Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04846/2017

THE IMMIGRATION ACTS

Heard at Newport	**Decision & Reasons Promulgated**
On 2 October 2018	**On 15 October 2018**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

A A N
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Lowis instructed by Migrant Legal Project (Cardiff)
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Iraq who was born on 14 November 1998. He is a Kurd and comes from Fayda in the Governorate of Dohuk in the Independent Kurdish Region (IKR) of Iraq.

3. In the summer of 2004, ISIS/Daesh attempted to take control of the appellant's home area by force. The appellant fled to his paternal aunt's house in Zakho which is some distance to the west of Fayda. From there, as a result of further threats, the appellant and his family fled to Turkey. They temporarily lived on the Turkish side of the border with Iraq. The appellant and his family were separated when the camp was raided by local police. The appellant was taken by an agent eventually arriving at Dunkirk in France. It is accepted by the respondent that the appellant lawfully entered the UK in February 2016 when he was 17 years old.

4. The appellant's father fled Iraq in 2003 and was granted ILR in the UK in 2010 and subsequently British citizenship in 2012.

5. Once in the UK, the appellant was reunited with his father.

6. On 16 November 2016, the appellant claimed asylum. On 5 May 2017, the Secretary of State refused the appellant's claim for asylum, humanitarian protection and under Art 8 of the ECHR.

The Appeal to the First-tier Tribunal

7. The appellant appealed to the First-tier Tribunal. In a determination promulgated on 11 August 2017, Judge N J Osborne dismissed the appellant's appeal on all grounds.

8. Judge Osborne found, applying the country guidance approved by the Court of Appeal in AA (Iraq) v SSHD [2017] EWCA Civ 944 ("AA(Iraq)") that the appellant's home area in the IKR was safe. Judge Osborne applied [18] of the country guidance where it is stated:

> "The IKR is virtually violence free. There is no Article 15(c) risk to an ordinary civilian in the IKR."

9. Recognising that return was (then) directly to Erbil in the IKR, Judge Osborne concluded that the appellant had failed to establish a real risk of persecution or of harm arising from indiscriminate violence under Art 15(c) of the Qualification Directive (2004/83/EC). Judge Osborne made an additional finding that, if necessary, the appellant could reasonably be expected to internally relocate within the IKR where, although he would initially struggle to find employment, he could obtain assistance from his father in the UK.

10. Finally, the judge concluded that it would be proportionate to return the appellant to Iraq and so not a breach of Art 8 of the ECHR.

The Appeal to the Upper Tribunal

11. The appellant sought permission to appeal to the Upper Tribunal on a number of grounds. Permission was initially refused by the First-tier Tribunal (Judge Dineen) on 2 November 2017. However, on 20 January 2018, the Upper Tribunal (UTJ Bruce) granted the appellant permission to appeal.

12. On 8 March 2018, the respondent filed a rule 24 notice seeking to uphold the judge's decision.

The Appellant's Submissions

13. The appellant's renewed grounds of appeal set out seven numbered grounds. Ms Lowis, who represented the appellant, relied on, and expanded, upon those grounds in her oral submissions.

14. Relying upon a combination of grounds 1 3 and 5, Ms Lowis submitted that the judge had wrongly dismissed the expert report, supporting the appellant's claim to be at risk in his home area, prepared by Professor Bluth. She submitted that the judge had done so because he had wrongly taken the Court of Appeal's decision in AA (Iraq) as approval of the Upper Tribunal's decision in AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC) ("AA") and had wrongly been critical of Professor Bluth for failing to deal with the Court of Appeal's decision handed down shortly before his report was prepared. She submitted that, in fact, the relevant country guidance concerning any risk to the appellant in the IKR was unaffected by the Court of Appeal's decision and, in fact, originated in the UT's country guidance in AA. Professor Bluth's report referred to the UT's decision and was expert opinion supporting the appellant's claim which post-dated the UT's decision. The judge was, Ms Lowis submitted, required to consider whether to depart from the country guidance in the light of his report. Instead, the judge failed to take it into account at all. She submitted that there were sections in his report at para 5.2 headed "the general risk to the appellant in the Kurdish Region of Iraq" and para 5.3 under the heading "specific risk to the appellant in the Kurdish Region of Iraq" which supported the appellant's claim. In particular, she submitted that it supported human rights abuses (para 5.2.4) and that "it can be expected that the security situation in the IKR could deteriorate very sharply in the near future. It is not safe for someone to be returned to the IKR for the foreseeable future" (at para 5.2.8). In addition, Ms Lowis submitted that Professor Bluth's report was also relevant to the circumstances to which the appellant would return in the IKR, including Professor Bluth's view that he would be forced to live as an internally displaced person (IDP) which was relevant to his Art 3 and Art 8 claims.

15. Ms Lowis, relying upon ground 2, also submitted that the judge had failed to consider the appellant's personal circumstances in determining whether there was a real risk of harm contrary to Art 15(c) applying the 'sliding scale' adopted by the CJEU in Elgafaji (C-465/07) [2009] 1 WLR 2100 at

[39]. She relied upon the matters set out in para 6(a)-(g) of the renewed grounds.

16. Further, Ms Lowis submitted, relying on ground 4, that the judge had speculated that the appellant's father would be able to provide some financial support to him in the IKR from the UK so as to overcome his difficulty in obtaining employment. She submitted that this was not a matter which had been raised in the evidence and there was no evidence that he had any disposable income even if the appellant lived with his father whom, the evidence showed, provided him with food and clothing. That did not mean that the appellant's father had any disposable income.

17. Finally, Ms Lowis submitted, relying on ground 6, that the judge had failed to take into account all the appellant's circumstances in concluding under para 276ADE(1)(vi) that there were not "very significant obstacles" to his integration in Iraq.

18. Ms Lowis, however, placed no reliance upon ground 7 and the judge's conclusion that the public interest was engaged because the appellant did not speak the English language. She accepted that the judge was required to take that into account under s.117B(2) of the Nationality, Immigration and Asylum Act 2002. As regards the judge's inference that the appellant could not speak English because he gave his evidence through a Kurdish Sorani interpreter, Ms Lowis accepted that the appellant was in some difficulty in challenging the judge's inference as he was not now putting forward a positive case that he spoke English.

19. In summary, Ms Lowis submitted that the judge had materially erred in law and his decision should be set aside and the appeal remitted for a fresh hearing.

The Respondent's Submissions

20. Mr Howells, who represented the respondent, relied upon the rule 24 notice.

21. He submitted that the judge was correct to apply the country guidance in the UT's decision in AA but was incorrect to regard the guidance as having been made, in effect, as a result of the Court of Appeal's decision in AA (Iraq) in July 2017. The country guidance was based upon material available to the Upper Tribunal in 2015.

22. Further, Mr Howells submitted that Professor Bluth's report accepted that the appellant's home area was under the control of the Kurdish Peshmerga. The judge was entitled to rely upon the country guidance in concluding that there was no Art 15(c) risk to the appellant in his home area.

23. In addition, Mr Howells relied upon the judge's finding in relation to internal relocation at para 34 of his determination which, he submitted, was based upon the evidence. The judge had adequately considered the

appellant's circumstances at paras 30-35 of his determination and, although he had not made specific reference to it, the evidence did not support a finding that he would be at risk under Art 3 on return.

24. Finally, Mr Howells submitted that the judge had adequately dealt with para 276ADE at para [40] of his determination and had been entitled to find that the appellant's removal would not breach Art 8 of the ECHR.

Discussion

25. The first issue concerns the judge's treatment of the relevant country guidance and Professor Bluth's expert evidence.

26. Country guidance for Iraq was given by the Upper Tribunal in AA on 30 October 2015 ([2015] UKUT 544 (IAC)). There was an appeal against that decision to the Court of Appeal. In its decision in AA(Iraq) handed down on 11 July 2017 (shortly before the appeal hearing before Judge Osborne) the Court of Appeal amended, in part, the UT's country guidance (see [2017] EWCA Civ 944, Annex). It did so only as regards the issues of obtaining a CSID and its relevance to an individual's circumstances on return to Iraq (see paras [9]-[11] of the country guidance Annex). This was done with the consent of the parties who acknowledged that the UT's guidance on this issue was flawed. The Court of Appeal was not asked to examine the validity of the remaining guidance and it did not do so.

27. Consequently, the UT's guidance in paras [17]-[21] of the Annex under the heading "Iraqi Kurdish Region" remained the country guidance. So, a person from the IKR would be returned to the IKR following his identity being "pre-cleared" with the IKR authorities (para [17]). Further, and importantly for this appeal, at para [18] the country guidance states:

> "The IKR is virtually violence free. There is no Article 15(c) risk to an ordinary civilian in the IKR."

28. Paragraph [19] of the guidance is concerned with a Kurd who does not originate from the IKR. It is, as a consequence, irrelevant to this appellant who does originate from the IKR. Para [20] is concerned with an individual who is returned to Baghdad and whether it would be "unduly harsh" for them to travel to the IKR. That also has no application to this appellant as, at least at all times relevant to him, he would be returned to the IKR directly. The position may well be different now following the more recent country guidance decision in AAH (Iraqi Kurds – internal relocation) Iraq CG [2018] UKUT 212 (IAC). But that decision, as Ms Lowis accepted, has no relevance to the appellant's claim before Judge Osborne.

29. Para [21] of the country guidance is concerned with the internal relocation to the IKR of a non-Kurd. That also has no relevance to this appellant.

30. It is clear law that country guidance is "authoritative" on an issue of country guidance and a Judge of the First-tier Tribunal should apply that country guidance "unless very strong grounds supported by cogent

evidence, are adduced justifying they not doing so" (see SG (Iraq) v SSHD [2012] EWCA Civ 940 at [47] *per* Stanley Burnton LJ with whom Maurice Kay and Gross LJJ agreed).

31. Consequently, the UT's country guidance applicable to the appellant at the time of the hearing before the judge was, as regards Art 15(c), set out in para [18] of the UT's country guidance which, with amendment made to the section dealing with CSIDs, was reproduced in the Annex to the Court of Appeal's judgment. It was based upon material available to the UT in 2015.

32. Before Judge Osborne, the appellant relied upon the expert report of Professor Bluth to provide good reason to depart from that country guidance.

33. Turning now to the judge's decision, at paras [21]-[24], he set out the relevant country guidance derived, as he saw it, from the Court of Appeal's decision in AA (Iraq), including para [18] which he set out in full at his para [24].

34. At paras [28]-[29], the judge turned to deal with the expert evidence of Professor Bluth as follows:

> "28. The expert witness is a Professor of International Relations and Security at the University of Bradford. His professional expertise is in international relations. He has a PhD from Kings College London. Although Professor Bluth has relied upon the assistance of Mr Azad Deewanee who comes from the Kurdish Region of Iraq and is a doctoral candidate under the supervision of Professor Bluth, I find that Professor Bluth is aware of his responsibility to this Tribunal and that he has prepared and is responsible for his report.
>
> 29. Professor Bluth at 5.3 considered the specific risks to the Appellant in the Kurdish Region of Iraq. Professor Bluth concludes that the Appellant would have to provide for himself and would not have sufficient funds to acquire accommodation so would have to live in IDP camps. Professor Bluth confirmed that Fayda is currently under the control of Kurdish Peshmerga but held that the situation in the area remains fluid as Iraqi forces and Shia militia also operate in the vicinity. However, I find that the Court of Appeal has recently considered the position as I have referred to above in the case of **AA (Iraq) [2017]**. To that extent, I prefer to be guided by the Court of Appeal which binds this Tribunal rather than the report of Professor Bluth. In any event Professor Bluth accepts that the Appellant's home area is under the control of Kurdish Peshmerga. Professor Bluth predicts that the number of displaced persons in the Dohuk province and the surrounding areas generally will make untenable the security accommodation employment and access to basic facilities position. That is his prediction for the future. Professor Bluth makes no mention of the case of **AA (Iraq) [2017]** in his report even though his report postdates the Decision of the Court of Appeal. Respectfully, Professor Bluth might have done well to consider the decision of the Court of Appeal as it is most pertinent to this appeal. The fact that Professor Bluth has not considered the contents of **AA (Iraq)** reduces the weight that I can give to his report."

35. Then, at para [30] the judge reached his conclusion under the heading "The Changing Conditions in IKR" as follows:

> 30. It follows from what I have said above and from what the Respondent is prepared to accept, that at the time the Appellant and his family left Fayda, he has a genuine fear of persecution by non-state actors. That was in the summer of 2014. Since then, the position had first deteriorated but now it has improved. Indeed, I find that the position within IKR has as confirmed by the guidance provided recently by the Court of Appeal in **AA (Iraq) [2017] EWCA Civ 944** has improved to the extent that this Appellant at the age of 18 years (and now therefore a young adult) may return to his home area where there is no objective threat of persecution of the Appellant from any source. The present Court of Appeal authority confirms that there is no Article 15(c) risk to an ordinary civilian in the IKR. I unhesitatingly assess the Appellant as an ordinary citizen."

36. It seems to me that the judge has fallen into the error identified by Ms Lowis in her submissions and in the appellant's grounds.

37. The judge discounted Professor Bluth's report because it failed to deal with the Court of Appeal's decision which the judge considered should have been referred to by Professor Bluth. I was taken to Professor Bluth's report and, indeed, there is no reference to the Court of Appeal's decision although his report (dated 24 July 2017) postdates the Court of Appeal's decision by thirteen days. He does, however, refer to the Upper Tribunal's decision at para 5.4.13, albeit in the context of ISIS attacks against civilians in Baghdad.

38. However, the important point is that the country guidance originated in the UT's decision in 2015. Professor Bluth's evidence, to the extent that it relied on evidence postdating the UT's decision, was relevant as to whether the appellant had shown "very strong grounds" which was "supported by cogent evidence" why the UT's country guidance in AA should not be followed. In effect, had the situation in the appellant's home area deteriorated such that it could not any longer be said that there was no Art 15(c) risk there.

39. In my judgment, the judge over-emphasised the effect of the Court of Appeal's decision. It is simply left untouched, because it was not challenged, the relevant part of the UT's country guidance in AA. There is a strong suggestion in the judge's reasoning that he discounted Professor Bluth's evidence because of the binding effect of the Court of Appeal's decision. In effect, it had even more weight than that of the UT when setting the country guidance in place in 2015. That was, in my judgment, a misapprehension of the effect of the Court of Appeal's decision. Further, since the guidance was based upon evidence available to the UT in 2015, self-evidently Professor Bluth's evidence postdated it and was relevant in assessing whether there was good reason to depart from it. The judge was required, therefore, to grapple with Professor Bluth's evidence. Although the judge refers to Professor Bluth's evidence in para [29] – in particular that the appellant's home area is now under the control of the

Kurdish Peshmerga – he made no reference to Professor Bluth's opinion that the situation was likely to deteriorate. Instead, the judge discounted that view based upon the fact that Professor Bluth had not referred to the Court of Appeal's decision. Although the judge states that that had the effect of "reduc[ing] the weight that I can give to his report", I accept Ms Lowis' submission that, in fact, the judge thereafter made no reference to the report and so, in effect, gave it no weight at all. In my judgment that was an error of law in his approach to the expert evidence and his assessment of whether the appellant's case that the country guidance in AA should be departed from had been established.

40. Whilst I acknowledge that Professor Bluth's report is, to some extent, anticipating what might happen, it does contain evidence which was relevant to assessing the risk under Art 15(c) to the appellant on return and I am not persuaded that it was inevitable that the judge, having considered that evidence, would have nevertheless followed the country guidance in AA. The error was, therefore, material to his dismissal of the appellant's appeal under Art 15(c).

41. Further, and in addition, Professor Bluth's report does contain evidence relevant to the appellant's circumstances in the IKR beyond risk. Professor Bluth, for example, states that the appellant would, in effect, become an IDP. This was relevant to the appellant's Art 3 claim. By discounting Professor Bluth's evidence, the judge did not deal with Art 3 and that too was, in my judgment, a material error of law. Also, the appellant's circumstances, including as identified by Professor Bluth on return, were relevant to his claim under Art 8, including under para 276ADE and whether there were "very significant obstacles" to his integration on return. In my judgment, therefore, the judge's discounting of Professor Bluth's evidence led the judge not to fully consider the appellant's circumstances under para 276ADE at para [40] or in determining the proportionality of his removal outside the Rules under Art 8 at para [42].

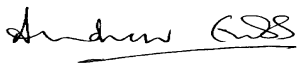
42. For these reasons, the judge materially erred in law in dismissing the appeal on humanitarian protection grounds and under Arts 3 and 8 of the ECHR. It is unnecessary, therefore, to consider the other grounds relied upon by Ms Lowis.

Decision

43. The First-tier Tribunal's decision involved the making of an error of law. The decision cannot stand and is set aside the decision.

44. The proper disposal of the appeal is to remit it to the First-tier Tribunal for a *de novo* rehearing before a judge other than Judge N J Osborne.

Signed



A Grubb
Judge of the Upper Tribunal

9 October 2018