Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/06572/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination sent**
on 23 April 2014	**On 6 May 2014**
	.....

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MUSTAPHA HAMAD RASUL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr B Criggie, of Hamilton Burns & Co, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1) The appellant identifies himself as a Kurdish citizen of Iraq, born on either 7 January or 1 July 1953. He appeals against a determination by First-tier Tribunal Judge Dennis, dismissing his appeal against refusal of recognition as a refugee.

2) The appellant applied to the First-tier Tribunal for permission to appeal to the Upper Tribunal, on the grounds that the judge was asked to consider whether the level of violence in Iraq was high enough to engage Articles 2(e) and 15(c) of the Qualification Directive, but focused only upon the Refugee Convention and Articles 2 and 3 of the ECHR, and "… in failing to consider the issue of indiscriminate violence … erred in law by failing to take into account evidence on a material matter."

3) On 30 September 2013 First-tier Tribunal Judge Kamara refused permission to appeal, observing that while the judge made no specific mention of those provisions of the Qualification Directive, it was apparent from the overall decision that the claim to humanitarian protection had also been considered and rejected. The representative's submission had been recorded, although no skeleton argument had been provided. There was no material error. Given the findings of the Upper Tribunal in *HM and Others* (Article 15(c)) Iraq CG [2012] UKUT 00409, which the judge was obliged to follow, specific mention would have made no difference.

4) The appellant sought permission to appeal from the Upper Tribunal, on somewhat different grounds, referring to authority that country guidance can be departed from where new evidence indicates a change of country situation:

> The evidence before the FtT judge indicated a spike in the level of indiscriminate violence within Iraq to levels not experienced since the height of sectarian tensions in 2008. The Country of Origin Information Reports and *HM and Others* were based upon evidence pre-2012. The judge was obliged to consider the updated evidence as against the country guidance case.

5) On 23 October 2013 Upper Tribunal Judge Coker granted permission to appeal.

6) The handwritten note of proceedings kept by Judge Dennis shows that the final submission for the appellant was that *HM* was "dated" and that the situation was presently deteriorating in Iraq, reaching the required level of indiscriminate violence. The judge notes: "page 438 of the appellant's bundle, a UN article on an upsurge in violence of March, and pages 439, 442, 443 and 457, evidence of rates of violence".

7) Mr Mullen submitted that a judge was not under a "negative obligation" to explain why he was not following binding country guidance. However, I prefer the argument for the appellant that once the point was raised the judge had to resolve it. It might not need to be dealt with at any great length, but some reason had to be given, and that was not to be found in the determination. That was an error of law which would have to be put right.

8) As to remaking the decision, Mr Criggie said that the appellant relied on the submission made in the First-tier Tribunal. He had there provided a 670 page bundle, most of which was background evidence.

9) I observed that I would not find any duty on the First-tier Tribunal or on the Upper Tribunal to comb through such voluminous material to see if there was anything to support the (quite far reaching) proposition that country guidance should not longer stand. The basic obligation on a tribunal must be to resolve the point based on the specific material relied upon.

10) Mr Criggie said that the necessary references were those identified in the handwritten note by Judge Dennis. These consist of a US State Department report and of news articles all dealing with a spike in violence, commonly agreed to reach the worst levels since 2008. He said that was enough to depart from *HM and Others*, and to allow the appeal on Article 15(c) grounds.

11) Mr Mullen in response relied on *Elgafaji*, CJEU C-465/07, 17 February 2009. The Court made it clear at paragraph 38 that Article 15(c) required "a clear degree of individualisation", and went on at paragraph 39:

> ... the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.

12) Mr Mullen pointed out that the appellant was found to be a thoroughly unreliable witness. He was at the bottom end of the scale of those who might be considered for protection under Article 15(c). The evidence of the spike in violence in April to May 2013 was not that it was pervasive throughout the country, but that it pertained in certain areas. Evidence that the level of violence at that period reached the highest since 2008 was not a basis for reaching conclusions different from those in *HM*. Paragraph 45 of *Elgafaji* also showed the high level generally required before it could be shown that a civilian would be at risk solely on account of his presence in his country. There was no case law to date, either in the UK or in any other EU state, holding that such a level in Iraq had been established.

13) Mr Criggie in response acknowledged that there is no UK authority tending to supersede *HM*, and that he is not aware of any authority elsewhere.

14) I reserved my determination.

15) The appellant has not shown that there is evidence to justify departure from the general conclusions in *HM*. Given the findings in his individual case, the appellant falls at the lowest level of potential requirement for protection under the Qualification Directive. Simply as a citizen of Iraq, applying *Elgafaji* and *HM*, he does not qualify.

16) The determination has been set aside on a limited point only. That having been resolved, the appeal is **dismissed on all available grounds**, including those arising under the Qualification Directive.

Hugh Macleman

28 April 2014
Judge of the Upper Tribunal