Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/00657/2017

<u>THE IMMIGRATION ACTS</u>

Heard at Manchester	**Decision & Reasons Promulgated**
On 13 March 2018	**On 27 March 2018**

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

<u>Appellant</u>

and

A S M
(ANONYMITY DIRECTION MADE)

<u>Respondent</u>

<u>Representation</u>:
For the Appellant: Mr Hussain, instructed by Broudie Jackson & Canter, Solicitors
For the Respondent: Mrs Aboni, Senior Home Office Presenting Officer

<u>DECISION AND REASONS</u>

1. The respondent, A S M, is a citizen of Iraq. I shall hereafter refer to the respondent as the appellant and the appellant as the respondent (as they appeared respectively before the First-tier Tribunal). By a decision which is dated 30 November 2017, I found that the First-tier Tribunal erred in law such that its decision fell to be set aside. My reasons were as follows:

> "1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant, ASM, was born in 1991 and is a

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female citizen of Iraq. She came to the United Kingdom in July 2016 when she claimed asylum. Her application for asylum was refused by a decision of the Secretary of State dated 6th January 2017. The appellant appealed to the First-tier Tribunal (Judge Myers) which, in a decision promulgated on 7 March 2017 allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The judge found the appellant to be a "singularly unimpressive witness." [22]. The judge found that the appellant had fabricated her account of fleeing forced marriage and found also that "[the appellant] has her family's full support for her marriage to her husband. I find there was nothing to prevent her returning to her family in the IKR [Independent Kurdish Region]." The judge moved on to consider risk on return. He noted the appellant claimed not to have a passport or Civil Status Identity Document (CSID). The judge found that there was no evidence to show that the appellant had been "pre-cleared with the IKR authorities [for a return to the IKR]". The judge found that she was "left with the situation that the appellant would be returned to Baghdad as a lone woman with no documentation, unable to speak Arabic and from a minority community."

3. The parties are agreed that the appellant is an Iraqi Kurdish woman from Sulimaniyah in the IKR, Iraq. The grounds assert that, instead of considering whether the appellant could obtain pre-clearance from the IKR authorities, the judge had, instead, proceeded to consider irrelevant matters, namely whether the appellant had a passport or CSID, the latter only of relevance were she to settle and live in Iraq. The grounds also complain that the judge effectively reversed the burden of proof by finding that "there was no evidence that [the appellant] has been pre-cleared with the IKR authorities"; the respondent observes that the onus remained on the appellant to show that her identity had been pre-cleared and it seemed likely, in light of the judge's findings, the appellant's family in the IKR could assist in resolving that matter.

4. I find that the judge's decision is problematic. At [33], the judge appears to find that the appellant would be likely to return to the IKR with her husband and with the support of her family who live there. However, she then dismisses her own observation as "mere speculation". It was entirely within the judge's power, on the evidence, to make a finding as to the likelihood of family support in the IKR and, indeed, whether the appellant's husband would return to live with her there. I am not clear as to why this should amount to "mere speculation." I also agree with the respondent that the judge has raised the question of pre-clearance with the IKR authorities (which would enable the appellant to fly directly to Erbil in the IKR and bypass Baghdad altogether) but then has not made any proper findings in relation to that issue. Instead, at [34], the judge has considered the possible position of the appellant in Baghdad where she would have no CSID. This is strange given that, if pre-clearance to the IKR were to be obtained, the appellant could fly directly to Erbil; the possession of a CSID only arises as a factor in the risk on return analysis if the appellant had to live for any length of time in Iraq, as opposed to the IKR. Overall, I find the judge's decision to be incomplete and confused. I have decided to set it aside.

5. I have, however, refrained from remaking the decision by dismissing the appeal. The judge's findings as regards the appellant's asylum claim are entirely sound and they shall stand. The only question in this case is whether the appellant can travel directly to the IKR and live there with her family. Because the judge in the First-tier Tribunal did not examine this issue in any proper detail, it remains for the Upper Tribunal to do so. I therefore direct that there should be a resumed hearing before me at Manchester on the first available date.

Notice of Decision

The decision of the First-tier Tribunal which was promulgated on 7 March 2017 is set aside. The judge's findings on the appellant's asylum appeal shall stand. The only issue remaining to be determined relates to the feasibility of the appellant returning directly to live in the Independent Kurdish Region (IKR). That issue is adjourned to a resumed hearing before Upper Tribunal Judge Lane in the Upper Tribunal at Manchester on the first available date. The parties may adduce fresh evidence relating to that issue provided that evidence is sent to the Upper Tribunal and to the other party no less than 10 clear days prior to the resumed hearing."

2. Matters have moved on since I wrote that decision. In particular, some of the assumptions which I have made at [4] no longer pertain. As at the date of writing, it is not now possible for the appellant to enter the IKR by flying into Erbil directly. Following the September 2017 Kurdish Independence Referendum, the Federal Government of Iraq has banned international flights into and out of the IKR through Erbil. Only domestic flights are now allowed. Mrs Aboni, for the Secretary of State, submitted that the Secretary of State would not seek to return the appellant to Iraq until it would be safe to do so. She submitted that the ban on international flights into Erbil is likely to be temporary and, when such flights resume, it would be possible for the appellant to be returned to the IKR directly from the United Kingdom by that route. Mr Hussain, for the appellant, relied upon the Court of Appeal's grant of permission in *AA (Iraq)* [2016] EWCA Civ 779 and also the substantive decision of the Court of Appeal in that case. Granting permission, the Court of Appeal identified the tension which existed between *HF (Iraq)* [2013] EWCA Civ 1276 and *HH Somalia* [2010] EWCA Civ 426. In the permission grant, the Court of Appeal wrote:

> "There is also, he submits, an illogicality in the Tribunal's approach. It recognised that, since AA could not currently be returned, "it could be said to be unnecessary to hypothesise any risk to him upon his return". (Such a proposition would indeed be consistent with what Elias LJ said in HF: see [15](a) above). But in fact the Tribunal decided that an applicant should not be precluded from pursuing a claim to international protection where the asserted risk of harm was not (or not solely) based on factors (such as lack of documentation) that currently rendered a person's actual return unfeasible. It gave the example of Jews and Nazi Germany and went on to remit the matter to the FtT to make the further necessary findings. One of the matters of factual dispute was as to AA's claimed inability to speak Arabic, the

whereabouts of his family members and possibly his ability to enter and remain in the IKR.

The illogicality is said to be this. One approach is to say that, if someone cannot be returned, it is inappropriate to hypothesize about what risk there will be to his safety if he is returned, not least because circumstances (whether personal to him or applicable in the country of intended return) may change by the time he can be returned. Another is to say that all matters relating to safety on return should be decided without delay. What is illogical is to decide all matters relating to safety with one exception, namely questions relating to whether, if returned, the appellant will have a CSID or will be able to obtain one and the risk of destitution if he cannot.

I was originally of the view that permission should be refused on the ground that the matter was determined by HF and that the decision in HH did not lead to any different conclusion because (a) it was obiter; (b) it concerned safety on passage from port of arrival to place of safety rather than an impediment to return; and (c) it was overtaken by HF.

I have, however, come to the conclusion that AA should be given permission to appeal on ground 1, namely whether as part of an assessment as to whether an individual required international protection a decision maker is (a) bound to consider whether the individual concerned had in his possession or could obtain a CSID either before he returned to Iraq or within a short period of returning there, failing which (in the absence of an alternative means of support) his circumstances were likely to amount to a breach of Article 3 and (b) not entitled to postpone any decision on that question if it was not feasible from him to be returned to Iraq.

I have reached that view because it seems to me arguable (with a realistic prospect of success) that the issue is not necessarily determined by HF; and that HH, which does not appear to have been cited in HF, may be said to point to a different result in the circumstances of this case (which are not the same as those in HF). The question is an important one of principle or practice applicable to many different individuals and merits consideration as a second appeal. The answer may be that a decision-maker should leave out of consideration any risk of harm attributable to want of a CSID because the fact that its absence creates a risk to safety as well as an impediment to return should not mean that that risk has to be considered when return is not possible. But it does not seem to me that that result is necessarily mandated by HF, which concerned only an identity document whose absence was an impediment to return, and may be contra-indicated by HH. In addition it is desirable for the court to address the arguable illogicality to which I referred in [28] above, which did not arise for consideration in HF."

3. At the substantive hearing of the appeal, the Court of Appeal found as follows:

"In reaching this part of their conclusions, the UT equated the CSID simply to a return document. On that basis, they applied the approach outlined by Elias LJ in HF (Iraq) v Secretary of State for the Home Department [2013] EWCA Civ 1276; [2014] 1 WLR 1329. In that case,

the point at issue was whether an Iraqi national returned to Iraq without a passport or laissez-passer would be detained at Baghdad airport and subjected to Article 3 ill-treatment. However, the risk rose from the absence of those documents, without which the Appellant could not be returned at all. In that context, the Court concluded that the question was redundant. Elias LJ expressed his conclusion as follows:

"98. … [Counsel for the Secretary of State, Mr Eadie]'s contention is that, properly analysed, the practice of not returning those without the appropriate documents is not a voluntary policy of the Secretary of State at all. The lack of documentation creates an impediment to return which the Secretary of State cannot circumvent. Iraq will not receive anyone from the UK without the relevant travel document. If an unsuccessful applicant for asylum refuses to co-operate to obtain the laissez passer document, he is in precisely the same situation as any other failed asylum seeker whom the Secretary of State is unable to return for one reason or another. The assurance of the Secretary of State that she would not return someone to Iraq without the relevant documents is of no special significance; it simply reflects realities. …

99. Mr Eadie submits that these appellants are precisely in the situation of any other failed asylum seekers who would not be at risk in their own state but cannot for technical reasons be returned home. The existence of technical obstacles does not entitle them to humanitarian protection. …

100. Mr Eadie says that this is not like the J1 case [2013] EWCA Civ 279 or the sur place cases where, if returned, the appellants would potentially face ill-treatment meeting Article 3 standards. They can only be returned with the necessary documentation, and if and when the impediment caused by lack of the relevant documentation is overcome, they will be safe on return.

101. In my judgment, this analysis is correct. I accept, as Mr Fordham submits, that it would be necessary for the court to consider whether the appellants would be at risk on return if their return were feasible, but I do not accept that the Tribunal has to ask itself the hypothetical question of what would happen on return if that is simply not possible for one reason or another. …"

The position with a CSID is different. It is not merely to be considered as a document which can be used to achieve entry to Iraq. Rather, it may be an essential document for life in Iraq. It is for practical purposes necessary for those without private resources to access food and basic services. Moreover, it is not a document that can be automatically acquired after return to Iraq. In addition, it is feasible that an individual could acquire a passport or a laissez-passer, without possessing or being able to obtain a CSID. In such a case, an enquiry would be needed to establish whether the individual would have other means of support in Iraq, in the absence of which they might be at risk of breach of Article 3 rights.

As the Appellant reminds us, decision-makers must take decisions on entitlement to protection within a reasonable period of time, and must not decline to address a material element of a claim such as this: see AG (Somalia) v Secretary of State for the Home Department [2006]

> EWCA Civ 1342 at [29]; HH (Somalia) v Secretary of State for the Home Department [2010] EWCA Civ 426 at [63] and JI v Secretary of State for the Home Department [2013] EWCA Civ 279, [42]-[54], in addition to Council Directives 2004/83/EC and 2005/85/EC. The Secretary of State agrees with this analysis. Hence, it will be wrong indefinitely to postpone the enquiry.
>
> Since the parties are agreed as to the error of law in this case, and what needs to be done to correct it, there is no point in remitting the case to the UT. The correction to the country guidance can be made by this court. Following submissions as to the best procedure to adopt, the parties are agreed that the safest course is to append to this judgment a complete revised Country Guidance, with the amended text highlighted. By this means, the revisions will be evident, but practitioners will have ready access to the Guidance in one document, avoiding the inconvenience and risk of confusion which might otherwise arise. The amended country guidance appears as the Annex to this judgment. Paragraph 170 of the UT's judgment should be read in the light of and consistently with this amended guidance."

4. In the light of the reasoning of the Court of Appeal, I find that I agree with Mr Hussain that this appellant cannot be kept in limbo indefinitely whilst the Secretary of State waits for country conditions to change in Iraq enabling return directly to Erbil. The appellant does not have a CSID card and removal to Iraq can only be via Baghdad. Mrs Aboni did not challenge the submission of Mr Hussain that return to Iraq for this appellant with no CSID card through Baghdad would expose her to a real risk of harm. The Sectary of State has not argued that the appellant could, without a CSID card or any other form of identity document be on the *laissez passer* (which would have only enabled the appellant's return from the United Kingdom to Baghdad) the appellant would not be able to access a flight immediately from Baghdad to Erbil and that taking an overland route from Baghdad to Erbil would be exceedingly hazardous. Mr Hussain fully acknowledged that a new decision could be issued by the Secretary of State if conditions change and return directly to Erbil became possible. He accepted that, given the fluid nature of events in Iraq, any protection afforded to the appellant in the United Kingdom may be of only very short duration. However the fact remains that (a) the Upper Tribunal should now consider the risk to this appellant of returning to Iraq via Baghdad and (b) such a return would expose the appellant to Article 3 ECHR risk. In the circumstances, her appeal is allowed.

Notice of Decision

5. This appeal is allowed on Article 3 ECHR 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 23 March 2018

Upper Tribunal Judge Lane

TO THE RESPONDENT
FEE AWARD

No fee is paid or payable and therefore there can be no fee award.

Signed Date 23 March 2018

Upper Tribunal Judge Lane