immigration Judge Pugh (as she then was) promulgated on 4 August 2008 dismissing his appeal against the Respondent's decision made on 20 December 2004 to refuse him asylum and to refuse him leave to enter the United Kingdom.

- 2 The appellant is a citizen of Iraq, and of Kurdish ethnicity. His account of what happened to him in Iraq has been accepted by the respondent. In May 1996, he joined the Workers Communist Party of Iraq ("WCPI"), and became an active member. This brought him into conflict with the PUK who in August 1996 detained, interrogated and tortured him. He was released only when the KDP overran the place where he was being held. The WCPI were not favourable to the KDP and so he fled first to Sulemaniyeh, then to Arbil then under KDP control. While there, on 15 September 1997, a play highly critical of both the PUK and the KDP which he had written and directed, was produced. This led to his arrest and detention by the KDP security forces. He was released, having promised not to involve himself in such activities again, but was on 6 November 1998 arrested with others who were rehearsing a play. His father obtained his release on "life bail", and he was told that he would be killed if he engaged in such activities again.
- 3 In 2000 the WCPI launched a campaign against the KDP's involvement with the Turkish government. Two of the appellant's friends were arrested, and he fled, fearing that if arrested, he would be executed given that he had breached the conditions of his bail. He left Iraq on 14 September 2000 and fled to the United Kingdom, arriving on 8 October 2000. He claimed asylum on arrival.
- 4 The appellant remained active in politics after his arrival, and on 2003 attended a meeting in Hull in 2003 to which he brought the head of the WCPI from London. He claims that his brother was arrested by the PUK and interrogated about his activities as a result; the brother was also told to contact the Appellant to tell him to cease such activities.
- 5 The Appellant fears that if returned to Iraq, he will be at risk from both the KDP and the PUK; that he would not be safe anywhere in Iraq; and, in the alternative that it would be unreasonable or unduly harsh to expect him to relocate anywhere within Iraq.
- 6 The respondent refused the appellant's application on 20 December 2004. In summary, he accepted the appellant's account of his activities in Iraq but concluded that his fear related only to certain areas within Iraq, and that he could return to Kurdish areas in Baghdad or elsewhere in central or Southern Iraq.

Procedural History

- 7 The Appellant's appeal was heard on 29 March 2005 by Mr S Gillespie, an Adjudicator, sitting at North Shields. He dismissed the appeal on all grounds. On 29 June 2005 the Appellant made an application for reconsideration under section 103A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). That was refused but on 10 October 2005, after the application had been renewed to the High Court, Collins J ordered reconsideration. The matter then came back before the AIT on 28 July 2006 when Senior Immigration Judge Warr determined that there had been an error of law

in the first decision. The appeal was then adjourned for the appeal to be determined afresh.

- 8 The appeal next came before the AIT on 31 July 2008 when it was heard by Immigration Judge Pugh who dismissed it on 4 August 2008. The appellant applied pursuant to section 103B of the 2002 Act to the AIT for permission to appeal to the Court of Appeal. That application was refused, as was the renewed paper application for permission. Eventually, on 19 February 2010 permission to appeal was granted by the Court of Appeal after an oral hearing.
- 9 By an order of the Court of Appeal made on 22 September 2010 with the consent of both parties, the appeal was allowed to the extent that it is remitted to the Upper Tribunal for Reconsideration.
- 10 The Statement of Reasons attached to the Court of Appeal's order provides:-

Permission to appeal to the Court of Appeal....was ... expressly granted "on limited grounds" although the parties understand that permission was granted on the limited ground relating to the issue of Dr Fatah's report and internal relocation.

The single point in issue at the hearing on 31 July 2008 was the issue of relocation. IJ Pugh expressed reservations about the general reliability of the evidence of Dr Fatah, based on the findings in *SM & others (Kurds - protection - relocation) Iraq* CG [2005]UKAIR 00111, and *HA (WCPI - IMIK - KRG) Iraq* CG[2007] UKAIT 00087. The Respondent and the Appellant agree that Dr Fatah's report in the present case does not necessarily suffer from the same flaws as identified in *SM* and *HA*, namely over reliance on WCPI documents, and it is therefore arguable that IJ Pugh's approach to Dr Fatah's evidence demonstrated a material error of law.

Hearing on 6 August 2011

- 11 We considered first the extent of our jurisdiction, given that sections 103A to E of the 2002 Act were repealed by The Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 (SI 2010 No. 21). The relevant transitional provisions are set out in Schedule 4:
 11. An appeal which is proceeding before the appropriate appellate court under section 103B or 103E of the 2002 Act before 15 February 2010 but which is not determined before that date shall continue as an appeal to the appropriate appellate court under section 103B or 103E of the 2002 Act.
 12. A case remitted by the appropriate appellate court on or after 15 February 2010 which, if it had been remitted before that date would have been remitted to the Asylum and Immigration Tribunal, shall be remitted to the Upper Tribunal and sections 12 and 13 of the 2007 Act shall apply.
- 12 This is an appeal to which these paragraphs apply, and so the Court of Appeal's powers in remitting the appeal are those set out in section 103B. These, unlike the powers set out in section 14 of the 2007 Act are not predicated on the Court of Appeal

having determined whether the decision in question involved a question of law, a matter which is therefore for us to consider.

13 We observe first that this matter has been remitted on a limited basis. The original grounds of appeal to the Court of Appeal challenged IJ Pugh's finding that the Appellant's brother had not been arrested due to the Appellant's activities in the United Kingdom, and that the removal of the Appellant would not be in breach of Article 8 of the Human Rights Convention. As Ms Vidal agreed, we consider that these grounds are no longer to be pursued.

14 There is no substantial dispute as to the facts of this claim, other than the reason behind the Appellant's brother's arrest. The appellant's credibility is not in issue and the central issue is whether the appellant could safely relocate to other areas of Iraq away from those under the control of the PUK/KDP.

15 There was before IJ Pugh a report from an expert, Dr Fatah, specific to the Appellant, and which opines that he would be in danger outside the area under PUK/KDP control. She noted that Dr Fatah had been the subject of criticism in **SM & Ors (Kurds-Protection-Relocation) Iraq CG** [2005] 00111 and **HA (WCPI-IMIK-KRG) Iran CG** [2007] 00087, in that his objectivity was questioned in the latter as he was too involved in the Kurdish cause and that some of his findings were unsourced. She said at paragraph [44]:

"In these circumstances, I find it would be difficult to accept the conclusions in the report from Dr Fatah uncritically in this case"

16 IJ Pugh did go on to consider the report but concluded that the Appellant would not be at any greater risk than other individuals, there being only report from the WCPI on which Dr Fatah had relied to suggest otherwise, and that nothing in his report shows that returns should not be made.

17 IJ Pugh also said at paragraph 49:

"**HA** has thrown doubt on the objectivity of Dr Fatah's report in that case, and on his general impartiality, since he is committed to the Kurdish report. This is the lynchpin of the Appellant's case, but the expert involved was, as I noted, criticised in **HA** and had been criticised in other areas for lack of objectivity. In this case, it is because he relied heavily on WCPI evidence. In **HA** there is a reference to **AM** at para 26. **AM** dealt with conditions in Mosul and Dr Fatah had relied on WCPI reports about assassination of its workers. The killing was found to have taken place in 1998. In that case, I cannot see how I can rely on such evidence simply because it postdates the hearing. If an expert is criticised for reliance on unreliable and unsourced WCPI evidence, should an Immigration Judge now in the light of **HA** be criticised for not relying on it uncritically?"

18 It is common ground that Dr Fatah has given evidence in Country Guidance cases on Iraq. It is also not in dispute that certain aspects of Dr Fatah's evidence were criticised in both **HA** and **SM**; as agreed by both parties before the Court of Appeal.

- 19 Before us, Ms Vidal, relying on the grounds of appeal submitted that IJ Pugh had failed to carry out a proper assessment of Dr Fatah's reliability by relying on criticisms of him which were not related to this report, and that as this report relies on sources other than the WCPI, her reasoning for rejecting it was flawed.
- 20 Mr Saunders submitted that the error was not material as the conclusions at section 8 of the report were not sourced. Ms Vidal replied that this was taking them out of context, as this section was only a distillation of the previous 265 paragraphs, covering 35 pages, which are sourced.
- 21 While Dr Fatah was criticised for relying on WCPI sources in his report in **HA**, the sources for the report on the Appellant are more extensive, and while Dr Fatah was criticised for being pro-Kurdish in **SM**, it is evident from **HA** that he was strongly opposed to the WCPI, the party which the Appellant, although a Kurd, supports. The judge did not engage with these factors, but discounted it for reasons which related to other reports he had produced, and while the cases cited indicate why those specific reports were flawed, she did not consider why this report was flawed. The criticisms of Dr Fatah in the other reports do not necessarily apply to the report produced for the Appellant; that requires proper consideration and analysis. We consider that IJ Pugh erred in the analysis of this important evidence.
- 22 The opinion contained in the report is that the Appellant would not be safe anywhere in Iraq where he could be expected to go. Looking at the report as a whole, that the conclusions at part 8 are based on the detailed, referenced material which proceeds it, and which requires detailed consideration. The error is therefore material, as it goes to the core of what was in dispute.
- 23 For these reasons, we find that the decision of IJ Pugh did involve an error of law, and we therefore set it aside. For the avoidance of doubt, the remaking of the decision is limited to the issues of relocation and internal flight.
- 24 We therefore direct that the appeal be listed for hearing not before 1 November 2012, as it is anticipated that a fresh decision on internal flight in Iraq is to be handed down by the Upper Tribunal before then.
- 25 This case has, unfortunately, had a long history within the court system which as Mr Saunders candidly admitted, has prevented its due consideration under the Legacy Provisions operated by the respondent. We would hope that the adjournment of this matter until November will allow the parties to ensure steps are taken such that the matter is dealt with under the Legacy provisions as a matter of urgency.

Signed:

Date: 9 August 2012

J K H Rintoul
Deputy Upper Tribunal Judge