Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/11507/2009

THE IMMIGRATION ACTS

Heard at Birmingham
on 17th January 2014

Determination Promulgated

Before

UPPER TRIBUNAL JUDGE HANSON

Between

Y A K
(Anonymity order in force)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs Chaggar instructed by Coventry Law Centre
For the Respondent: Mr Mills – Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The appellant is an Iraqi citizen born in 1990. He entered the United Kingdom in 2007 and claimed asylum. The claim was rejected by the Secretary of State who issued removal directions dated 22nd September 2009. The Appellant's appeal against that decision was heard by Immigration Judge Rose sitting at Walsall on 28th October 2009.

2. The Appellant told Judge Rose that the reason he was seeking international protection was as a result of an incident that occurred in August 2007. The Appellant stated that he worked in a teahouse and noticed that people would come into this teahouse and exchange carrier bags. One night two people came to them and said they were leaving bags with the Appellant and his brother to be collected. They refused but were told they will be killed if they did not help. As a result the Appellant and his brother made an appointment for the individuals to return to discuss the matter the following night. They reported the matter to the police and when those individuals returned they were arrested. The following night two other individuals came to the teahouse. One had a gun and shot the Appellant's brother although the Appellant himself was able to escape. He called his uncle who took the Appellant to his own house. When the funeral of his brother took place the family noticed people asking about him, as a result of which, his uncle told him that he must not stay in the country. Arrangements were made to bring him to the United Kingdom.

3. The Appellant claims that if returned to Iraq he will be killed by the terrorist group to which his attackers belonged who had influence in the whole of Iraq.

4. Judge Rose's findings are set out from paragraph 10 of the determination, which include a finding that although some aspects of the Appellant's account appear improbable some credence should be attached to his evidence and that the risk upon return was to be assessed on that basis [23]. Judge Rose found that although the attacks occurred as a direct consequence of the actions of the Appellant and his brother which led to the arrest of two members of the group, it was found implicit in his account that his actions were likely to be regarded as an indication of his political opinion and that if the account the Appellant has given of events that caused him to leave Iraq is correct there is a serious possibility that he will face persecution by members of the group if he were now to return to Kirkuk [28].

5. At paragraph 33 Judge Rose specifically sets out a finding that the Appellant has established that if he were now to return to his home area there will be a real risk that he will suffer persecution or serious harm although the Judge also found there was an internal flight option available and on that basis dismissed the appeal.

6. The determination was challenged and reconsideration ordered by former Senior Immigration Judge Jarvis on 26th November 2009. The case was remitted and came before Designated Judge McCarthy sitting in Birmingham on 23rd February 2010. Judge McCarthy records that he was satisfied that in paragraph 32 of his determination Judge Rose relied on an approach and analysis taken by the Tribunal in KH (Iraq) which were found to be conclusions legally flawed in the later case of QD (Iraq), a judgment handed down some months before Judge Rose heard the appeal. As a result it was found Judge Rose erred on a point of law.

7. Designated Judge McCarthy proceeded to remake the decision by considering the internal relocation option and, having analysed the material made available to him, concluded that although Judge Rose had made an error on a point of law it was not necessary to set the decision aside as Judge McCarthy came to the same conclusion regarding the availability of internal relocation, albeit for different reasons.

8. Application for permission to appeal to the Court of Appeal against the findings of Designated Judge McCarthy was refused by Upper Tribunal Judge Dr Kekic and again by the Right Honourable Lady Justice Hallett, on the papers, on 13th July 2010. The application was, however, renewed to the Court of Appeal and following an oral hearing at which the Appellant was represented by Mr Michael Fordham QC and Jessica Boyd, Lord Justice Ward granted permission.

9. By an order dated 28th March 2011 Lord Justice Sullivan, by consent, ordered that the appeal be allowed and the case remitted to the Upper Tribunal to determine where in Iraq the Appellant could internally relocate to without undue hardship given the specific findings of fact in his case and taking into consideration the country guidance case of HM and others [2010] UKUT 331.

10. Paragraphs 5 and 6 of the statement of reasons attached to the consent order are in the following terms:

> 5. It is accepted that the Appellant and his brother were attacked in August 2007 by former members of the Ba'ath party, that his brother was killed and that the Appellant would be at risk in Kirkuk from other members of that organisation as he and his brother had been responsible for the arrest of two of the members of the group. The Appellant faces a real risk of persecution in Kirkuk, his home area, and therefore cannot return to Kirkuk. Further, it was agreed before IJ rose that the Appellant could not be expected to relocate to the KRG area. The Appellant's father had been a member of the Ba'ath party and had carried out atrocities against Kurds up to 1991 when he was killed by Kurdish people.
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> 6. In the specific circumstances of this case as outlined in paragraph 5 above, the Respondent agrees that the AIT materially erred in law by failing to properly consider where in Iraq the Appellant could internally relocate to without undue hardship. This is because this case does not concern whether the Appellant would face indiscriminate violence which was the test applied by the court in respect of the appellants in HM , RM , ASA, AA (Iraq) v SSHD [2010] UKUT 331. Rather this case is premised on the fact that this particular Appellant faces very particular risks as a result of the circumstances surrounding the deaths of his brother and father.

11. It was established at an earlier hearing before the Upper Tribunal that the Secretary of State was not making a concession that the Appellant could not relocate to the KRG which resulted in that hearing having to be adjourned as the full scope of the issues under consideration had not previously been communicated adequately to both advocates.

12. It is accepted by both Mr Mills and Mrs Chaggar that the issue was one of the reasonableness of internal relocation.

Submissions

13. On behalf of the Appellant it was submitted that he was unable to rely upon any protection from the authorities and that internal relocation is not an option for him as he believes he will be targeted by members of the former Ba'ath party.

14. It is also submitted that the Appellant does not have family on whom he could rely to help him relocate and that he was likely to face economic destitution or an existence of at least inadequate levels of subsistence. Mrs Chaggar placed reliance upon the decision of the House of Lords in Januzi v SSHD [2006] UKHL 5.

15. In relation to the KRG Mrs Chaggar referred the Tribunal to the UNHCR eligibility guidelines in which it is said that they generally consider that internal relocation in the KRG is not relevant to many Iraqis due to accessibility issues, such as the ability to access a livelihood, affordable housing, education and food through the public distribution system. It is also submitted that the fact the Appellant's late father tortured Kurdish people through his membership of the Ba'ath party may be relevant to relocation to the Kurdish north.

16. It was submitted that given the undue hardship the Appellant is likely to face if returned with expectation that he ought to relocate to some other part of Iraq other than Kirkuk there is a real possibility that he may be tempted to return to an area of persecution and so his appeal ought to be allowed.

17. On behalf of the Secretary of State Mr Mills submitted that it was reasonable to expect the Appellant to relocate if he cannot return to Kirkuk. He relies upon the case of MK (documents – relocation) Iraq CG [2012]] UKUT 126, which post dates the date of the remittal from the Court of Appeal. The guidance in MK was of course subject to challenge to the Court of Appeal as part of HS and others and although MK has been remitted to the Tribunal to be reheard on the basis of its facts, the country guidance aspects of MK were not set aside by the Court of Appeal.

18. It was submitted that even if the Appellant was unable to transfer his PDS card to the KRG, but felt unable to make visits to Kirkuk to receive his rations there,

he would still be able to attain a reasonable standard of living in the KRG area by working and purchasing non-subsidised food locally and would also be able to access support provided by the UNHCR to internally displaced people.

19. Mr Mills also submitted that evidence considered by the Upper Tribunal in the later reported determination of HM and others (Article 15(c)) Iraq CG [2012] UKUT 00409 (IAC), at paragraphs 151 to 152, noted there were difficulties in having the PDS card and its associated entitlement to food rations transferred to the KRG area, not that it was impossible and that such uncertainty counts against a finding that it would be unduly harsh to expect the appellant to relocate to the KRG area.

20. In the alternative Mr Mills submitted that as the preserved finding is that the Appellant had shown a real risk of persecution if he returned to live in Kirkuk this did not necessarily acquaint to a real risk of harm if he made short visits to the city in order to collect food as the risk to him relates to events in August 2007 and it was considered the likelihood he will be recognised and targeted in 2014 in a city of some 500,000 to 700,000 people is sufficiently slight that it cannot be said to render relocation to the KRG area unreasonable.

21. Mr Mills also submitted that even if the Appellant was unable to relocate to the Kurdish north he has the option of relocating to other parts of Central and Southern Iraq and that it would not be unduly harsh to expect him to do so to avoid harm in Kirkuk. Mr Mills relies upon the country guidance case law including SI (expert evidence, Kurd, SM confirmed) CG [2008] UKAIT 00094 as well as the more recent cases of MK, HM2 and HF in support.

Discussion

22. In relation to the Immigration Rules/Qualification Directive; paragraph 339O of the Rules, which is intended to incorporate the Directive, states:

(i) The Secretary of State will not make:
  (a) a grant of asylum if in part of the country of origin a person would not have a well founded fear of being persecuted, and the person can reasonably be expected to stay in that part of the country; or
  (b) a grant of humanitarian protection if in part of the country of return a person would not face a real risk of suffering serious harm, and the person can reasonably be expected to stay in that part of the country.

(ii) In examining whether a part of the country of origin or country of return meets the requirements in (i) the Secretary of State, when making his decision on whether to grant asylum or humanitarian protection, will have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the person.

(iii) (i) applies notwithstanding technical obstacles to return to the country of origin or country of return.

23. Judge Rose found in paragraph 32 of his determination that the Appellant is Kurdish, has no health issues, and is a young man only having been born in 1987. Judge Rose also records in paragraph 27 that the Appellant's evidence was that he had been in contact with his uncle in order to obtain documents and that he did not indicate that he had since been unable to make contact with him again. Although Judge Rose accepted the Appellant's mother has since passed away there is no evidence the Appellant is not able to make contact with his uncle and no evidence to show that family support would not be available if he was required to re-establish himself in another part of Iraq, although the availability or lack of such support is not determinative of the issue.

24. Mrs Chaggar relies upon the UNHCR Eligibility Guidelines but in **HF (Iraq) and others v Secretary of State for the Home Department [2013] EWCA Civ 1276** the Claimant failed asylum seekers unsuccessfully challenged the most recent country guidance decisions relating to Iraq. The Court rejected an argument that there was justification for conferring a presumptively binding status on UNHCR reports merely because of their source. The Court had to assess all the evidence affording such weight to different pieces of evidence as it saw fit.

25. Although not mentioned by either party I have considered the decision in **M A-H (Iraq) v Secretary of State for the Home Department [2013] EWCA Civ 445** in which the Court of Appeal upheld a First-tier Tribunal decision that an appellant who was the son of a former member of the Baath party and who was targeted by members of a militia lead by Iraqi MP, Al-Daini would be at risk in the KRG. The Court of Appeal held that HM and others (Article 15(c)) Iraq CG [2010] UKUT 331 (IAC) did not address the issue of whether relocation provided security for an individual targeted by a specific terrorist group (paras 22 – 23).

26. The Appellant does not claim he has been targeted by militia led by a prominent Iraqi politician but it was submitted that internal relocation to the Kurdish zone will be problematic if the actions of his father were discovered.

27. There is no merit in a claim the Appellant can return as a result of risk associated with country conditions in general and there have been a number of recent cases decided by the European Courts that have considered this issue: In BKA v Sweden (Application no. 11161/11) ECtHR (Fifth Section) (December 2013), it was held that although the Applicant would face a real risk of being subjected to treatment contrary to Article 3 of the ECHR if returned to Baghdad or Diyala, the Court found that he could reasonably settle in another governorate, for instance, the Anbar governorate, where it had not been shown that he would face such a risk. Neither the general situation in that governorate nor any of the Applicant's personal circumstances indicated the existence of said risk. In TA v Sweden (Application no. 48866/10) ECtHR (Fifth Section), 19 December 2013 it was held that there was insufficient evidence to conclude that the Applicant would face a real risk of being subjected to treatment contrary to

Article 2 or 3 of the ECHR upon return to Iraq. In TKH v Sweden (Application no. 1231/11) ECtHR (Fifth Section), 19 December 2013 it was held that the Applicant would not face a real risk of being subjected to treatment contrary to Article 2 or 3 of the ECHR upon return to Iraq. Moreover, his health status was not of such a serious nature that his deportation would give rise to a breach of those provisions.

28. Mr Mills specifically referred me to the case of **MK (documents – relocation) Iraq CG [2012] UKUT 00126 (IAC)** in which the Tribunal held that despite bureaucratic difficulties with registration and the difficulties faced by IDPs, it is wrong to say that there is, in general, no internal flight alternative in Iraq, bearing in mind in particular the levels of governmental and NGO support available. In HM and others (Article 15(c)) Iraq CG [2012] UKUT 00409(IAC) (October 2012) the Tribunal decided that further evidence that has become available since the Tribunal heard MK does not warrant any departure from its conclusions on internal relocation alternatives in the KRG or in central or southern Iraq save that the evidence is now sufficient to establish the existence of a Central Archive maintained by the Iraqi authorities retaining civil identity records on microfiche, which provides a further way in which a person can identify themselves and obtain a copy of their CSID, whether from abroad or within Iraq.

29. The availability of an internal flight option was also confirmed in SI (expert evidence - Kurd - SM confirmed) Iraq CG (2008) UKAIT 00094 in which the Tribunal confirmed the guidance given in SM and Others (Kurds-Protection-Relocation) Iraq CG (2005) UKAIT 00111 that relocation of a Kurd from the KRG to central or southern Iraq could in general be effected without this being unduly harsh and without giving rise to a real risk "in all but the most exceptional high profile cases" of their relocation being brought to the attention of any of the KRG authorities who might be interested in them. SI and SM were effectively confirmed by the Court of Appeal in SH (Iraq) v SSHD (2009) EWCA Civ 462 in which the Court of Appeal also noted that there was a substantial Kurdish population in Baghdad.

30. Designated Judge McCarthy noted in his termination, at paragraph 32, that in his asylum interview in December 2007 the Appellant confirmed he had received his Iraqi identity card from his uncle in Iraq. This will enable him to obtain any other documentation that he requires and to travel freely in Iraq.

31. I note in MK the Tribunal held (i) Entry into and residence in the KRG can be effected by any Iraqi national with a CSID, INC and PDS, after registration with the Asayish (local security office). An Arab may need a sponsor; a Kurd will not. (ii) Living conditions in the KRG for a person who has relocated there are not without difficulties, but there are jobs, and there is access to free health care facilities, education, rented accommodation and financial and other support from UNHCR.

32. It was never part of the Appellant's claim that he will be at risk in all Iraq as his fear is based upon being attacked in his home area of Kirkuk. It has not been shown that those seeking him would have influence in the Kurdish regions and he has not adduced evidence to show that he will be at risk on return as a result of the activities of his father in all of Iraq. The subjective fear of risk from the small groups of former Ba'ath party members it said are spread throughout Iraq has not been proved to be objectively well founded, especially as it has not been established that they will be aware of his return.

33. Although the Immigration Rules refer to the need for the Secretary of State to consider the situation that prevails in a potential point of relocation, in AMM and others (conflict; humanitarian crisis; returnees; FGM) Somalia CG [2011] UKUT 00445 (IAC) the Tribunal held that there is no legal burden on the Secretary of State to prove that there is a part of the country of nationality etc of an appellant, who has established a well-founded fear in their home area, to which the appellant could reasonably be expected to go and live. The appellant bears the legal burden of proving entitlement to international protection; but what that entails will very much depend upon the circumstances of the particular case. It will be for the appellant to make good an assertion that, notwithstanding the general conditions in the proposed place of relocation, it would not be reasonable to relocate there. In an Article 3 claim, a similar position pertains, in that, although the test of reasonableness/undue harshness does not formally apply, unduly harsh living conditions etc – albeit not themselves amounting to a breach of Article 3 – may nevertheless be reasonably likely to lead to a person returning to their home area, where such a breach is reasonably likely.

34. In GH (Iraq) CG [2004] UKIAT 00248 the Tribunal said that the UNHCR submission that the correct consideration of the issue of internal flight required a particular area to be identified and the claimant to be provided with an adequate opportunity to respond was also unacceptable as it shifted the burden of proof to the host country. It was therefore an error of law to consider internal relocation by reference to the UNHCR guidelines on internal protection of 23 July 2003 as this did not accord with UK jurisprudence on the subject.

35. I do not find that the Appellant has substantiated his claim that he will be at risk for the reasons stated throughout the whole of Iraq. I find he has not substantiated his claim to show that he does not have an internal flight option available to him to either the Kurdish zone or one of the other provinces of Iraq. The existence of such option is implicitly accepted as the submissions made on behalf the Appellant are that it will not be reasonable in all the circumstances to expect him to avail himself of that option.

36. In Januzi and others v SSHD [2006] UKHL 5 the House of Lords appeared to suggest that the test was whether an applicant would face conditions such as

utter destitution or exposure to cruel or inhuman treatment, threatening his most basic human rights although in AH Sudan [2007] UKHL 49 the House of Lords said that, if the AIT considered that conditions in the place of intended relocation could not be unreasonable or unduly harsh unless they were liable to infringe an applicant's rights under Article 3 or its equivalent, it was plainly wrong. Nothing in Januzi or in the materials referred to in Januzi suggested such a test. No argument to that effect was advanced in **Januzi**, because there was no issue on the point. To the extent that reference was made to Article 3 in **Januzi** it was to make clear, as might be thought obvious, that a claimant for asylum could not reasonably or without undue hardship be expected to return to a place where his rights under Article 3 or its equivalent might be infringed.

37. In AH (Sudan) it was also said that it was not a correct application of the test to only focus on the comparison between conditions in a claimant's home country as a whole and those prevailing in the proposed area of relocation. Nor was it correct to only compare conditions in the place of habitual residence from which a claimant had fled and those in the safe haven. The decision in Januzi supported both those bases of comparison and did not suggest that one was to be preferred: the weight to be given to each was a matter to be judged by the decision maker in the context of a particular claim.

38. I have considered all elements relating to the general situation in Iraq and those applicable to the Appellant in person. I do not find that it has been established that the Appellant will face a situation of such severity that will prevent him having a relatively normal life by Iraqi standards in all of that country. It has not been established that he will not be able to enter the KRG and as a Kurd he is not likely to require a sponsor or will not be able to obtain one if needed. It has not been established that he will not be able to avail himself of the support that will be available from such as the UNHCR to enable him to meet his basic needs. It has not been established that he is unable to find gainful employment which will enable him to secure housing and purchase food that he cannot acquire from other sources. This is not a case in which it has been established that there would be a requirement to return to Kirkuk to collect rations as I accept that the country material does not state that it is impossible to transfer an individual's ration card. Even though I accept that it may be a difficult process it has not been shown that such would make an expectation to relocate unreasonable.

39. The language of the interpreter request by the Appellant is Kurdish (Sorani) and although there may be some parts of south or central Iraq to which a lack of Arabic may be seen as a barrier, the case law clearly identifies the existence of a substantial Kurdish population living in Baghdad. It has not been shown that it is unreasonable to expect the Appellant to avail himself of the opportunities that might be more likely to assist in re-establishing himself within his own ethnic group, and it has not been shown to be unreasonable in all the circumstances to expect him to do so.

40. The burden is upon the Appellant to substantiate his claim and although there are a number of aspects which stand him apart from many who fail before the Tribunals, such as the acceptance of the core account of his claim to be at risk in Kirkuk, I find he has failed to substantiate his claim that it is not reasonable in all the circumstances to expect him to avail himself of the internal flight option, irrespective of whether his uncle is able to assist or not.

41. As there is such an option the Appellant has not substantiated his claim that he is entitled to a grant of international protection and accordingly this appeal is, again, dismissed.

Decision

42. **I remake the decision as follows. This appeal is dismissed.**

Anonymity.

43. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make that order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed…….
Upper Tribunal Judge Hanson

Dated the 17th March 2014