Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/07855/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 May 2017	**On 31 May 2017**

Before

UPPER TRIBUNAL JUDGE WARR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HZ
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Miss J Isherwood, Home Office Presenting Officer
For the Respondent: Miss Moffatt of Counsel instructed by Fisher Jones Greenwood
Solicitors

DECISION AND REASONS

1. This is the appeal of the Secretary of State but I will refer to the original appellant, a citizen of Iraq, born on 3 June 1999, as the appellant herein.

2. The appellant arrived in this country illegally and applied for asylum in January 2016. The application was refused on 13 July 2016, however it was accepted that the appellant was Kurdish and from the Iraq Kurdistan region and that he came from Kushaf. The appellant referred to a land dispute in his claim and stated that his father used to transport alcohol to

and from Mosul. The Secretary of State rejected the appellant's claim on humanitarian protection grounds as well as under Articles 2 and 3 of the ECHR.

3. The appellant appealed and his appeal came before a First-tier Judge on 15 March 2017 when the appellant was represented by Miss Moffatt, who appears before me.

4. At the hearing the respondent's representative argued that the appellant would not be returned as a minor, but it was submitted on behalf of the appellant that the hearing was to consider how things were as at the date of hearing when the appellant was a child.

5. The judge in her findings noted that it was accepted that the appellant was a child and as at the date of the hearing was 17 years and 8 months old. The appellant would be returned to Erbil. In relation to the asylum appeal the judge found that the appellant had exaggerated the question of the land dispute, although she accepted that there had been an issue about land in Gwer which was approximately fourteen kilometres from his village. However, no-one worked the land at present and the judge found there was no land dispute which affected his ability to live safely in Kushaf. The judge accepted the appellant's evidence that his father's business was transporting alcohol in the region and travelling to Gwer and she accepted that there was no difficulty with his father travelling through the region with his business, as identified by the appellant.

6. The judge found that the appellant did not come within the scope of the Refugee Convention and there has been no challenge to that aspect of her decision.

7. The judge refers to the country guidance case of **AA (Article 15(c)) Iraq CG [2015] UKUT 00544** in considering the appellant's humanitarian protection claim and his claim based on Articles 2 and 3 of the ECHR and concludes her determination as follows:

> "46. He is an Iraqi Kurd from the Iraqi Kurdish Region (IKR) area and I rely on the Country Guidance case. The headnote to **AA** states:
>
> *The respondent will only return P to the IKR if P originates from the IKR and P's identity has been 'pre-cleared' with the IKR authorities. The authorities in the IKR do not require P to have an expired or current passport, or laissez passer.*
>
> *The IKR is virtually violence free. There is no Article 15(c) risk to an ordinary civilian in the IKR.*
>
> 47. **Elgafaji (C-465/07)** sets out:
>
> *'39. In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of*

indiscriminate violence required for him to be eligible for subsidiary protection.

40. Moreover, it should be added that, in the individual assessment of an application for subsidiary protection, under Article 4(3) of the Directive, the following may be taken into account:

- *the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, as is clear from Article 8(1) of the Directive, and*

- *the existence, if any, of a serious indication of real risk, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower.'*

48. I find that the appellant is a minor and I make this decision with facts at the date of the hearing, such that he is a minor. I find that he left Iraq at the beginning of 2015 with his uncle, aunt and sister. He was separated from them on his journey when he was put into a separate van by agents. His sister had his documents and therefore he is undocumented. He has had no contact with them and does not know their whereabouts.

49. I bear in mind that his mother has died and his father is missing. He has other family who were in Erbil when he left Iraq but I have no information that they have been traced or indeed that they remain in Iraq. I accept that he was not close to some family members who did not accept his father's business. There is no information before me that his father has been traced.

50. I note the information in the respondent's bundle that Kurdish forces had pushed back ISIS from the villages of Kushaf and Saqlyah dated 30 November 2014. I find that this does not clarify the position in early 2015. I note that the numbers identified are small, with 12 ISIS militants captured and 3 killed. I find this consistent with the appellant's evidence that he has not seen ISIS but that ISIS were in the area.

51. The UNHCR report sets out that the area controlled by the Kurdistan Regional Government has difficulties with *"... continued insecurity, large scale contamination with mines and IEDs ...*" and the Home Office country information dated August 2016 confirms that the Kurdistan region has seen airstrikes and the use of chemical weapons has been reported. I put weight on this evidence.

52. The absence of support for the appellant from family, his youth and the increased risks arising out of the conflict encroaching in the region are all factors I bear in mind in considering the risks to him on return. I note that he does not have a CSID and that there may be difficulties and delays in obtaining a CSID which exposes him to a risk of destitution on return. I accept that he is in good health and would be returning to Erbil but, on balance, I find that the appellant cannot be returned to the IKR without breach of Article 15(c) of the Qualification Directive and Article 3 ECHR.

53. I am not satisfied that the appellant would be at risk of treatment counter to Article 2 ECHR.

Notice of decision

54. The appeal is allowed. Whilst the appellant's removal does not breach the Refugee Convention, his removal would breach Article 15(c) of the Qualification Directive and/or Article 3 ECHR."

8. On 24 March 2017 the respondent applied for permission to appeal noting that while the judge had found that the appellant was not a refugee, she had gone on to consider whether the appellant would be at risk on humanitarian protection grounds and the judge had failed in considering whether there was a situation of internal armed conflict in Erbil. The judge had failed to make any findings on this and there was nothing within the country guidance or in the Secretary of State's own guidance which accepted that there was an internal armed conflict there. The risk of serious harm only arose when there was an internal armed conflict, and if there was not an internal armed conflict, the appellant could not succeed on humanitarian protection grounds. The judge had failed to explain why the appellant would be at risk from indiscriminate violence or serious harm. The lack of documentation identified by the judge was not without more a reason to find a risk of serious harm. This was "precisely what the Tribunal in **AA (Iraq)** found against when considering the lack of documentation in such cases. The findings are therefore inadequately reasoned."

9. Permission to appeal was granted on 10 April 2017. The First-tier Judge commented that what was said in paragraph 50 of the decision was "arguably insufficient to meet the test for internal armed conflict and accordingly it would be an error". Counsel filed a response on 25 April 2017. It was pointed out that the judge had found that returning the appellant would breach Article 3 and it was not necessary to show the existence of an internal armed conflict for removal to violate Article 3.

10. In relation to the humanitarian protection claim the judge had relied on the appellant's minority, his lack of documentation and the lack of any family support and that he would be an unattached child on return. She had also referred to the background country evidence of "continued insecurity, large-scale contamination with mines and IEDs" in the Kurdistan region, air

strikes and the use of chemical weapons as well as the difficulties and delays the appellant would face in obtaining a civil status identification document ("CSID"), thereby exposing him to the risk of destitution.

11. While the Secretary of State had criticised the findings about the documentation the CSID was required to access income/financial assistance, employment, education, housing and medical treatment – reference was made to paragraph 152 of **AA Iraq**. The appellant would have difficulty based on the findings in that case at paragraph 186 in obtaining a CSID. A conclusion that he would face a risk of destitution was open to her. She had not simply relied on the lack of documentation to find a violation of Article 3 and the Secretary of State had misinterpreted her decision.

12. At the hearing it emerged that Miss Isherwood had not had sight of Counsel's reply and so I put the matter back to enable that to be copied to her. She relied on the grounds and submitted that the judge had been required to consider the situation in the place to which the appellant was to be returned and his individual circumstances. The fact that the asylum claim had been dismissed had not been challenged. The lack of documentation was not sufficient to allow the appeal and Miss Isherwood referred to **H v Secretary of State (application of AA Iraq CG) IJR [2017] UKUT 119 (IAC)**. It was clear from that case that the state of internal armed conflict only existed in certain parts of Iraq. That did not include the appellant's area. The country guidance confirmed that the IKR was virtually violence-free and there was no risk to the ordinary civilian there. The judge had found that there was no risk from ISIS in the appellant's region and no risk flowing from the land dispute and his father could carry on his business with no significant difficulties. It was accepted that the appellant was still a minor and that the judge had been correct to deal with him as such. She submitted however that the lack of documentation was not enough to enable the appellant to succeed.

13. The appellant had other family in the area and was not an unattached child, although his mother had died and his father was missing. Although the appellant was a minor the lack of documents was not enough and he had other family members. No reasons had been given for the judge's findings.

14. Miss Moffatt submitted that the case of **H v Secretary of State** to which Miss Isherwood had referred did not establish the proposition relied on by her. The lack of documentation was not the sole factor in the appellant's case and she referred to paragraph 40 and the citation from the case of **AA**. It was said in paragraph 41 that a person who was returnable might nevertheless face difficulties if a CSID could not be obtained following return. The case did not advance matters from the decision of **AA** itself. Counsel referred to paragraph 152 of **AA** to which she had made reference in her skeleton argument. There would have to be a careful examination of the facts in each case – for example, whether there was an adequate support mechanism.

15. The judge had taken the correct approach. It was clear in the light of the judge's findings at paragraph 49 of her determination that the appellant had no support mechanism. He had no contact with family members and would face destitution as an unattached child. As argued in her reply, the judge had also found in the appellant's favour in relation to Article 3 and accordingly any error in considering the humanitarian protection claim was not material. The appellant had individual characteristics – he was still a child, he was unattached and he would be returned alone and his family had not been traced. There was no documentation and there would be a risk of destitution. The judge had made findings about the difficulties in the region at paragraphs 50 to 52 of her determination. In relation to the challenge in ground 2 the judge had been entitled to have regard to the material before her and Counsel relied on her response.

16. Miss Isherwood submitted that in the refusal letter reference had been made to the Home Office guidance and it had been stated that:

> "Persons originating from the IKR whose identity has been 'pre-cleared' with the IKR authorities are not required to have a current or expired passport, or a laissez passer. Their nationality and identity has been established and accepted and return is feasible."

In the respondent's letter reference had been made to returning the appellant as an adult. The decision of **H v Secretary of State** had not been available to the First-tier Judge. The judge had accordingly not dealt with the country guidance as explained in **H v Secretary of State**.

17. At the conclusion of the hearing I reserved my decision. I remind myself that I can only interfere with the decision of the First-tier Judge if it was materially flawed in law. The judge appears to have directed herself correctly on the law and the country guidance. For example, Miss Isherwood in her final remarks referred to an extract from the Home Office guidance but this appears to be based on the head note to the country guidance of **AA** which is reproduced by the judge at paragraph 46 of her decision. The judge also reproduces what is said in **AA** about the IKR being virtually violence-free. There does not appear to be any misdirection in her approach. The judge also refers to **Elgafaji** paragraph 47 of her decision.

18. The judge gives careful consideration to the appellant's personal circumstances. She notes how he was separated from his uncle, aunt and sister on the journey and that he was undocumented as his sister, from whom he was separated by the agents, had the documents. He had no contact with them and did not know their whereabouts. In addition, his mother had died and his father was missing. There was no information before the judge that other members of the appellant's family had been traced, or indeed that they remained in Iraq. The judge specifically accepted that the appellant was somewhat estranged to some family members who did not accept his father's business. There was no information that the appellant's father had been traced.

19. The judge considered the respondent's position in paragraph 50 of her decision which I have reproduced above.

20. It is clear that the judge did not rely on one factor alone in reaching her decision and she sets out in paragraph 52 a number of points of which the absence of a CSID is only one. The judge focused on the circumstances as at the date of hearing – when the appellant was a minor – and Miss Isherwood acknowledges that is correct, and indeed that aspect of her decision was not challenged in the grounds. I agree with Counsel that the case of **H v Secretary of State** does not advance matters. Indeed, it stresses the importance of making findings of fact regarding an appellant's circumstances in order to apply the country guidance. Paragraph 41 of the determination makes it clear that difficulties may be faced by someone who cannot obtain a CSID on return, even if there are no difficulties about obtaining a passport or laissez passer. The Tribunal refers to an extract from the country guidance in paragraph 40 – the concluding paragraph of paragraph 170 reads:

> "The Tribunal will need to know, in particular, whether the person concerned has a CSID. It is only where return is feasible but the individual concerned does not have a CSID that the consequences of not having one come into play."

The Tribunal found that the country guidance decision of **AA** "does not support the respondent's approach in the present case to the issue of documentation".

21. I am not satisfied that the determination is materially flawed for the reasons advanced by the Secretary of State in this case. The judge went carefully into the appellant's individual circumstances. It was open to her to allow the appeal under Article 15C and Article 3. As Counsel points out, if the judge erred in finding that there was indiscriminate violence in the appellant's home area – and Counsel does not concede this – then the error was not material as the appeal had also been allowed under Article 3.

22. I note that the judge had referred to **Elgafaji** at paragraph 47 of her determination and the question of the appellant's individual circumstances which might lower the level of indiscriminate violence required for the appellant to be eligible for subsidiary protection. She took all relevant matters into account.

23. For the reasons I have given I am not satisfied that the grounds disclose a material error of law on the part of the First-tier Judge.

24. The appeal of the Secretary of State is dismissed.

Anonymity Direction

25. The First-tier Judge made an anonymity order and it is appropriate that that should continue:

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

TO THE RESPONDENT
FEE AWARD

The First-tier Judge made no fee award and I make none.

Signed Date 26 May 2017

G Warr, Judge of the Upper Tribunal