Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05700/2012

THE IMMIGRATION ACTS

Heard at Birmingham	**Decision & Reasons Promulgated**
On 17th March 2017	**On 23rd June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE MANDALIA

Between

MR. DELSHAD KADIR AHMAD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Ms. R Manning instructed by Barnes Harrild & Dyer Solicitors
For the Respondent: Mr. D Mills, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal ("F*t*T") Judge Juss, who by a decision promulgated on 6th September 2016 dismissed the appellant's appeal against the respondent's decision of 16th May 2012 to refuse to grant the appellant asylum, and to refuse the appellant's human rights' claims.

2. As the respondent's decision was made over five years ago, I set out a little of the history. The appellant's appeal was heard by F*t*T Judge Pacey on 10th December 2013. She allowed the appeal for the reasons set out in a decision promulgated on 18th December 2013. The respondent was granted permission to appeal to the Upper Tribunal. Upper Tribunal Judge Dawson found that there was a material error of law in the decision of F*t*T Judge Pacey for the reasons set out in his decision promulgated on 25th April 2014. Upper Tribunal Judge Dawson concluded that the extent of the error in the decision of F*t*T Judge Pacey, was such that the decision must be set aside and remade in its entirety. The appellant applied for permission to appeal that decision to the Court of Appeal but permission was refused, first by Upper Tribunal Judge Dawson himself, and then by Lord Justice Tomlinson following an oral hearing on 1st December 2015.

3. The appellant's appeal was heard by F*t*T Judge Juss on 4th August 2016 and dismissed for the reasons set out in his decision promulgated on 6th September 2016. Permission to appeal was granted by F*t*T Judge Pooler on 17th October 2016 and it is the decision of F*t*T Juss that is the subject of the appeal before me. At the conclusion of the hearing before me, I reserved my decision and I said that I would give my decision and the reasons for my decision in writing. This I now do.

4. The appellant is an Iraqi national of Kurdish ethnicity. He lived in Kirkuk in northern Iraq with his parents, two brothers and one sister. At a screening interview, he claimed that he last saw his family in June 2007. He claims to have left Iraq in either November 2006, February 2007 or June 2007, but whenever that may have been, he claimed asylum in the UK on 25th July 2007. A screening interview was completed on that day, and the appellant was placed in immigration detention. He absconded on 3rd August 2007, and did not report again until March 2012. On 15th May 2012, a substantive interview was completed and on 22nd May 2012 a decision was made by the respondent to refuse the claim for asylum.

5. At paragraphs [1] to [7] of his decision, F*t*T Judge Juss sets out the background to the appeal before him. At paragraphs [7] to [9], he sets out the evidence before him.

At paragraph [12] he refers to the two expert reports that were in the appellant's bundle before him. The first from professor Nadje Al Ali dated 31st July 2015 and the second from Sheri Laizer, dated 15th July 2016. The findings and conclusions of the F*t*T Judge are to be found at paragraphs [14] to [24] of his decision. The Judge found, at [14], that the appellant's evidence is not coherent and plausible for the reasons that follows at [15] to [19].

6. At paragraph [15], the Judge rejected the appellant's account of his being at risk upon return on account of his brother having fallen in love with a Colonel's daughter. The Judge was prepared to accept, at [16], the appellant's account that he could not bring any identity documentation from Iraq with him because his father said to him that it would get lost on the journey to Europe. However, the Judge did not accept that the appellant has made efforts thereafter to procure such documentation in any meaningful or determined way. The Judge rejected the appellant's account of his having gone to the British Red Cross in 2012. The Judge accepted that the appellant had been in touch with the British Red Cross in July 2016, but found that this was very late in the day, and just a few days before the hearing before the F*t*T. At paragraph [18], the Judge refers to the grant of permission to appeal by the Court of Appeal in **AA (Iraq) [2016] EWCA Civ 779** and at paragraphs [19] and [20], the Judge refers to the expert evidence before him, and the country guidance set out in **HM and Others (Article 15(c)) Iraq CG [2010] UKUT 331** and **AA (Article 15(c)) Iraq CG [2015] UKUT 00544**.

7. The appellant advanced two grounds of appeal. First, the Judge erred in his assessment of the appellant's evidence concerning his attempts to trace his family. Second, the F*t*T Judge failed to consider the fact that the appellant is an undocumented Kurd, in reaching his conclusions as to whether is it safe for the appellant to return to Iraq. There are a number of facets to that second ground, that I shall return to. F*t*T Judge Pooler found there is no merit to the first ground, but found the remaining grounds to be arguable. He stated:

"The remaining grounds are arguable. The judge's consideration of the country guidance and of the expert reports is found at [19] and [20]. It is arguable that the judge erred in law in his assessment of the risk on return insofar as (a) he was apparently faced with expert evidence which, if accepted, would have led him to depart from country guidance and he arguably failed to give adequate reasons for rejecting the evidence; and (b) he arguably misdirected himself by failing to consider the risk factors, identified in the country guidance and set out in the grounds at [5], which are relevant to the issue of humanitarian protection."

8. The appellant claims that the Judge refers to the country guidance decision of **AA (Article 15(c)) Iraq CG [2015] UKUT 00544**, but the Judge failed to consider the guidance set out. Before me, Ms Manning submits that the F*t*T Judge failed to carry out any fact specific analysis of the appellant's circumstances before concluding that the appellant can safely return to Iraq. In reply, Mr Mills submits the appellant is not a person whose return is currently feasible and therefore the Judge was not required to carry out a full fact specific analysis of the circumstances that the appellant would find himself in, on return.

9. In the country guidance case of **AA (Article 15(c)) Iraq**, the Upper Tribunal stated the UK should not return individuals to the contested areas of Iraq. It can, however, return them to safe areas. For example, "it will not be unreasonable or unduly harsh for a person from a contested area to relocate to Baghdad city." The Tribunal held that each case is fact sensitive. Relevant factors will include the applicant's gender, family connections, ethnicity, ability to speak the language of the region, and possession of an Iraqi Civil Status Identity Document ("CSID"). The Upper Tribunal evaluated the relative positions of those relocating to the capital city as follows (at paragraph 202):

> "Arabic speaking males with family connections to Baghdad and a CSID are in the strongest position. At the other end of the scale, those with no family connections in Baghdad who are from minority communities and who have no CSID are least able to provide for themselves. There are a wide range of

circumstances falling between these two extremes. Those without family connections are more vulnerable than those with such connections. Women are more vulnerable than men. Those who do not speak Arabic are less likely to be able to obtain employment. Those from minority communities are less likely to be able to access community support than those from the Sunni and Shi'a communities."

10. In the country guidance case of **AA (Article 15(c)) Iraq**, the Upper Tribunal also considered whether Article 15(c) of Directive 2004/83 prevents the removal of Iraqi nationals to Iraq on the basis that they are entitled to humanitarian protection. The Tribunal held *inter alia* that an international protection claim could not succeed by reference to any alleged risk of harm arising from an absence of Iraqi identification documentation, if the Tribunal found that return was not feasible because of the state of the documentation. The headnote states:

> **B. Documentation and Feasibility of Return (excluding IKR)**
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> 5. Return of former residents of the Iraqi Kurdish Region (IKR) will be to the IKR and all other Iraqis will be to Baghdad. The Iraqi authorities will allow an Iraqi national (P) in the United Kingdom to enter Iraq only if P is in possession of a current or expired Iraqi passport relating to P, or a laissez passer.
>
> 6. No Iraqi national will be returnable to Baghdad if not in possession of one of these documents.
>
> 7. In the light of the Court of Appeal's judgment in HF (Iraq) and Others –v- SSHD [2013] EWCA Civ 1276, an international protection claim made by P cannot succeed by reference to any alleged risk of harm arising from an absence of Iraqi identification documentation, if the Tribunal finds that P's return is not currently feasible, given what is known about the state of P's documentation.

11. In **HF (Iraq) and Others –v- SSHD [2013] EWCA Civ 1276**, the Court of Appeal considered the position of those who may be forcibly returned to Iraq without the appropriate documentation. The Upper Tribunal had concluded this would not happen because the respondent had stated that in practice, she would not return

anyone to Iraq who did not have the relevant identity documentation. That was because without the necessary documentation, there was no guarantee that they would be accepted by the Iraqi authorities in Baghdad. The Upper Tribunal held that with the appropriate documentation, the appellants would not be at risk on return from ill-treatment arising out of detention; without it, they would not be returned. It was within their control, which category they fell into. Before the Court of Appeal, the appellants submitted the Upper Tribunal was obliged to ask itself the hypothetical question whether there would be a real risk of ill treatment constituting either a breach of Article 3 or entitling the appellants to humanitarian protection. The appellants submitted they were entitled to have their position determined not least because it affected their status, and hence their rights, whilst they remained in the United Kingdom. Lord Justice Elias (with whom Lord Justice Fulford and Lord Justice Kay agreed) held:

> " *101. …….I accept, as Mr Fordham submits, that it would be necessary for the court to consider whether the appellants would be at risk on return if their return were feasible, but I do not accept that the Tribunal has to ask itself the hypothetical question of what would happen on return if that is simply not possible for one reason or another. Section 67 of the 2002 Act envisages that there may be practical difficulties impeding or delaying making removal arrangements, but those difficulties do not alter the fact that the failed asylum seeker would be safe in his own country and therefore is in no need of refugee or humanitarian protection. I agree with the Secretary of State that the sur place cases are distinguishable because there the applicant could be returned and would be at risk if he were to be returned. They are not impediment to return cases.*
>
> *102 There are two further arguments which strictly only arise if and when it becomes possible for the Secretary of State to return the appellants without documents. First, Mr Eadie submits that even if that were the case the appellants ought not to be granted humanitarian protection simply on the basis of their assertion that they will not co-operate so as to obtain the necessary laissez passer. It is a criminal offence not to co-operate under section 35 of the Asylum and Immigration (Treatment of Claimant's etc) Act 2004 and it should not readily be assumed that an asylum seeker would risk imprisonment by refusing to co-operate. I would accept that a tribunal would be entitled to assume that the asylum seeker will act lawfully, although presumably in some cases*

> *there may come a point where it might become clear that he will not, and thereafter the tribunal would have to determine asylum status on that basis.*
>
> *103 Second, he contends that as a general proposition an asylum claim ought not to succeed where the risk on return arises only because of the refusal by the asylum seeker to co-operate. He should not be able to secure the benefit of humanitarian protection where he could be returned safely and is at risk of serious ill treatment solely because of his own conduct – a fortiori where, as with the refusal to co-operate, that conduct is criminal – and where he can up to the very moment of return eliminate the risk by co-operation.*
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> *104. I accept that submission. The claim for humanitarian relief in such circumstances is wholly unprincipled and subverts the true purpose of asylum law. Whether in those circumstances the appellants could properly be sent back to Iraq (assuming that Iraq would take an undocumented person) is no doubt problematic; but even if that would infringe their human rights, it does not follow in my view that they should then be entitled to claim humanitarian status with all the benefits which that confers.*
>
> *105. Accordingly, in my judgment, there was no obligation on the Upper Tribunal to determine the issue of Article 3 status in the circumstances of this case.*

12. In my judgment, the assessment of the risk upon return in this case, is inextricably linked to the feasibility of return. From the opening sentence of paragraph [16] of his decision, it is clear the F*t*T Judge considered the feasibility of the appellant's return to Iraq. The Judge accepted the appellant's evidence that he had not brought any documentation from Iraq with him, because his father had said to him that it would get lost on the journey to Europe. The Judge found that the appellant had not made efforts thereafter to procure such documentation in any meaningful or determined way. In the absence of the necessary documentation, the return of the appellant to Baghdad is not, as Mr Mills submits, feasible and the F*t*T Judge did not therefore have to ask himself the hypothetical question of what would happen on return. I therefore reject the submission made by Ms Manning that the Judge refers to the country guidance decision of **AA (Article 15(c)) Iraq**, but the Judge failed to consider the guidance set out. Internal relocation within Iraq, and whether it would be unreasonable or unduly harsh for a person to relocate to Baghdad, is only

relevant where return to Baghdad is in fact, feasible. It is clear in my judgment that the F*t*T judge considered the feasibility of return, and because of the lack of necessary documents, the appellant could not feasibly be returned to Baghdad. The country guidance decision provides that an international protection claim cannot succeed by reference to any alleged risk of harm arising from an absence of Iraqi identification documentation, if the Tribunal finds that the person's return is not currently feasible, given what is known about the state of the person's documentation. As return is not feasible at present, no fact specific analysis of the appellant's circumstances and whether it would be unduly harsh for the appellant to relocate to Baghdad, was necessary.

13. Ms Manning submits the F*t*T Judge failed to consider the appellant's claim for humanitarian protection. I also reject that submission. Without the necessary documentation, the appellant will not be returned to Baghdad and in my judgement, there was no obligation on the F*t*T to determine the issue of the appellant's Article 3 status, in the circumstances of this case. As the Court of Appeal held in **HF (Iraq) and Others**, the claim for humanitarian relief in such circumstances is wholly unprincipled and subverts the true purpose of asylum law. Whether the appellant can properly be sent back to Iraq is no doubt problematic. The F*t*T Judge rejected the appellant's account that he had gone to the Red Cross in 2012, but there was evidence before the F*t*T that the appellant had been in touch with the Red Cross in July 2016, only a few days before the hearing before the F*t*T. What the outcome of those enquiries reveals will become clear in the fullness of time, but as the Court of Appeal held, even if that would infringe human rights, it does not follow that the appellant is entitled to claim humanitarian status, with all the benefits which that confers.

14. Ms Manning also submits that the F*t*T Judge failed to give proper weight to the two experts reports that were before him, both of which post-date the country guidance decision of **AA (Article 15(c)) Iraq CG [2015] UKUT 00544**. Ms Manning submits that the report of Sheri Laizer provides up to date evidence regarding the relocation of Iraqi Kurds to Baghdad, and the report of Dr Nadje Al-Ali concludes that

Kurdish failed asylum seekers from the north, cannot currently be safely removed to any part of Iraq. In reply, Mr Mills submits that the Country Guidance decision of **AA** refers to the views of a number of experts, and that the generic evidence of the experts relied upon by the appellant, is insufficient to warrant a departure from the recent country guidance given, following a careful evaluation of evidence from a number of independent sources. In any event, he submits that in **BA (Returns to Baghdad) Iraq CG [2017] UKUT 00018 (IAC)**, a decision that post-dates the expert evidence relied upon by the appellant, the Upper Tribunal has yet again confirmed that the level of general violence in Baghdad city remains significant, but the current evidence does not justify departing from the conclusion of the Tribunal in **AA (Article 15(c)) Iraq [2015] UKUT 00544 (IAC).**

15. Country guidance cases provide decision makers and on appeal, Judges, the starting point for the discussion. They play a crucial role within the immigration system. Without them the Home Office and the courts would have to assess the risks in individual countries in each case. Country Guidance cases have a significance which transcends the particular appeal. Consistent with the purpose underlying the principle of such guidance, Judges must follow country guidance cases "unless very strong grounds supported by cogent evidence are adduced justifying their not doing so"; **R (SG (Iraq)) –v- SSHD [2013] 1 WLT 41**.

16. The F*t*T Judge refers at paragraph [19] of his decision to the experts' reports relied upon by the appellant. He states that he has taken them into account. The summary of the reports, albeit brief, refers to the conclusion of both Sheri Laizer and Dr Nadje Al-Ali that no Kurdish individual can safely relocate to any area Iraq and in particular, the Baghdad belts or Baghdad. The F*t*T Judge refers in his summary to the evidence of the experts that Ms Manning highlights in her Grounds of Appeal. I have no reason to believe that the F*t*T Judge did not, as he says, take the reports into account. The reports are not specific to the appellant or his circumstances, but in any event, I accept as Mr Mills submits, that any error in the Judge's approach to that expert evidence is immaterial considering the recent

decision in **BA (Returns to Baghdad) Iraq CG [2017] UKUT 00018 (IAC)**, that post-dates the expert evidence relied upon by the appellant.

17. It follows that in my judgment, the decision of the F*t*T does not contain a material error of law and the appeal is dismissed.

Notice of Decision

18. The appellant's appeal is dismissed. The decision of the F*t*T does not contain a material error of law and stands.

19. No anonymity direction is made.

Signed Date 19th June 2017

Deputy Upper Tribunal Judge Mandalia

TO THE RESPONDENT

FEE AWARD

I have dismissed the appeal, and there can be no fee award.

Signed

Deputy Upper Tribunal Judge Mandalia