Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02423/2016

THE IMMIGRATION ACTS

Heard at: Liverpool	**Decision & Reasons Promulgated**
On: 9th November 2017	**On: 27th November 2017**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

XBA
(anonymity direction made)

Appellant

And

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: **Ms Patel of Counsel instructed by Broudie Jackson and Canter Solicitors**
For the Respondent: **Mr Harrison, Senior Home Office Presenting Officer**

DETERMINATION AND REASONS

1. The Appellant is a national of Iraq born in 1990. She appeals with permission[1] the decision of the First-tier Tribunal (Judge G. Tobin), who on the 19th December 2016

[1] Permission was granted by First-tier Tribunal Judge Deans on the 10th May 2017

dismissed her appeal against the Respondent's decision to refuse her protection claim.

Background and Decision of the First-tier Tribunal

2. The Appellant was born in Kirkuk and lived there until she was 24 years old. She left because her father had forced her into marriage and her husband had been violent and abusive towards her. Her husband had a son who was of a similar age to the Appellant and on three separate occasions this man had attempted to sexually assault her. She had sought the help of her natal family but they had refused to intervene and had insisted that she stay with her husband as a matter of 'honour'. She left Iraq via Erbil, with the assistance of an aunt. She flew to Turkey and from there made her way to the United Kingdom where she claimed asylum.

3. The Respondent did not doubt the claim advanced by the Appellant. The refusal letter dated 26th February 2016 expressly accepted that the Appellant is from Kirkuk, and that she has been the victim of abuse by her husband and stepson [at 24]. The Respondent further accepted that applying the caselaw of AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC) the Appellant was from a 'contested area' where there was real risk to civilians arising from war. The Respondent was not however minded to grant protection. She did not consider that the Appellant feared persecution for a Refugee Convention reason. Whilst it was accepted that she feared serious harm (ie a violation of Article 3 ECHR) the Respondent found that the Appellant could reasonably be expected to relocate within Iraq to avoid such harm, namely to the Independent Kurdish Region (IKR). Although she was not in possession of a passport or other identity document (ie a CSID) as a Kurd she would be admitted to the IKR with no difficulty. In the individual circumstances of her claim – she is relatively educated and had the support of an aunt – it would not be unreasonable to expect her to go and live there, away from her husband.

4. When the matter came before the First-tier Tribunal the central issue was therefore whether it was reasonable to expect the Appellant to avail herself of the 'internal flight alternative' and go and live in the IKR. There had also been a factual development in that the Appellant had, in October 2016, given birth to a baby boy. The father was said to be the Appellant's new partner, an Iranian naturalised as a British citizen who has lived in this country since he was a child.

5. The Tribunal accepted the Respondent's contention that this was not a claim that engaged the Refugee Convention. It permitted the Appellant to amend her grounds of appeal to include reference to her child, but refused to adjourn proceedings so that documentary evidence of the child's nationality could be provided. The Tribunal considered the Appellant's evidence about her relationship with her baby's father. It found her evidence about when that relationship commenced to be evasive and contradictory to the extent that the Judge found, at paragraph 17 of the decision, that he "could not really believe the truth of anything she was saying". Evidence was given by a witness who claimed to be the Appellant's partner. His testimony was found to be "well rehearsed", the determination recording that he "stuck to his

script". Notwithstanding the internal consistency in the witness' evidence the Judge concluded that he was "not at all convinced about this relationship", adding "the lack of corroboration and self-serving answers heightened my discomfort with the story I'm being told". Noting the submissions that the birth of this *prima facie* illegitimate child would increase the risk of 'honour' based violence the Tribunal says this:

> "The fact that the appellant has not raised any intention to pursue divorce and/or to remarry the father of her child raises questions. The appellant had a weak claim to remain in the UK and, I find, her new purported relationship and parenthood looks to be an attempt to shore up an otherwise weak case to remain in the UK. I am not convinced by this purported relationship".

6. Having made those findings about the Appellant's circumstances in the UK, the Judge went on to say this: "Likewise, I did not believe what the claimant said about the circumstances of her departure from Iraq. If the appellant was in an abusive relationship with a violent husband, then it would be highly unlikely that the appellant's stepson would indecently assault his stepmother. Such an intolerable situation would hardly contrive to ensure the appellant's silence. So obviously there would be no sensible constraint on telling her husband about her stepson's behaviour. It does not make sense that the Appellant suffered in silence. In any event, I do not believe that the stepson would have engaged in such activity for fear that the appellant would tell her husband". Those findings are at paragraph 18. At paragraph 23 the Tribunal returned to the accepted facts – that the Appellant has a well-founded fear of harm in Kirkuk – but stated that it did not accept that she would "not be safe" if returned elsewhere. On this matter the Tribunal did not accept that the Appellant would not receive support from her own family; it noted that she had demonstrated considerable determination and adaptability, and that she had shown herself to have "skills that would be useful upon her return to Iraq and/or IKR".

7. The Appellant was granted permission on the 10th May 2017.

Discussion and Findings on Error of Law

8. Before me the parties were in agreement that the decision of the First-tier Tribunal must be set aside for multiple errors of law. These included:

   (i) Going behind a concession of fact made by the Respondent. The Respondent has expressly accepted that the Appellant was at risk from her husband and stepson and that concession had not been withdrawn by the HOPO at hearing.

   (ii) Failing to give the Appellant notice that the Tribunal had concerns about the evidence in respect of Iraq. The hearing proceeded on the basis that the evidence was uncontested and Counsel was not given the opportunity to address the Tribunal on those matters. This amounted to procedural unfairness.

(iii) A further procedural unfairness arose in respect of the child, and the child's father. The child had been born on the 4th October 2016. His birth had been registered on the 5th October 2016. His parents had immediately sent off his long-form birth certificate with the application for his British passport and by the date of the hearing on the 5th December 2016 it had still not been returned. Counsel for the Appellant indicated that those documents would very shortly be forthcoming; she sought an adjournment so that they could be before the Tribunal when it made its decision. The Tribunal refused to adjourn on the grounds that the Appellant had had "ample time" to sort out her evidence. That comment, with respect, rather misses the point. It is difficult to see how the Appellant could have expedited production of that evidence. She had registered the birth within 24 hours of her labour, and had sent off the completed passport application form within the week. The matter of paternity of that child assumed pivotal significance in this case (on both protection and human rights grounds) and that the Tribunal subsequently rejected the evidence of the relationship – and implicitly paternity – on the grounds that it was "uncorroborated" serves to underline the importance of the evidence that was awaited. The delay was likely to be a short one. As it happens the long-form birth certificate confirming the witness to be named as the child's father, and the child's British passport, were available within days of the hearing, the passport having already been issued on the 29th November 2016.

(iv) Applying the wrong standard of proof. The Tribunal repeatedly finds itself "not convinced". It did not have to be "convinced" about anything. That phrase suggests the application of a higher standard of proof than was necessary in this case. The Tribunal had to be satisfied on the lower standard of proof.

(v) Irrationality. The central reason given by the Tribunal for rejecting the (accepted) evidence that the Appellant was assaulted by her stepson is that it did not accept that this would have occurred, because she could have told her abusive husband about it. I am satisfied that this is a finding that no reasonable Tribunal could possibly have reached, had regard been had to the context in which this claim is made. The Appellant is a Kurdish woman operating in a society where domestic and 'honour' based violence are commonplace, and where women are routinely blamed for sexual violence visited upon them. That was indeed one of the reasons why the Respondent had accepted her evidence: see paragraph 23 of the refusal letter. In reaching its contrary finding the Tribunal appears to have imbued the husband and stepson with a degree of rationality and humanity that on the evidence they did not have, and to the Appellant a degree of defiance and bravery that as a woman in that culture, in that context, she was unlikely to possess.

(vi) At paragraph 22 the Tribunal draws negative inference from the fact that the Appellant remains married to her first husband, concluding that her failure to pursue a divorce and marry the father of her child "raises questions". It is difficult to discern from the determination what those questions might be, but the Tribunal has here entirely failed to set this claim in the context of the relevant country background material and law. The Appellant was married to her husband in accordance with Islamic law. This does not, even on the most liberal interpretation of *fiqh*, provide any mechanism for the Appellant to divorce her husband short of applying directly to the local sharia court for a '*Khula*. The expectation that she should have done so is, in the circumstances, wholly unrealistic.

(vii) Legal misdirection in respect of the appropriate test on internal flight. The question is not whether the Appellant would be "safe" elsewhere in Iraq, but whether it would, in all the circumstances, be *reasonable* to expect her to relocate.

(viii) Failing to make clear findings on fact on why the Appellant might reasonably be able to relocate. The finding that she has acquired "skills that would be useful" is entirely unparticularised. Neither party was able to assist me with what those skills might be.

(ix) Failing to conduct a holistic assessment of the reasonableness of internal flight. The Tribunal has not considered any country background evidence at all on the likely circumstances faced by a Kurdish woman with a child trying to establish herself in the IKR, on whether it would be reasonable to separate this family, or alternatively whether it would reasonable, or even possible, for a British man of Iranian origin to live in the IKR.

(x) Misdirection as to the definition of 'particular social group' and failing to take published policy guidance into account. The Tribunal considered whether the Appellant could fall within the particular social group 'woman who has fled domestic violence/sexual assault' and found as follows: "by any criteria women who flee domestic violence/sexual assault are not a PSG because day (sic) do not fulfil the appropriate definition in *Shah & Islam*". This reasoning is hard to follow. The Tribunal does not explain why the Appellant would not fall into a 'particular social group' applying the criteria in Shah & Islam [1999] Imm AR 283. It is unclear to me why 'Kurdish women in Iraq' would not a be an adequate definition, sharing as they do an immutable characteristic that results in discrimination against them. That is a moot point that I need not address however, since the Respondent's own published guidance accepts that persons in the Appellant's position fell within the very group that the First-tier Tribunal rejected (without reasons): see 2.2.1 of the Respondent's Country Policy and Information Note *Iraq: Kurdish Honour Crimes*:

> "2.2.1 Victims or potential victims of 'honour' crimes can form a particular social group (PSG) within the meaning of the 1951 Refugee Convention. This is because victims or potential victims of 'honour' crimes can share a common background that cannot be changed – the experience that they have compromised family or tribal 'honour' – and have a distinct identity that is perceived as being different by the surrounding society".

9. The parties agreed that the entire decision of the First-tier Tribunal should be set aside. They invited me to re-make the decision on the evidence before me.

Protection: The Re-Made Decision

10. The accepted facts are that the Appellant is at risk of harm in Kirkuk. The Respondent has produced no evidence to warrant departure from the country guidance given in AA and I continue to apply the finding in that case that Kirkuk is a contested area where civilians are at a real risk of harm arising from indiscriminate violence. The Respondent accepts that the Appellant is further at risk of 'honour' based violence, and domestic violence, from her husband in Kirkuk. The parties agree therefore that the only issue is internal relocation.

Legal Framework

11. Article 8 of the Qualification Directive reads:

> 1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.
> 2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.
> 3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin.

12. In Secretary of State for the Home Department v AH (Sudan) [2007] UKHL 49 the House of Lords make clear that the question of whether internal flight is "reasonable" is not to be equated with the test under Article 3 ECHR. Lord Bingham refers [at 5] to his own guidance in Januzi v Secretary of State for the Home Department [2006] UKHL 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, evidence 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."

13. At 20 Baroness Hale cites with approval the UNHCR view that the test is whether the individual will be able to live a "relatively normal life without undue hardship", itself a formulation approved by their Lordships in Januzi [9]:

> "As the UNHCR put it in their very helpful intervention in this case:
>
> > '...the correct approach when considering the reasonableness of IRA [internal relocation alternative] is to assess all the circumstances of the individual's case holistically and with specific reference to the individual's personal circumstances (including past persecution or fear thereof, psychological and health condition, family and social situation, and survival capacities). This assessment is to be made in the context of the conditions in the place of relocation (including basic human rights, security conditions, socio-economic conditions, accommodation, access to health care facilities), in order to determine the impact on that individual of settling in the proposed place of relocation and whether the individual could live a relatively normal life without undue hardship'.
>
> I do not understand there to be any difference between this approach and that commended by Lord Bingham in paragraph 5 of his opinion. Very little, apart from the conditions in the country to which the claimant has fled, is ruled out."

14. The assessment on the individual characteristics of the claimant must include her personal history, and its relevance in the society in which she is relocating. See for instance VNM v Secretary of State for the Home Department [2006] EWCA Civ 47 [per Wilson LJ at 25]:

> "it is obvious that the reasonableness of her relocation in a different part of Kenya requires consideration of the practicability of her settling elsewhere; consideration of her ability convincingly to present to those in her new milieu a false history relating to herself and to her daughter, including the latter's paternity, and a false explanation for their arrival there; and, in the light of her substantial psychological vulnerability, consideration of her ability to sustain beyond the short term a reasonable life for them both on that false basis".

Personal Characteristics

15. The Appellant has the following personal history and characteristics:

    i) She is a woman

    ii) She is a mother of a baby boy

    iii) As far as she is aware, she remains married to a man in Kirkuk

    iv) She is in an adulterous relationship with a man in the UK

    v) She has no CSID and no easy means of obtaining one. She cannot be expected to return to her home governate because she faces a real risk of harm there. The potential proxies who might be able to obtain one for her are her persecutors (either her husband, who subjected her to domestic violence, or her father, who forced her into marriage: both perceive her to have 'dishonoured' them)

    vi) She is moderately educated, having completed secondary school and one year of agricultural college

    vii) She travelled on her own through the IKR to leave Iraq, spent 2 months in Turkey on her own and showed sufficient resilience to get to the UK and claim asylum

    viii) She has an aunt who previously assisted her in escaping from Kirkuk

    ix) She has no family members in the IKR

    x) She has no family or other connections to Baghdad.

Country Background Information

16. I have had regard to the Respondent's Country Policy and Information Notes *Iraq: Return/Internal relocation* ('IR') and *Iraq: Kurdish Honour Crimes* ('KHC'). I have further had regard to the Upper Tribunal decision in AA (Article 15(c)) Iraq CG [2015] UKUT 544 (IAC). I note the following:

- Although there are two government run shelters for women fearing 'honour' based violence in the IKR service provision is so inadequate that it must be concluded that although the Kurdish authorities are able to provide sufficient protection, they are in fact unwilling to do so [2.4.2 KHC]. The focus of the shelters is to persuade women to return to their families, sometimes forcibly so [8.6.2]

- Although Kurdish women have traditionally enjoyed a degree of freedom greater than that of their Arab counterparts, that situation has changed in recent decades. A Kurdish woman is considered to be the 'property' of her male guardians [section 5 KHC]
- Having sexual relations with someone other than your husband would count as a 'crime' necessitating action to preserve 'honour'; the most common form of 'honour' based violence in Iraq is murder [section 7 KHC]: "in the severely puritanical atmosphere of Kurdistan, death is the usual punishment for any breach of the moral code" [7.2.2]
- It is generally possible for Kurds who are not from the region to enter the KRI [2.2.11 KHC]
- Although internal relocation to Baghdad is generally possible it will be more difficult for a lone woman who does not speak Arabic and has no family or other connections to the city [2.2.15 IR, AA]
- A CSID is generally required in order for an Iraqi to access financial assistance from the authorities; employment; education; housing; and medical treatment [2.4.8 IR, AA at 204]
- A person who: a) is unable to replace their CSID or INC; and b) is unable to obtain support from family members or others is likely to face significant difficulties in accessing services and humanitarian conditions which may reach the Article 3 threshold and in those circumstances a grant of humanitarian leave will usually be appropriate [2.4.9 IR]
- Admission to the IKR remains at the discretion of the authorities [7.1.1] but at the date that the IR CPIN was produced (September 2017) Kurds were permitted into the region without needing any particular permit. Kurds are granted a short period of entry, after which they must register with the Asayish to gain a permit allowing them to reside and move freely within the IKR [7.1.2]. Some sources suggest that a sponsor is required if the IDP wishes to remain permanently in the IKR [see for instance 7.1.3] but this requirement is not applied to lone women [see for instance 7.3.2]. Some sources report Kurds from Kirkuk to also be exempt [7.1.5].

Conclusions

17. I am satisfied, having regard to the evidence, that the Appellant would be able to gain admission to the IKR. Although there are variable reports about the requirements being imposed on Kurds fleeing into the ILR from other places in Iraq the objective material indicates that she would have two advantages: she is a lone woman, and she is from Kirkuk. Both of these groups have been identified as being exempt from the requirements imposed on others, for instance the requirement to have employment, or to have a sponsor. I am satisfied that she would be admitted to the region, even without a CSID.

18. I now consider whether she might reasonably be expected to live there. It is true that this is a relatively educated woman who had previously exhibited some degree of resilience in leaving her abusive family and travelling to Europe on her own. She did pass through the IKR on that journey. Today however, she is in a very different position, because she is now in what must be assumed to be an adulterous relationship, and has had a child out of wedlock.

19. Her partner questions whether, as an Iranian national, he would be permitted entry to the IKR. That is a good question that is not answered in the evidence presented to me. Since the burden of proof lies on the Appellant I assume for the purpose of this determination that his concerns are unfounded and that he would be able to gain entry and live there. What then? This couple are likely to draw some scrutiny from the authorities: when the Appellant attends for her Asayish interview she will no doubt be asked for some explanation as to why she has an Iranian husband. At that point the Appellant would have to lie in order to avoid revealing her personal history of having fled from her Iraqi Kurdish family, having travelled to the UK and having met him there. Assuming that she tells the truth, it would at that point be obvious that the child is illegitimate. The Appellant – and her partner – would then be at the mercy of an official in the "severely puritanical" atmosphere of Kurdistan, where specialist domestic violence shelters consider it appropriate to return women to the very families that they have fled from. I consider there to be a real risk that the Asayish would in these circumstances either refuse to issue a residence permit or alternatively to inform the Appellant's family of her whereabouts. The alternative would be to lie, in order to avoid the risk of harm. I am satisfied that this would not be a 'reasonable' alternative for the Appellant. Even if I accepted the Respondent's 'best case scenario' in respect of the IKR – that she would be permitted to enter and reside and would be able to support herself even absent a CSID (either with or without her partner) the Appellant would face this predicament in her every interaction with authority. I do not consider that this would be a burden that she should be expected to tolerate. Living with the constant fear of discovery, and the attendant risk of murder or other serious harm would in these circumstances be unduly harsh.

20. I therefore allow the appeal on protection grounds.

Human Rights

21. There is no dispute that the Appellant enjoys a family life with her partner in the UK, or that her removal to Iraq would result in a significant interference in this family's life together. I am satisfied that Article 8 ECHR would be engaged. It is accepted that the decision to refuse leave to persons who do not qualify under the rules is one that is lawfully open to the Respondent to take. In assessing whether or not it would be proportionate I must have regard to the factors set out at s117B of the Nationality, Immigration and Asylum Act 2002. The parties agree that in this case, it is sub-section (6) of that provision that is likely to be determinative:

> (6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom."

22. The Appellant is the parent of a British child. I am satisfied that she enjoys a genuine and subsisting parental relationship with him. I am further satisfied that it would not be 'reasonable' to expect him to leave the EEA, as he would inevitably have to do if she was removed to Iraq (she is still nursing him). I note the terms of the Secretary of State's policy on this matter, set out in the Immigration Directorates' Instructions, *Family Migration Appendix FM* Section 1.9 at 11.2.3:

> "Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer.
>
> In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine subsisting parental relationship.
>
> It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or the EU"

23. I am satisfied that there are no considerations of sufficient weight to justify separation of this family, in particular of mother and infant. The child could theoretically remain in the UK with his British father but in the absence of any criminality on the part of his parents, and given that this would be strongly contrary to his best interests, I am satisfied that this would not be a reasonable course of action. I therefore allow the appeal on human rights grounds.

Decisions

24. The decision of the First-tier Tribunal contains material errors of law and it is set aside.

25. I remake the decision by allowing the appeal on protection *and* human rights grounds.

26. There is an order for anonymity.

Upper Tribunal Judge Bruce
23rd November 2017