Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/08319/2017**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 26 January 2018	**On 9 February 2018**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[H A]
(ANONYMITY NOT DIRECTED)

Respondent

Representation:
For the Appellant: Ms R Petterson, (Senior Home Office Presenting Officer)
For the Respondent: Ms S Khan (Counsel)

DECISION AND REASONS

1. This is the Secretary of State's appeal to the Upper Tribunal, brought with the permission of a Judge of the First-tier Tribunal, from a decision of the First-tier Tribunal (hereinafter "the tribunal") which it sent to the parties on 23 October 2017, whereupon it allowed the claimant's appeal against the Secretary of State's decision of 15 August 2017 refusing to grant him international protection.

2. The claimant is a citizen of Iraq and is of Kurdish ethnicity. He is from Diyala in Iraq. None of that was the subject of dispute before the tribunal. In seeking asylum he gave an account of his being pressurised to work for the organisation sometimes referred to as "ISIS". He claims, however, that he responded to this bid to forcibly recruit him by fleeing for his own safety.

3. The Secretary of State did not believe that the claimant had told the truth about the claimed attempt to forcibly recruit him. Nor, for that matter, did the Secretary of State believe a further claim he had made to the effect that he had experienced difficulties in the past due to his father's claimed history as a former member of the Ba'ath party. The Secretary of State, as I understand the reasons for refusal letter in this case, thought that it would be safe for him to return to Diyala. Whilst this is perhaps clumsily expressed I have in my paragraph 55 of that letter where it is said:

> "55. It is noted that in Iraq you fear returning to Diyala governorate. This means that you have related your fear of return only to certain areas within Iraq. It is also noted that in general, a person can relocate to Diyala as ISIS does not control this area (country policy info: internal relocation 3.1.2)."

4. It was then suggested, in the same letter, that in any event the claimant would be able to relocate elsewhere in Iraq.

5. The claimant, having been refused international protection, appealed. His appeal came before the tribunal on 27 September 2017. Both parties were represented. The claimant's representative before the tribunal was, as before me, Ms S Khan. The tribunal, as noted, allowed the claimant's appeal. It did so despite its view that he had not offered a credible account concerning the claimed forcible recruitment. It does not seem to have dealt with any risk consequent upon the father's claimed previous involvement with the Ba'ath Party but perhaps that was not pursued. In any event the tribunal concluded that, having reminding itself of what had been said in AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC), that there was a state of internal armed conflict in Diyala and that any person returned there would, solely on that basis, face a real risk of indiscriminate violence amounting to serious harm within the scope of article 15(c) of the Qualification Directive. The tribunal also decided that the claimant would not have available to him a viable internal flight alternative having considered the possibility of his relocating to Baghdad (the place where he would be returned) or the area controlled by the Kurdish authorities ("KRG"). The tribunal explained its reasoning as to all of that in this way:-

> "23. The refusal letter does not suggest Diyala is no longer a contested area. The Country Policy Information Note, Iraq; Return/ Internal relocation. Version 5.0 September 2017 confirms the situation in Diyala is still so serious it reaches the Article 15C threshold. I therefore accept the appellant cannot return to his home area and would have to relocate. I have not believed his evidence concerning contact with his family but as he is from Diyala and given what is said about the difficulty in obtaining documents in such areas I accept he will be

> unable to obtain the necessary entry evidence on return to Baghdad. I accept he speaks Arabic and Kurdish so he has the benefit of being able to speak Arabic but given he is from Diyala I accept he will be alone in Baghdad and would as a Sunni Kurd find it very difficult to support himself. I am not satisfied in those circumstances that Baghdad is a viable option. There is a paucity of evidence of how, therefore, he would be able to safely travel from Baghdad to the KRG and on the current evidence I am not satisfied this is viable as I understand if he can be forced to leave the KRG if he cannot find work. This isn't a safe and durable option in his circumstances."

6. So, the appeal succeeded.

7. The Secretary of State applied for permission to appeal. The grounds, in summary, contain these propositions:

   (a) The tribunal misread the Home Office policy document to which it referred and which actually suggests that since ISIS have lost territory in Iraq safe return is possible to most areas of that country including Diyala;

   (b) The tribunal wrongly concluded that the claimant would not be able to obtain documentation from Diyala and that wrong conclusion fed into its assessment as to relocation to Baghdad;

   (c) The tribunal did not adequately consider the possibility of relocation to the KRG.

8. Permission to appeal having been granted there was a hearing before the Upper Tribunal (before me) so that the question of whether or not the tribunal had erred in law could be explored and decided. I am grateful to each representative.

9. At the hearing Ms Khan provided me with a typed note constituting her record of what had been said before the tribunal. She told me that the relevant Home Office policy document had not been placed before the tribunal by the representative for the Secretary of State. She said that the Secretary of State's representative had simply relied upon the content of the reasons for refusal letter and had not invited the tribunal to depart from what had been said in the Country Guidance decision in AA. Ms Petterson, at that stage, suggested that Ms Khan was giving evidence to the Upper Tribunal but I accept that a representative is entitled to inform the Upper Tribunal, during the course of a hearing such as this, as to what recollections she/he may have about what was said below and, of course, Ms Khan had her note in any event. But the intervention did cause me to consider whether if there was going to be dispute about what was said I should consider an adjournment for Ms Petterson to see if there was any similar note which had been made by the Secretary of State's representative. In the end, though, such proved to be unnecessary.

10. Ms Petterson argued that, whether the policy document had been placed before the tribunal or not, it had considered it for itself and had misread it. Even if that were not the case, the consideration of internal flight to the KRG had been very brief and did not amount to a proper consideration. Ms

Khan, replying, said that it had been accepted in the reasons for refusal letter that Diyala was controlled by ISIS. She referred me to paragraph 53 of that letter which reads as follows:

> "53. In light of the above conclusions, it is accepted that you have demonstrated a genuine subjective fear on return to Iraq. However, for the reasons given below it is considered that your genuine subjective fear is not objectively well founded because you are able to internally relocate in Iraq".

11. She further argued that AA is still extant and binding Country Guidance case law. So, ran the argument, tribunals have to follow it unless satisfied that there has been a durable change. The tribunal had not been invited by the Secretary of State to depart from Country Guidance and the policy document in isolation cannot be taken to displace the Country Guidance. The tribunal's findings as to risk in Diyala had been open to it. Alternatively, even if the tribunal had erred any error could not be material because the tribunal was required, as a matter of law, to apply AA in any event. The reasoning as to internal flight to Baghdad had not been challenged by Ms Petterson today. The reasoning as to internal flight to the KRG was succinct but, nevertheless, adequate.

12. After hearing the submissions I was able to inform the parties that I would be concluding that the tribunal's decision had to be set aside on the basis that it had given inadequate reasons for its conclusions as to internal flight to the KRG. I indicated I would decide later whether there were any other errors of law and also whether, given that I was setting aside the tribunal's decision, I would retain the case in the Upper Tribunal or remit to the First-tier Tribunal.

13. I have, in fact, decided that the tribunal erred not only in the way in which it dealt with internal flight to the KRG but in other ways too. I explain my reasoning, as to all of that now.

14. There is no doubt that, in considering what the situation was with respect to regulation 15c of the Qualification Directive, the tribunal did consider the policy document referred to above. There is an extract from it contained in the grounds of appeal to the Upper Tribunal and it has not been suggested, at any point, that the extract, as produced in the grounds, is incorrectly worded. The extract quoted is as follows:

> "2.2.3 Since AA (Iraq) was promulgated, the security situation has changed. In particular:
>
> · Daesh (Islamic State of Iraq and Syria/ the Levant) have lost territory;
>
> · Government Iraq (GI) and/ or associated forces have regained control of some areas;
>
> · The level of violence has declined;

· Internally Displaced Persons (IDPs) are returning to their areas of origin.

See the country policy and information note on Iraq: security and humanitarian situation.

2.2.4 **Therefore, internal relocation is, in general, possible to all areas of Iraq except;**

· Anbar Governorate (but possible to the areas – Daesh no longer controls, including the Fallujah, Ramadi and Heet districts), Ninewah Governorate, the parts of Kirkuk Governorate in and around Hawija, and the parts of the "Baghdad Belts" (the residential, agricultural and industrial areas that encircle the city of Baghdad) that border Anbar, Diyala and Salah al-Din.

These areas are still assessed as meeting the Article 15c threshold."

15. So, and the contrary was not argued before me or in the written grounds, the tribunal was incorrect in saying the policy document "confirms the situation in Diyala is still so serious it reaches the Article 15c threshold". Indeed, according to the wording set out above, it says the opposite. I have no doubt, in looking at paragraph 23 of the tribunal's written decision, that its view as to what the policy document relevantly stated was a factor in its concluding that there remained an Article 15c risk in Diyala. On the face of it, therefore, it does appear that the tribunal has erred through misunderstanding relevant evidence and through reaching a view as to an important aspect of the case on the basis, in part at least, upon that misunderstood information. But, as noted, Ms Khan makes a number of points about that which I must now consider.

16. It is said that the Secretary of State's representative simply relied upon the content of the reasons for refusal letter which, of itself, contained an acceptance that Diyala is still controlled by ISIS such that risk remains for anyone (I suppose other than ISIS members) simply in consequence of being present in Diyala.

17. The reasons for refusal letter is imperfectly drafted and to an extent does lack clarity. But I do not read it in the way Ms Khan does. I have set out paragraph 53 and paragraph 55 of that letter above. I have not been taken to anything else in the letter that might be interpreted as an indication that the Secretary of State, when the letter was prepared, was accepting that ISIS did still control Diyala or was accepting that there remained an Article 15c risk in Diyala. Paragraph 53 does talk about a "subjective fear" but that does not seem to me to amount to a concession with respect to any Article 15c risk. Surely, if the Secretary of State had been of the view that there was such a risk then it would have been acknowledged that the claimant had an objective fear. But, perhaps confusingly, the paragraph does then make the point that the claimant can internally relocate rather than making the point that he can simply return to Diyala. Nevertheless, paragraph 55 does contain the view, expressed by the Secretary of State, that ISIS does not control Diyala and that "in general a person can relocate

to Diyala". So, I conclude that it cannot be said that the reasons for refusal letter does contain an acceptance on the part of the Secretary of State that ISIS still control Diyala (in fact the opposite is said) or that there remains an Article 15c risk there.

18. Ms Khan makes the point that the policy document was not placed before the tribunal by the Secretary of State's representative at the appeal hearing or before it. I am happy to accept that that is so. Ms Khan's note does not make any reference to it being produced on behalf of the Secretary of State at the hearing and there is no copy of it in the Upper Tribunal's file which there probably would have been had a hard copy been handed up. But given what is said in the reasons for refusal letter to which I have already referred, I do not accept that the mere fact of the failure to produce it relieved the tribunal of an obligation to consider whether country conditions in Iraq, or more specifically in Diyala, had changed. Had I read the reasons for refusal letter in the way that Ms Khan does or had there been a record of the Secretary of State's representative accepting that there had been no changes in Diyala since the decision of the Upper Tribunal in AA had been made then I might have reached a different view. But that was not the case.

19. Ms Khan says that the tribunal was not invited to depart from the Country Guidance decision in AA in any event. Again, I am happy to accept that no specific invitation was made to the tribunal to do so. I say that on the basis of Ms Khan's note of the hearing. But again matters come back to the content of the reasons for refusal letter. On my reading the Secretary of State, in writing that letter, as I have already said, was indicating or suggesting that there had been a significant material change in that ISIS was no longer in control of Diyala. So, the invitation was already there and there is nothing to suggest it was withdrawn by the Secretary of State's representative. I agree that where it is part of the Secretary of State's case, or indeed part of a claimant's case, that pre-existing Country Guidance should not be followed, that really ought to be prominently flagged up for the tribunal in oral submissions or, perhaps more appropriately, at the very outset of a hearing. It may be that in that sense the tribunal did not receive the degree of assistance it was entitled to expect. But what had been said was, in my judgment, sufficient to trigger the tribunal's obligation to deal with the matter of changes in Diyala. Indeed, the tribunal did do so, albeit that it misunderstood the Secretary of State's stance and the policy document.

20. Finally, Ms Khan submits that any error that the tribunal made in misunderstanding the policy document could not possibly have been a material one because the document, of itself, was incapable of justifying departure from pre-existing Country Guidance. She says, more specifically, it was incapable of indicating that there had been a "durable change" in country conditions in the relevant part of Iraq. It is not necessary, for the purposes of this decision, for me to go through the various authorities which address the question of when Country Guidance may be departed from. There is relevant material as to that in Practice Direction 12.2 and

12.4 and the UTIAC Guidance Note 2011, no. 2. Departure may be justified where there is credible fresh evidence relevant to the issue that was not considered in the Country Guidance case. That may be where Country Guidance has become outdated by reason of developments in the country in question. But a durable change should be demonstrated.

21. The indications contained in the policy document refer to changes of significance in consequence, in particular, of ISIS having lost territory. Perhaps it might be said that the document, of itself and taken in isolation, could not have been capable of persuading the tribunal that the conditions necessary for departure from Country Guidance in the context of Diyala had been satisfied. But it certainly was sufficient to raise that possibility. Had the tribunal not misunderstood the document, therefore, it might have been that it would have wished to hear further from the parties or would have directed further relevant material to be produced. That might have led to a different outcome. I am unable to say, therefore, that the error which the tribunal did make as to the document could not have been a material one.

22. In light of the above I have concluded that the tribunal did err, in a material way, through its misreading of the policy document. On that basis alone, therefore, the tribunal's decision does fall to be set aside.

23. As to other matters what was said about the lack of viability of internal flight to the KRG was very brief. Brevity, of itself, does not bring about legal error and is not to be discouraged. But, whilst it appears that the tribunal took the view the claimant would not be likely to find work in the KRG and might be removed from there in consequence, those conclusions were not explained at all. No reasons for those conclusions were offered. So that represents a further error of law on the part of the tribunal.

24. My analysis as to additional errors has stopped there. That is because, having decided that the tribunal's decision must be set aside on the basis of its having made two errors of law I have decided that there ought to be remittal for a complete rehearing. As to that, I appreciate that Ms Petterson did not actively pursue the grounds regarding the internal flight to Baghdad. I appreciate that Ms Khan, in her grounds, did not seek to challenge the tribunal's findings regarding the claims concerning forcible recruitment by ISIS. Nevertheless, I have decided that a substantial amount of the tribunal's reasoning has been infected by the errors I have identified. There is sometimes a degree of artificiality in seeking to pick out aspects of a tribunal's decision that can and aspects that cannot be preserved. I take the view that since I have identified errors with respect to the safety of return to the home area as well as the availability of internal flight, and since therefore much of the tribunal's reasoning cannot stand, it is most appropriate to remit to the First-tier Tribunal for a complete rehearing and to give the tribunal an entirely blank canvas. So, I will set aside the whole of the tribunal's decision and there shall be a remittal for a complete rehearing where all matters will have to be considered afresh.

25. I do think, though, that it is important that the tribunal rehearing the case ought to know, in advance, precisely and in entirely straightforward terms what is being asked of it. The previous tribunal was hamstrung because of a lack of such clarity which probably goes a long way to explaining why it erred as it did. It is because of that need that I have set out what might appear to be relatively prescriptive directions. Those directions may be replaced, amended or supplemented but I hope that they will be of some assistance in ensuring that the issues of dispute are clearly identified in readiness for the rehearing.

26. Finally then, my decision is that the tribunal's decision involved the making of errors of law. The tribunal's decision is set aside. The case is remitted to the tribunal for a complete rehearing in accordance with the directions set out below.

Directions

A. There shall be a complete rehearing of the appeal before a differently constituted First-tier Tribunal (in other words before a different Judge).

B. The rehearing shall take place at the Bradford Hearing Centre. There shall be a time estimate of three hours. The claimant shall be provided with a Kurdish-Sorani speaking interpreter.

C. The Secretary of State shall provide to the First-tier Tribunal, at least ten working days prior to the date which will be fixed for hearing, a written submission confirming in clear terms whether or not the tribunal rehearing the appeal is to be invited to depart from Country Guidance as contained in AA or any other current Country Guidance decisions concerning Iraq. When that submission is sent to the First-tier Tribunal a copy must simultaneously be sent to the claimant's solicitors.

D. If the Secretary of State wishes to rely on any further documentary evidence, policy guidance or background country material, copies must be supplied to the tribunal and to the claimant's solicitors within the above time frame. Such material should be contained in an indexed and paginated bundle with a schedule of essential reading if appropriate.

E. If the claimant seeks to rely upon any further documentary evidence or background country material which has not already been sent to the First-tier Tribunal or the Upper Tribunal, such material should be sent to the tribunal (with a copy simultaneously sent to the Secretary of State) at least five working days prior to the date which will be fixed for the rehearing. Again, such material should be in the form of an indexed and paginated bundle with, if appropriate, a schedule of essential reading.

F. If the claimant is to give any oral evidence to the tribunal at the rehearing beyond what is contained in his witness statement of 20 September 2017, such evidence must be set out in a supplementary witness statement drawn in sufficient detail so that it, coupled with the

statement of 20 September 2017, may stand as his evidence-in-chief. The statement should be sent to the tribunal (with a copy being sent to the Secretary of State) at least five working days prior to the hearing date.

G. These directions may be varied, replaced or supplemented at any time by any salaried Judge of the First-tier Tribunal.

H. The parties should note that the Upper Tribunal considers it important that these directions are adhered to by both.

Decision

The decision of the tribunal involved the making of errors of law. It is set aside.

The case is remitted for a complete rehearing before a differently constituted First-tier Tribunal.

Anonymity

No anonymity order is made. None was made by the First-tier Tribunal and none was sought before me.

Signed: Date: 7 February 2018

Upper Tribunal Judge Hemingway

TO THE RESPONDENT
FEE AWARD

I make no fee award.

Signed: Date: 7 February 2018

Upper Tribunal Judge Hemingway