Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/05184/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 October 2018	**On 20 November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

[O A]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K Smyth, Solicitor, Kesar & Co, Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the remaking of a decision of First-tier Tribunal Judge Burns dated 5 July 2017. That decision was aside by me, with the concurrence of the Secretary of State, on the basis of an error of law concerning the application of Country Guidance. See the brief Decision and Reasons dated 11 July 2018.

2. I directed that the findings of fact of the First-tier Tribunal be preserved, save in relation to one minor matter which, as events have transpired, became of marginal relevance. The matter was originally set down for hearing on 31

August 2018, but for reasons particularised in a separate decision could not proceed. It was therefore re-listed for 17 October 2018. An accompanying decision deals with the wasted costs of the ineffective hearing.

3. I am grateful to both representatives for narrowing the issues and preparing full skeleton arguments on the matters requiring determination. A substantial volume of additional material was lodged, and I have read all those parts to which my attention has been directed. However, it is only necessary to refer to a small portion of this material in order fairly to dispose of the matter.

Background

4. The appellant is an Iraqi Kurd, born on [~] 1998, to a farming family in a village near Daquq in the Kirkuk governorate. He is the youngest of four siblings. The appellant claims that his father was a senior member of the Ba'athist military regime, an assertion not accepted by the Secretary of State. I am not required to make any finding in that matter.

5. It is accepted by the Secretary of State that in 2014 the appellant's village was attacked by ISIS forces and the appellant fled with his family to Kirkuk where they stayed initially with one of the appellant's sisters, and thereafter in rented accommodation. They learned that the appellant's brother had been captured by ISIS. They returned to live with the appellant's sister but were not able to leave Kirkuk.

6. It was found by the First-tier Tribunal that a friend of the appellant's brother (named as [K]) assisted the appellant to flee Iraq, handing him to an agent in Erbil. He reached the United Kingdom on 19 November 2015 whereupon he claimed asylum. The appellant submitted an identity card, which he claimed was sent to him by [K], brought to the United Kingdom by a third party. The Secretary of State does not accept that the card is genuine.

7. The appellant has produce medical evidence attesting to a diagnosis of PTSD with features of anxiety and depression, including symptoms of nocturnal enuresis (bed-wetting). An updating report of Dr Onwuchekwa, consultant psychiatrist, dated 31 August 2018, records that the appellant 'is struggling to function and interact with people due to his illness'. The Secretary of State does not dispute the medical evidence.

Issues

8. At my direction, the parties have narrowed the issues for determination. They are contained in an agreed document, dated 13 September 2018, the salient part of which reads:

    (1) Is there an Article 15(c) risk in the appellant's home area of Kirkuk?

    (2) Is so, is it reasonable for the appellant to relocate internally?

    (3) Is the appellant is possession of a CSID?

    (4) If not, could he obtain one within a reasonable period of time?

(5) Is there a stand-alone Article 3 risk in Baghdad arising from any lack of CSID.

9. I propose addressing each of these issues in turn.

(1) Article 15(c) risk in Kirkuk

10. The appellant relies upon ***AA (Article 15(c)) Iraq CG*** **[2015] UKUT 544 (IAC)**. The Secretary of State submits that the conditions on the ground have changed significantly since this decision and that it is appropriate to depart from this Country Guidance.

11. ***AA (Article 15(c)) Iraq CG*** is a decision of Upper Tribunal Judges Lane, O'Connor and Finch. For present purposes, it is sufficient to reproduce paragraph 1 of section A of the Country Guidance:

> ***A. INDISCRIMINATE VIOLENCE IN IRAQ: ARTICLE 15(C) OF THE QUALIFICATION DIRECTIVE***
>
> 1. *There is at present a state of internal armed conflict in certain parts of Iraq, involving government security forces, militias of various kinds, and the Islamist group known as ISIL. The intensity of this armed conflict in the so-called "contested areas", comprising the governorates of Anbar, Diyala, Kirkuk, (aka Ta'min), Ninewah and Salah Al-din, is such that, as a general matter, there are substantial grounds for believing that any civilian returned there, solely on account of his or her presence there, faces a real risk of being subjected to indiscriminate violence amounting to serious harm within the scope of Article 15(c) of the Qualification Directive.* (emphasis added)

12. The above passage was expressly approved and adopted without revision when the case reached the Court of Appeal, reported as ***AA (Iraq) v Secretary of State for the Home Department*** **[2017] EWCA Civ 944.** On the basis of this passage, there would be an Article 15(c) risk on return the appellant's home area of Kirkuk, irrespective of any particular characteristics or features pertaining to the appellant. The onus, therefore, falls on the Secretary of State to demonstrate that there are good reasons to depart from this Country Guidance.

13. I remind myself of the Immigration and Asylum Practice Direction, paragraph 12.2 of which states that unless it has been expressly superseded or is inconsistent with other authority binding on the tribunal, Country Guidance (duly marked as such by the designation CG) should be followed unless that tribunal is persuaded that it does not apply to the case in question. To borrow from Stanley Burnton LJ in ***SG (Iraq) v Secretary of State for the Home Department*** **[2012] EWCA Civ 940, at 47***:* "tribunal judges are required to take Country Guidance determinations into account, and to follow them unless very strong grounds supported by cogent evidence, are adduced justifying their not doing so".

14. Mr Tufan, for the Secretary of State, submits that there are good reasons to depart from the Country Guidance in ***AA (Article 15(c)) Iraq CG***. He says that in June 2014, the Iraqi army fled Kirkuk and Kurdish forces took control,

preventing ISIS from so doing. He asserts that Iraqi government forces retook control of Kirkuk on 17 October 2017, following a referendum for independence in the Iraqi Kurdish Region (variously abbreviated to IKR or KRI).

15. Reliance is placed by Mr Tufan on two authorities in support of his proposition that fundamental changes in Iraq have arisen in consequence of the demise of ISIS. The first is ***The Queen (On the Application of QA) v Secretary of State for the Home Department*** **[2017] EWHC 2417**, a decision of Sir Ross Cranston, sitting as a Judge of the High Court.

> [63] As far as the position in Kirkuk is concerned, and the requirement for the claimant to return there to obtain a CSID, the Secretary of State was entitled to take the realities on the ground there into account. Kirkuk is no longer a contested area. In my view, country guidance cases must give way to the realities, a point recognised by the Court of Appeal in *SG (Iraq) v Secretary of State for the Home Department* [2012] EWCA Civ 940 at para 47. There are apparently still dangers there, but nothing like the position as when *AA* was decided. That being the case, I cannot regard the passages in the Secretary of State's letter as regards the claimant's ability to obtain a CSID as being flawed.

16. However, in an order sealed on 3 August 2018, Longmore LJ granted permission to appeal to the Court of Appeal, albeit on a limited basis. I was informed that a consent order is in the process of being drawn up by the parties for approval by the Court of Appeal, in consequence of which the matter was likely to be considered afresh. In the circumstances, Mr Tufan, wisely in my view, withdrew his reliance on this judgment.

17. The second authority to which Mr Tufan referred me was an unreported decision of Upper Tribunal Judge Hanson in ***JAA v Secretary of State for the Home Department*** **(PA/02593/2016),** promulgated on 7 December 2017. In that case, it was noted at [24] that the Secretary of State had made no concession that Kirkuk was contested territory (as had been the case in ***AA (Article 15(c)) Iraq CG***) and the judge concluded on the evidence presented by the parties that there was no present risk of serious harm due to indiscriminate violence. Mr Tufan, again in my view wisely, does not overstate the value of this decision in terms of binding precedent. On the contrary, he recognises that each case turns on its own particular facts; and as the evidence will be different, so might the outcome.

18. The country material placed before me on this issue on behalf of the Secretary of State is limited. Mr Tufan relies on a report of the *International Organisation for Migration (IOM)* dated 4 September 2018. It records that in December 2017 Iraqi Prime Minister Haider al-Abadi declared the end of the country's war against ISIL, and that since then nearly 4 million formerly displaced persons have returned to their homes. It is stated that the displacement figures fell below 2 million for the first time since 2014. These broad statistics are also reflected in the United Nations *Report on Human Rights in Iraq* (July to September 2017) which notes the Prime Ministerial declaration of final victory

over ISIL, and the sharp reduction in civilian casualties (section 3). It also records federal forces launching repositioning operations from October 2017 onwards, stating that commencing in Kirkuk, they proceeded rapidly through other disputed territories. In most cases, the withdrawal of Peshmerga forces from these areas took place in coordination with the Iraqi Security Forces. There is little of assistance to be found in the Home Office's *Country Policy and Information Note: Iraq* (version 7.0, September 2018) and it did not feature significantly in Mr Tufan's submissions.

19. Mr Tufan, in his skeleton argument and as developed in oral submissions, concedes that the threat from ISIS has not disappeared entirely, but is confined to small pockets and it has changed its nature from open conflict to periodic asymmetric attacks by ISIS in areas which include the Kirkuk region. He asserts that the nature of these attacks goes nowhere near reaching an Article 15(c) threshold. He points to the appellant's own evidence in the form of an answer the appellant gave in interview (AIR Q 38) on 11 May 2017 in the following terms, 'for now there is no danger of ISIS in Kirkuk'.

20. Mr Tufan submits that the burden of proof lies on the appellant to show that the prevailing circumstances are such that there would still be a breach of Article 15(c) were the appellant to be returned to Kirkuk. He asserts that the Secretary of State no longer makes the concession that had been made in ***AA (Article 15(c)) Iraq CG***. However, in my opinion, the burden of proof in disapplying the Country Guidance still lies with the Secretary of State. The Guidance was not parasitic on the concession. It remains binding on this tribunal unless, again to 15r2 borrow from Stanley Burnton LJ (above), 'very strong grounds supported by cogent evidence, are adduced justifying [it] not doing so'.

21. Whilst it would appear that the situation on the ground in Kirkuk has improved significantly, I am not satisfied that a demonstrable, unambiguous and enduring new reality has dawned. In my assessment, the grounds relied upon in this case by the Secretary of State are insubstantial, and the limited evidence placed before me is lacking in cogency. The County Guidance in ***AA (Article 15(c)) Iraq CG*** has not been displaced and there remain substantial grounds for believing that any civilian returned to Kirkuk, solely on account of his or her presence there, faces a real risk of being subjected to indiscriminate violence amounting to serious harm within the scope of Article 15(c) of the Qualification Directive.

22. In the alternative, were the burden of proof to be on the appellant, as Mr Tufan contends, to demonstrate a breach of Article 15(c) on return to Kirkuk, I am of the opinion that such burden would be comfortably discharged by the material placed before me by Mr Smyth on behalf of the appellant, material that was singularly lacking in ***JAA*** (above). For present purposes, it is unnecessary for me to rehearse its detail within what is already a lengthy decision. I have considered the matters referenced by Mr Smyth at the rear of bundles AB3 and AB4, in the Key Passage Indices at pages 651-1775 and 1013-1072 respectively. Mr Tufan takes no issue with the content of any of the material, and adduces

nothing in rebuttal beyond the documentation rehearsed above. In substance, his submission is that notwithstanding the volume of this material, its repetitive nature simply magnifies sporadic instances, and that taken at its highest the material attests to nothing more that isolated pockets of conflict. In my assessment, this is to misrepresent the totality of the evidence which remains sufficient to substantiate a breach of Article 15(c) in the event of a return to Kirkuk.

23. These conclusions are sufficient, without more, to be dispositive of this appeal, but having heard full argument on the other issues, it is appropriate to determine them, albeit more briskly.

(2) Internal relocation

24. The issue of internal relocation is inextricably linked to the obtainability of a CSID so I address this issue in conjunction with issue (4) below.

(3) Possession of CSID

25. Mr Tufan conceded that as the only identity document presented by the appellant is fake, he is not in possession of a CSID. The question therefore becomes whether he can be expected to obtain one within a reasonable time of arriving in Baghdad.

(4) Obtainability of CSID

26. On this issue, there is disagreement between the parties. The starting point in resolving the dispute is ***AAH (Iraqi Kurds - internal relocation) Iraq CG*** **[2018] UKUT 212 (IAC).** Mr Tufan does not pursue a positive case that the appellant could obtain a CSID from the Iraqi embassy in the United Kingdom. He submits, however, that he would be able to do so once in Baghdad. He makes reference to a high level Iraqi delegation of its Migration and Human Rights Committee which had been in London recently to address this and related issues with officials from the Home Office.

27. He placed before me correspondence emanating from Dr Salih Husain Ali, the Ambassador of the Republic of Iraq to the United Kingdom. The first letter is dated 5 September 2018 and the relevant part reads:

> 'The arriving returnees [to Baghdad] can continue their onward journey to their final destination in Iraq by domestic flights or road using their *laissez passer* or letter (if provided) which help them to [pass through other designated check points. Please note than most of them may be in possession of copies of their national IDs which may have not been not [*sic*] disclose previously.
>
> The returnees can re-document themselves and apply in their local Civil Status Departments for a national ID Card on arrival using copies from his/her old documents or family records with reference to the page and register number holding the returnees' information or that of their family.

> We can confirm that all the Civil Status Records are preserved and held digitally by each Governorate Directorate of Civil Status Affairs and are accessible to assist in determining a returnee's identity with reference to the register and page.'

28. The second letter, dated 2 October 2018, has not copied well but its text is reproduced in the body of Mr Tufan's skeleton argument, and Mr Smyth accepts the accuracy of the transcription. The material part reads:

> 'In addition to our clarifications in our letter of 5 September, please note that the same procedures are applied to all the returnees onward travel from Baghdad to KRG or any city in Iraq. The certification letter is issued on a case-by-case [*sic*] and depending on the availability/unavailability documentations (sometimes requested by the returnee), the letter is issued by Baghdad International Airport Police, and contains information about the returnee including name, date of birth and clarification that the returnee landed with a *laissez passer* and his repatriation procedure is completed at the Airport, this letter is sufficient to pass through checkpoints in case of inquiry, please note that in rare occasions they may be questioned at checkpoints. This letter usually not always issued for all cases, but individually case-by-case. All Civil Status Records have been preserved nationally and there is a central register back up in Baghdad that includes all the civil records of all the provenances in the event of any form of damages of destruction.
>
> Representatives from the repatriation committee would be available at Baghdad International Airport and ready to receive a returnee even at the weekends if we are informed in advance that a returnee is on board of a flight. The officers are fully qualified dealing with the repatriation process and they can deal with it with the last minute notes.'

29. Mr Tufan submits that these statements from the Ambassador should be accepted in preference to the opinion of the expert Dr Fatah, on whose evidence the Upper Tribunal had relied in framing the Country Guidance in ***AAH***. Mr Tufan submits that a departure from pre-existing Country Guidance was again justified because of the additional new information provided by the Ambassador. The particular aspect of the Country Guidance in ***AAH*** from which Mr Tufan needs to justify a departure is summarised in paragraph 5 of the headnote:

> 5. P [a returnee] will face considerable difficulty in making the journey between Baghdad and the IKR by land without a CSID or valid passport. There are numerous checkpoints en route, including two checkpoints in the immediate vicinity of the airport. If P has neither a CSID nor a valid passport, there is a real risk of P being detained at a checkpoint until such time as the security personnel are able to verify P's identity. It is not reasonable to require P to travel between Baghdad and IKR by land absent the ability of P to verify his identity at a checkpoint. This normally requires the attendance of a male family member and production of P's

identity documents but may also be achieved by calling upon "connections" higher up in the chain of command.

30. Mr Smyth offers various criticisms of the Ambassadorial correspondence, some legitimate and others less so. Most compelling is his submission that the letters are couched in generalities, not addressing the particular facts of this appellant. The letter expressly indicates that a 'case-by-case' approach, so there is no way of knowing what the position would be for this particular appellant. The Ambassador states that returnees 'may be provided with a certification letter' (emphasis added) but this is by no means guaranteed, and the letter is not expressed as constituting a firm and binding governmental undertaking.

31. In my judgment, whilst not in any way questioning the *bona fides* of the Ambassador, his letter does not provide a robust foundation sufficient to sustain a departure from the recent Country Guidance in ***AAH,*** promulgated in January 2018. I have particular regard to the considerable weight afforded to Dr Fatah's evidence which the Upper Tribunal categorised as 'measured, detailed and well-sourced' [91]. In particular, the aspirational tone of the Ambassador's letter repeats an assertion expressly considered and rejected in ***AAH*** at [111]:

> 'Whilst we note the evidence of Country Research manager Bill Lacy that the Iraqi authorities have assured the Home Office they will "assist with any onward travel documentation" we have been shown no evidence that this has actually happened, or what such documentation might be. Dr Fatah's uncontested evidence was that a failure to produce a CSID – or in the environs of the airport a passport – would likely result in detention until such time as the authorities could be satisfied as to the individual's identity.'

32. Whilst the Ambassadorial correspondence evidences a direction of travel which is to be welcomed, I do not consider that as currently constituted it amounts to cogent evidence constituting strong grounds for departing from the Country Guidance of ***AAH.***

33. I am drawn inevitably to the conclusion that the appellant would be unable to obtain a CSID within a reasonable period of time of arriving in Baghdad. He arrived in the United Kingdom as an undocumented, separated child and is not in possession of a CSID, passport or birth certificate. The appellant's brother is probably deceased and his father in poor health, living in a care home in Kirkuk: neither is in a position to assist with the patrilineal registration system. The circular argument that he return to Kirkuk to obtain the documentation is self-evidently flawed, as he cannot travel there without a CSID. His unchallenged mental health issues is a further consideration rendering less likely any prospect of securing a CSID within a reasonable time.

34. Mr Tufan's submissions on this subject are mere speculation: I do not consider it appropriate to assume that the fact the appellant's parents are residing in a care home amounts to proof that either or both is in possession of a CSID. Nor do I consider it appropriate to assume that family members residing in Kirkuk would be able to travel to Baghdad bringing all necessary documentation

within a reasonable time to obtain a CSID, especially when the appellant would have debilitating mental health needs.

35. My clear conclusion on this key issue is that the appellant could not obtain a CSID within a reasonable period of time of arriving in Baghdad.

(5) Article 3 risk in Baghdad arising from lack of CSID

36. Mr Tufan accepted that in the event that I were to find that the appellant could not obtain a CSID within a reasonable period of time of his return to Baghdad, then he would face a real risk of destitution and, accordingly, his Article 3 claim would succeed. I have so found and it therefore follows that this appeal is also allowed under Article 3.

Conclusion

37. For the reasons set out above, I conclude that the appellant's protection claim succeeds as there is demonstrable risk for the purposes of Article 15(c) of the Qualification Directive. Applying the Country Guidance which is still current, there remains such a high level of indiscriminate violence that substantial grounds exist for believing that the appellant would face a real risk which threatens his life and person. Further the appellant's human rights claim also succeeds as his return to Baghdad would entail a violation of Article 3 of the Convention.

Notice of Decision

(1) The decision of the First-tier Tribunal having been set aside, it is remade as follows:

(a) the appellant's appeal is allowed under Article 15(c) of the Qualification Directive;

(b) the appellant's appeal is also allowed under Article 3 of the European Convention on Human Rights

(2) No anonymity direction is made.

Signed *Mark Hill* Date 8 November 2018

Deputy Upper Tribunal Judge Hill QC