IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001986
First-tier Tribunal No: DC/00065/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

22nd February 2024

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Hersh Karim
(no anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr C. Bates, Senior Home Office Presenting Officer
For the Respondent: Mr C. Holmes, Counsel instructed by Arden Law

Heard at Manchester Civil Justice Centre on 26 January 2024

DECISION AND REASONS

1. The Appellant is a national of Iraq born in 1984.

2. On the 11th April 2023 the First-tier Tribunal (Judge Austin) allowed the Appellant's appeal against a decision to deprive him of his British citizenship. The Secretary of State obtained permission to appeal against that decision and by her decision of the 25th October 2023 Upper Tribunal Judge Jackson set the decision of Judge Austin aside. Her reasons for so doing are set out in her written decision of that date, but in brief summary she was satisfied that the First-tier Tribunal had erred in conducting a merit-based review, rather than confining itself to considering whether the decision of the Secretary of State was flawed for public law error: Ciceri (deprivation of citizenship appeals: principles) [2021] UKUT 00238 (IAC), Begum, R. (on the application of) v Special Immigration Appeals Commission & Anor [2021] UKSC 7.

3. I am now asked to remake the decision in the appeal. For the purpose of this appeal Mr Holmes was prepared to accept that the approach taken by Judge

Jackson was, on the present state of authority, correct. He has however reserved his position on whether the principles in Begum should in fact be applied to cases in which the Secretary of State alleges deception: s40(3) British Nationality Act 1981. That reservation duly recorded, I proceed to consider and determine the issues raised by Mr Holmes' superlative submissions.

The Home Office Case

4. The Appellant entered the UK on the 10th October 2002 and within a week had presented himself to the authorities and claimed asylum. He said that he was a Kurd who had lived in Makhmour. He was refused asylum, but was granted Exceptional Leave to Remain (ELR) on the 24th November 2002. He obtained Indefinite Leave to Remain (ILR) on the 7th February 2007 and was naturalised as a British citizen on the 16th April 2009. It is the Home Office contention that none of that would have happened but for the fact that the Appellant had said he was from Makhmour, a town in government of Iraq (GOI) controlled territory. It is now the Home Office belief that in fact the Appellant is from Erbil, a town at all material times under Kurdish control. He should never have got ELR, or ILR, and should not therefore have become British.

5. The Secretary of State's case is that the Appellant benefitted from a policy or practice, adopted at that time, to grant ELR to all Iraqis from GOI controlled territory. That was why his place of origin is so important to this case. Mr Bates states that at the time of his asylum claim the Appellant consistently said that he was from Makhmour, whereas latterly he submitted documents to the Home Office, in support of passport applications for his children, which indicate that he is from Erbil. Those documents are:

   i) An extract from the 'family book' (civil register) in Iraq dated the 4th May 2016. It shows the Appellant as the 'head of family', and underneath the names of his wife and two children. For each the place of birth is recorded as 'Erbil'.

   ii) An extract from the 'family book' (civil register) in Iraq dated the 4th July 2019 which also gives the Appellant's place of birth as Erbil;

   iii) The Appellant's marriage certificate which under the heading 'identification' gives the following information about the Appellant:

Register	218M
Page	73
District	Erbil
Date of birth	15/09/1984
Marital status	Bachelor

6. Mr Bates submits that in all the circumstances it was reasonably open to the Secretary of State to conclude that the Appellant was from Erbil and not Makhmour, and that the condition precedent was met because the Appellant did make false representations in his various applications, which led to him becoming naturalised. Mr Bates reminds me that it is not for me to undertake a proleptic assessment of whether the Appellant's human rights would be breached in the future as a result of the decision to deprive; that is for another day. In respect of the 'limbo' period Mr Bates indicated that at present the Home Office aims to

consider any human rights application made subsequent to a failed deprivation appeal within 4 weeks of an appellant becoming 'appeal rights exhausted'.

The Appellant's Case

7. The Appellant's case, on the facts, is quite straightforward. He did say that he had formerly lived in Makhmour. That was not however where he was registered for the purposes of Iraqi civil administration. The civil registry for Makhmour is in Erbil. That is why all the documentation relating to his marriage and children refers to Erbil.

8. On behalf of the Appellant Mr Holmes advanced seven submissions. His first three points are concerned with the materiality of the alleged deception:

   i) The Home Office has not explained, or produced any evidential basis to explain, why the Appellant was given ELR in 2002 or ILR in 2007. There is therefore no basis to conclude that it was because he said he was from Makhmour

   ii) The Appellant's place of birth cannot conceivably have been relevant to the decision to grant him ELR or ILR, because he was not, in connection with either of those applications, asked where he was born

   iii) The suggestion that, (i) notwithstanding, it must have been because of a then-extant policy is a fallacy because it was the Respondent's stated position at the time that no such policy existed: see GH (Former Kaz – Country Conditions – Effect) Iraq CG [2004] UKIAT 00248

9. The next four go to specific public law errors in the decision making process:

   iv) The Secretary of State has failed to take account of material facts, in particular that Makhmour is a town under the administrative control of Erbil. On a proper analysis of the documents at the heart of this case, it can be seen that the references there to 'Erbil' are to the *governate* not the city

   v) The Secretary of State has further failed to have regard to the important evidence given by Dr Fatah, and accepted by the Upper Tribunal in AAH (Iraqi Kurds – internal relocation) Iraq CG UKUT 00212 (IAC), about the operation of Iraqi civil status procedures

   vi) The refusal letter and subsequent pleadings give no indication that the Secretary of State exercised her discretion in this case, or if she did, what her reasons were for concluding that it should not be exercised in the Appellant's favour

   vii) There has been a procedural unfairness in that the decision "appears to be the product of a closed mind".

Discussion and Findings

10. The operative statutory provision is s40 (3) of the British Nationality Act 1981:

> 40 Deprivation of citizenship.
>
> (1) In this section a reference to a person's " citizenship status " is a reference to his status as—
>
> (a) a British citizen,
> (b) a British overseas territories citizen,
> (c) a British Overseas citizen,
> (d) a British National (Overseas),
> (e) a British protected person, or
> (f) a British subject.
>
> …
>
> (3) The Secretary of State may by order deprive a person of a citizenship status which results from his registration or naturalisation if the Secretary of State is satisfied that the registration or naturalisation was obtained by means of—
>
> (a) fraud,
> (b) false representation, or
> (c) concealment of a material fact.

11. The burden of proof lies on the Respondent to lawfully establish the condition precedent of fraud, false representation or concealment. Thereafter he must exercise his discretion in whether or not to deprive the Appellant of citizenship in a lawful and rational manner.

12. Given the scope of my decision it is important to start with the decision itself. The letter informing the Appellant of the Respondent's decision is dated the 27th July 2022:

> 12. Although your asylum claim was refused it was Home Office policy not to remove any Iraqi national if they claimed they were from an area within government controlled Iraq (Annex O), Makhmur being one such area. Therefore, you were granted four years exceptional leave to remain (ELR) (Annex E). This decision was based solely on the reason you claim to have been born and raised in Makhmur.
> …
>
> 25….the fact that you stated your place of birth as Makhmur and not Erbil as displayed on your ID documents is a reason to consider depriving you.

> 26. Prior to the fall of Saddam Hussein, Makhmur was considered part of Government controlled Iraq (GCI). At the time of your asylum claim it was accepted practice that asylum seekers who were accepted as being from GCI were granted four years exceptional leave to remain (ELR). Policy at the time stated,
>
> "Although there was no specific blanket policy it was accepted practice that all asylum seekers who were accepted as being Iraqi nationals, but who were found not to be refugees, from April 1991 to 20 October 2000, would be granted 4 years' ELR arising from factors such as the severe penalties imposed on those who had left Iraq illegally. From October 2000, in light of the improved conditions in KAZ, only claimants who were accepted to have come from GCI were granted 4 years' ELR. On 20 February 2003 this changed to 6 months' ELR in the view of the uncertain situation surrounding Iraq, in particular the prospect of imminent military action against Iraq. On 20 March 2003 initial consideration of all Iraqi asylum applications was suspended following the commencement of military action in Iraq. Decision-making on Iraqi asylum claims resumed on 16 June 2003, since when all Iraqi asylum applications, regardless of where the claimant originated, have been considered on their individual merits"
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> (Annex O2, section 3.6 refers). This, as explained earlier was the sole reason you were allowed to remain in the UK.
>
> …
>
> 37. Clearly you were aware you had provided false information throughout your dealings with the Home Office and had signed declarations that you were providing true information whilst knowingly doing the opposite, despite warnings that to do so was illegal, including on the form AN itself. The guidance is clear that you should have declared this on your naturalisation form in order that the caseworker could properly assess whether you met the good character requirements, yet you made no attempt to do this.

13. The policy referred to there, and set out at Annex O, is the 12th January 2009 Country Policy Bulletin on Iraq. It was published in response to a number of decisions in the High Court and Court of Appeal about the legality of removals to Iraq. I shall return to this document below, but mention here simply that it post-dates both the grant of ELR and ILR in the Appellant's case.

14. This brings me to Mr Holmes' first ground of appeal. Assuming for a moment that the fraud is established (again, a matter I return to below), it is for the Secretary of State to establish its materiality. It has to be shown that the lie led to the benefit. Here we have a Kurdish claimant who says he was at risk of harm from the Ba'ath party in his home town of Makhmour in 2002. The reasons for refusal letter of the 24th November 2002 says nothing at all about Makhmour. The claim is rejected, in large measure, on the ground that the Appellant could reasonably

avail himself of internal protection in what was then called the Kurdish Autonomous Zone (KAZ) north of the 36th parallel (the no fly zone imposed on Saddam Hussain by NATO). The letter granting ELR is dated the same day. It says nothing at all about why the grant is being made, save that it is "in the particular circumstances" of the Appellant's case. No minutes from the Home Office file have been produced. Mr Holmes submits that in these circumstances it is not possible to say, on balance, why the grant was made.

15. The Secretary of State says that the lack of reasons and minutes from 2002 should not detract from what is said in the current decision letter, and the 2009 policy bulletin, to the effect that there was a "accepted practice" back in 2002 of granting ELR to claimants from GOI controlled territory. That being known generally, it was obviously to the Appellant's advantage to say that this is where he was from.

16. This argument is very effectively demolished by Mr Holmes third submission: that contrary to what is now said, in 2002 the Secretary of State flatly denied the existence of any such policy, or "accepted practice". In GH (Former KAZ – Country Conditions – Effect) Iraq CG [2004] UKIAT 00248 the Upper Tribunal considered not just the position for Kurds, but for Iraqis from territory formerly controlled by Saddam Hussain [at §1]. Counsel for the claimant in that case, Ms Sonali Naik (now KC), argued that everyone knew that there was an accepted practice of granting claimants from Iraq some form of leave, and that this had given rise to a legitimate expectation on the part of her client that he too would benefit from that approach. It was unlawful for the Secretary of State to depart, without reasons, from his own policy. This argument was rejected by the Tribunal in the following terms:

> 31. As to the claim in respect of the past policy of the Secretary of State in relation to Iraq, there was no evidence of any general policy either in March 2000 or subsequently. Miss Naik relied upon a letter dated 12 July 2004 from Des Browne, a Minister concerned with immigration and asylum policies, which stated in reply to a question raised by the appellant's instructing solicitors as to the position of enforced return to Iraq and Somalia:
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> 'In October 2002 the Home Secretary announced the end of blanket country specific "exceptional leave" policies. Since then all asylum claims have been assessed on their individual merits, in line with our obligations under the 1951 UN Refugee Convention and the European Convention on Human Rights.'
>
> That passage does not, of course, set out what was the policy previously in relation to Iraqi claimants. Mr Weisselberg informed us that prior to October 2000 there was a practice to grant exceptional leave to remain to northern Iraqis but it was not a blanket policy, simply a practice which was not of universal application. From October 2002 the practice changed and there were occasions when exceptional leave was granted to Iraqis from the south of Iraq without any connection with the Kurdish Autonomous Zone. Again it was not a general

> policy and each case was decided on its own facts. Since the hearing, and in accordance with an undertaking given in the course of the hearing, a letter of 14 July 2004 has been filed and served for the Respondent. It states that the practice operating prior to October 2000 has been confirmed. It originated in the potential difficulty of forcibly removing failed asylum seekers because of the lack of commercial flights to the KAZ. It had no reference to any accepted risk to failed asylum seekers and was discontinued because of the increasing numbers of claimants in 2000. Voluntary returns were made through other channels.
>
> 32. Given that, we are satisfied that there was no general published policy under which it could be said that the appellant had a legitimate expectation of being granted leave to remain: so the Abdi point is not engaged.

17. The Appellant's claim was determined in November 2002. In GH we have a clear statement from Treasury Counsel, accepted by the Tribunal, that from October 2002 there was no policy, no practice, and that actually each case was decided on its own facts: "there were occasions when exceptional leave was granted to Iraqis from the south of Iraq without any connection with the Kurdish Autonomous Zone. Again it was not a general policy".

18. I accept Mr Holmes' submission that what is said in GH is to be preferred to what was subsequently asserted in the 2009 Policy Bulletin, and in particular how that has been construed in the decision to deprive the Appellant of his British citizenship. The position then set out was that there was no positive policy one way or the other. In those circumstances there can have been no direct advantage to the Appellant saying he had lived in Makhmour. Of course it might be suggested that there is another way of reading the 2009 document. It is not concerned with a *positive* policy that Iraqis from government controlled Iraq get leave, it expresses the *negative* policy that those from the KAZ *don't*. Had that been the Respondent's case, it would have been unaffected by the decision in GH, since Ms Naik was concerned only with the former situation, and causation in this case might well have been established. That was not however the Respondent's reading, or his case before me: the decision letter expressly states:

> "At the time of your asylum claim it was accepted practice that asylum seekers who were accepted as being from GCI were granted four years exceptional leave to remain (ELR)"

I am satisfied, in light of GH, that this is incorrect as a matter of fact.

19. Mr Holmes might have stopped there, but he did not. His grounds (ii), (iv) and (v) are all concerned with what it means, in the Iraqi context, when an individual says that he is "from" a certain place. He says that in reaching the conclusion that the Appellant sought to deceive, the Secretary of State has failed to have regard to obvious and pertinent evidence that would have informed his decision-making process.

20. The first thing to note, and this is ground (ii), is that in the course of claiming asylum, and subsequently being granted ELR and then ILR, the Appellant is never

once asked to give his place of birth, nor to specify where his birth was registered by the Iraqi authorities. In his 'screening' SEF, self-completed and returned to the Home Office by post, the Appellant answered pro-forma questions to say that he feared the Ba'ath party in his home town of Makhmour. He is not asked to give his place of birth. Similarly there is no evidence that in his application for ILR he was asked to give, or otherwise gave, his place of birth. Mr Holmes submits that this in itself is significant, because it indicates that someone's place of birth was in no way considered to be relevant to whether they required surrogate protection. As a matter of logic, that is correct. What was important was where the Appellant lived, and whether he was at risk there.

21. Today the Secretary of State's case rests on the evidence that the Appellant is in fact 'from' Erbil, as indicated in the various personal documents in the possession of the Home Office, in particular the two extracts from the civil register and the marriage certificate. Mr Holmes submits that important evidence about what the word 'Erbil' means on those documents has been overlooked by the decision maker.

22. The first point that has eluded the decision maker is the now well known evidence about the way that the Iraqis managed their civil registration system, set out in several country guidance cases *passim*. See for instance the explanation offered to, and accepted by, the Upper Tribunal in AAH:

> 20 First, Dr Fatah explained that an individual is considered to be 'from' the governate or district where his family registration is held. Where that is, subject to certain exceptions outlined below, will usually be where his or her father was registered. Thus an individual may be legally 'from' a place where he has never in fact been. His place of birth is largely irrelevant. Dr Fatah gave the following example. A child is born in Baghdad, but his father is from Sulaymaniyah. The father's family will be registered in Sulaymaniyah, that is to say all their births, marriages and deaths will be recorded in the 'family registration book' held at the *Daa'ira*, the civil registration office in that city. Dr Fatah described these books as huge ledgers, their origins in Ottoman bureaucracy, containing handwritten entries updating the official record on what has happened to the family in question. Although the information contained in these volumes is key to Iraqi citizens this is not however a readily searchable database. Because the entries in these books are all handwritten anyone wishing to make an amendment to the record, or rely on it for the issuance of official documentation, must know the volume and page relating to his or her family. Thus in the example given, the father of the new baby would travel from Baghdad to the office in Sulaymaniyah, and satisfy the Registrar there as to where his family's records might be found, enabling the Registrar to manually record the child's birth. That child is then officially 'from' Sulaymaniyah, a place he might never in fact visit in his life.
>
> 21 What we know for a certainty in this case is that the Appellant's family registration book is (or today, post-digitalisation, perhaps was) in Erbil. That is

because the documents say so. At the top of the extracts, for instance, it says 'Governate: Erbil'. What Dr Fatah tells us in AAH, however, is that the existence and location of such a record is not to be equated with being born in Erbil, or living there. The Secretary of State has not considered any of that obviously relevant information when considering whether the condition precedent is here met.

22 Furthermore a closer reading of the documents reveals that the entry reading 'place of birth: Erbil' may not in fact refer to Erbil city, but rather the governate. The first of the register extracts is dated 4th May 2016:

Persons relation to head of family	Occupation job or craft	Religion	Date of birth in numbers	Date of birth in words	Place of birth
Head of family	-	Muslim	…	…	Erbil
Wife	-	Muslim	…	…	Erbil
Son	-	Muslim	…	…	Erbil
Daughter	-	Muslim	…	…	Erbil

23 The second of the register extracts – from the same family book but by a different official and three years later - reads:

Persons relation to head of family	Occupation job or craft	Religion	Date of birth in numbers	Date of birth in words	Place of birth
Head of family	-	Muslim	…	…	Erbil
Wife	-	Muslim	…	…	Harir, Shaqlawa, Erbil
Son	-	Muslim	…	…	Erbil
Daughter	-	Muslim	…	…	Erbil

24 For whatever reason, the second official to provide an extract decided to be more specific about the Appellant's wife's place of birth. Instead of simply recording 'Erbil', as the first official had done, he transcribed the record that she was in fact born in Harir, Shaqlawa, Erbil. Harir is a small town about 66km from Erbil. It is however in Erbil governate. The difference between the two extracts is wholly explained by, and supports, Dr Fatah's evidence that for the purpose of Iraqi administration, the actual place of birth is "largely irrelevant". What matters is where that individual is registered. As the Appellant's wife was registered in Erbil, that is what the record consistently refers to. As to why the Appellant, who claims to have been born in Makhmour, should be registered as born in Erbil, this is the next obvious piece of information that Mr Holmes says that the Respondent has overlooked. Makhmour is, like Harir, a town about 60km away from Erbil. Although Mr Bates is correct to say that it has sometimes been classified as coming under the Nineveh governate, elsewhere, and more frequently, it is classified as being part of Erbil: that is what, for instance, google maps and UNHCR will tell you. There is therefore strong evidence to suggest that there is absolutely no discrepancy between the Appellant's claim to have been 'from' Makhmour, and the information recorded in his civil registry records that he is 'born' in Erbil.

25 Having considered all of this evidence, and the submissions made, I am satisfied that the decision of the Secretary of State to find the condition precedent made out is flawed for the following public law errors:

i) A failure to take material evidence into account, *in particular*

- what Dr Fatah, and numerous country guidance cases, had to say about the civil registry system in Iraq;

- the fact that Makhmour is commonly regarded as being in the Erbil governate;

- and the evidence revealed by the difference between the extracts, namely that an entry stating the place of birth as 'Erbil' may simply refer to the governate rather than the city.

ii) Irrationality/mistake of fact: the decision maker was wrong as a matter of fact to state: "At the time of your asylum claim it was accepted practice that asylum seekers who were accepted as being from GCI were granted four years exceptional leave to remain (ELR)" . This was the fallacious basis upon which the Secretary of State deduced that the Appellant had reason to lie.

26 It follows that I need not deal in any detail with the final grounds. That the decision maker did not explore innocent explanations for what he regarded as a discrepancy in the evidence presented by the Appellant is perhaps evident from what I say above, and is indeed indicative of a 'closed mind'. The fact that the Appellant and his documents interchangeably used the words 'Erbil' and 'Makhmour' was, for him, possibly as meaningless as someone saying in one place that they were born in 'Camden' and another in 'London'. That is a possibility strongly suggested by a proper analysis of the evidence, and it is a possibility that does not appear to have been considered. As to whether the Secretary of State exercised his discretion, having found the condition precedent to be met, I would agree that there is no evidence of that on the face of the refusal letter.

Decision

27 The appeal is allowed.

28 There is no order for anonymity.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
20th February 2024