Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/06247/2017**

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 17 April 2018	**On 27 April 2018**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A O A
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms L Brakaj, Iris Law
For the Respondent: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Head-Rapson promulgated on 28 November 2017, allowing the respondent's appeal on humanitarian protection and Article 8 grounds.

2. The respondent is a citizen of Iraq of Kurdish ethnicity and from Kirkuk. He was born on 1 March 1984 and entered the United Kingdom clandestinely, and claiming asylum on 21 August 2001. Although refused asylum, he was granted exceptional leave to remain until 2005 and was later granted indefinite leave to remain on 3 January 2006.

3. As detailed in the refusal letter of 21 June 2017 the respondent has a number of criminal convictions including assaults for actual bodily harm (8 February 2007) possessing drugs, driving whilst uninsured, the most serious offence being a conviction on 2 July 2010 for wounding/inflicting grievous bodily harm for which he was sentenced to twelve months' imprisonment. As a result of that conviction the respondent signed a deportation order against the respondent. His appeal against that decision was allowed on 30 September 2011 to the extent of being remitted back to the Home Office for the respondent's duties pursuant to Section 55 of the UK Borders Act 2009 to be considered.

4. The Secretary of State maintained that decision and on 10 April 2014 signed a new deportation order against the respondent. He appealed against that decision but the appeal was dismissed on 7 August 2014. The appeal against that decision was unsuccessful as were applications to appeal to the Upper Tribunal against that decision.

5. Following further submissions submitted on a number of dates between 28 July 2015 and 15 February 2017, including the information that the respondent was in a relationship with his now wife and the birth to them of two children the Secretary of State considered that it was appropriate to make a fresh decision in which she concluded that the respondent did not have a well-founded fear of persecution and that as the security situation had changed in Kirkuk he would be able to return there and although not from Baghdad, would not be expected to return there other than for the purpose of his route of return to his home area. It was also noted following **AA (Article 15(c)) Iraq CG [2015] UKUT 00554** that he would be able to relocate to the Iraqi Kurdish Region should he choose to do so. It was considered he would be able to resettle in the IKR if he so desired.

6. The Secretary of State considered that Article 15(c) did not apply in this case first because the area around Kirkuk was no longer a contested area in which the threshold of 15(c) was met; [24] that he would be able to obtain a CSID if required and that in any event he was excluded from humanitarian protection by operation of paragraph 339B of the Immigration Rules as he had been convicted of a serious crime in the United Kingdom.

7. In considering the respondent's right pursuant to Article 8, although it was accepted that he had three children who were British citizens, the oldest born in 2005 the result of a previous relationship it was not accepted that he had a genuine and subsisting parental relationship with her given the lack of contact and it was not accepted [50] that it would be unduly harsh for his two children with whom he does have a relationship to live in Iraq given that his wife had said that she will go there with him and the children were he to be deported. It was not accepted either that it would be unduly harsh for the children to remain in the United Kingdom with their mother even were he to be deported [51].

8. Although accepting that the respondent has a genuine and subsisting relationship with his partner, as she had stated that she would be

prepared to accompany him to Iraq it was not considered that it would be unduly harsh to expect her to do so therefore the requirements of the Immigration Rules were not met. The Secretary of State was not satisfied that there were very compelling circumstances such that although he had not met the requirements of the Immigration Rules it would nonetheless be a breach of Article 8 to remove him to Iraq.

9. On appeal, Judge Head-Rapson found:-

(i) Although the respondent has no documentation, that is, no passport, Iraqi Civil Status Identity Document [38] and the attempt to obtain these on return to Iraq to have recourse to food and basic services and to obtain the CSID card he would need to return to own governorate which had been under the control of ISIS and therefore any documentation he would now have; in the light of AA (Iraq) [2017] EWCA Civ 944 that he could not return to his home area [45] and it was not reasonable for him to relocate via Baghdad to the Kurdish area given that he would be at great risk during the journey;

(ii) that in assessing the possibility of relocation by reference to AA and BA (Returns to Baghdad) Iraq CG [2017] UKUT 18 that on return to IKR he would have no support, assistance or sponsorship [47] and in light of the Home Office CPIN, it would not be reasonable to expect him to undertake the journey and that [49] his lack of CSID documentation places him at risk on return;

(iii) that Article 8 would be breached if the respondent was expected to return to Iraq [85], the consequences for his children and wife being unjustifiably harsh [86] as they do not have the option of accompanying him to Iraq: and having noticed [70] that the respondent's wife would not go to Iraq because she has grave concerns about her safety on return would not expose their children to such risk, noting [71] the respondent does not qualify for leave under the Immigration Rules.

10. The Secretary of State sought permission to appeal on the grounds that the judge had erred:-

(i) With respect to the CSID card, as the respondent was from Kirkuk and return would be to the IKR, he would not have required an expired current passport and therefore his entrance would be precleared as confirmed in AA (Iraq) (Court of Appeal), it being for the respondent, were he to require a CSID card, to demonstrate that he had exhausted all possible avenues before finally finding that none is available;

(ii) that the lack of economic opportunities was not sufficient for a grant of protection under Article 3 humanitarian protection, being for the respondent to prove he is destitute, the judge having failed to consider the facility to return scheme in his findings despite this being referred to in the decision letter;

(iii) the return was proposed to Kirkuk which is not a contested area, while there are currently no direct flights to the IKR, there are currently no restrictions on internal flights from Baghdad.

(iv) that the judge's approach to Article 8 was entirely flawed, failing to appreciate that this was a deportation revocation and making no reference to the factors set out in the Section 117C of the 2002 Act or whether the respondent's deportation was an unduly outcomes for a child or partner.

11. On 19 December 2017 Designated Judge Shaerf granted permission, noting that it was arguable that the judge gave insufficient reasons for concluding that the respondent could not be so if he returned to the IKR or could not obtain a CSID card in Baghdad bearing in mind that he had previously held one; and, that it was arguable that the judge had failed to have proper regard to the weight to be attached to the public interest in the deportation of foreign criminals.

12. The respondent replied pursuant to Rule 24 of the Procedural Rules stating:-

(i) that the Secretary of State's grounds were flawed in that as the respondent had originated from Kirkuk which is not within the IKR, return would not be there and would in fact be to Baghdad;

(ii) that in any event the security situation in Kirkuk had declined for Kurdish nationals, the grounds being contradictory in stating that it was not proposed to remove to Bagdad then stated there were no returns to the IKR then state the removal was a technical issue.

(iii) that the judge had given adequate reasons with respect to Article 8.

13. Mr Diwncyz accepted that there was an error in the challenge to the findings on the CSID card in that Kirkuk was not in the IKR and accepted that there was no challenge to the finding of fact at [38] that the respondent would need to return to his own governorate to get a CSID. He accepted that there was in effect no challenge to these findings given that the grounds were drafted on the presumption that the respondent would be returned to the IKR. There is no challenge either to the judge's finding at 40 to 44 that a CSID would be necessary and that she would [44] follow the guidance set out by the Court of Appeal in **AA (Iraq).** There is, I find no real engagement with the findings reached by the judge on those issues, or basis for concluding that they were unsustainable or otherwise made in error.

14. In respect of the ground that a lack of economic opportunity was a sufficient grant of protection, it being for the respondent to prove he would be destitute, it is unclear what in the judge's decision is challenged. Given the sustainable finding that he could not obtain a CSID and the guidance given by **AA (Iraq)**, it is unclear how, given the unchallenged findings at

[47] that the respondent would have no support, assistance or sponsorship to secure employment and the evidence that Iraqis, like the respondent, who do not originate from the IKR are being asked to travel onwards, it was open, given these facts as found to conclude that the respondent would be destitute. Whilst I accept that the judge did not, as the grounds identify, take into account the facilitated return scheme referred to in the refusal letter at [95] the sum is unclear whereas the basis on which discretion would be exercised to give him the money, it being stressed that "he may be eligible". Further, it is not clear that this paragraph was cited either in submissions or in the refusal letter as being funds which could or should be taken into account in assessing the viability of return (note to self check in **AA** and **BA** on this point).

15. With respect to the challenge and the basis that return is currently proposed to Kirkuk that there therefore would not be a return to a contested area, in the submission on **Amin v SSHD [2017] EWHC 2417 (Admin)**. That is a decision of Sir Ross Cranston sitting as a judge of the High Court in a challenge to a decision by the Secretary of State that the submission did not amount to a fresh claim. It is, in essence, a submission that the judge should not, as she chose to do, follow country guidance. It is simply not arguable on the basis of a case which does not appear to have been cited to the judge that she should have departed from the country guidance, contrary to established law and guidance. It is clear that she had regard to that guidance at [36] but, for the reasons set out at 39 to 44 concluded that she was not prepared to depart from the guidance in **AA** and in the circumstances, it cannot be argued that this amounts to an error of law. Further, this ground is also infected by the same error that it is believed that Kirkuk is located within the IKR. Thus, observations about internal flights are not relevant.

16. Accordingly, in the circumstances, I am satisfied that the decision of the First-tier Tribunal that the applicant's Article 3 rights should be breached by his return to Iraq are sustainable.

17. In the circumstances, it is unnecessary for me to consider whether the Secretary of State's challenge to the findings in respect of Article 8 are made out as they are not material to the outcome of the appeal.

18. I do, however, note that the judge's decision records that the appeal is allowed on humanitarian protection grounds. That is clearly an error and must be corrected given that, owing to his criminal convictions, the respondent is not eligible for humanitarian protection.

Notice of Decision

1. The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it, save for amending the basis on which the appeal was allowed.

2. The decision of the First-tier Tribunal was allowed on article 3 grounds but dismissed on humanitarian protection grounds.

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 their 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.

Signed Date 25 April 2018

Upper Tribunal Judge Rintoul