



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/03850/2017(V)

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre
On 13 August 2020 Remotely

Decision & Reasons Promulgated
On 27 August 2020

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

S M M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Gardiner instructed by Migrant Legal Project
For the Respondent: Mr I Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant. A failure to comply with this direction could lead to Contempt of Court proceedings.

Introduction

2. The appellant is a citizen of Iraq who was born on 27 March 1995. He is of Kurdish ethnicity and comes from a village called Albu Najim in the district of Daquq in Kirkuk Governorate.
3. The appellant arrived in the United Kingdom on 8 October 2016 and claimed asylum. The basis of his claim was twofold. First, he claimed that he feared ISIS which had attacked his village in August 2014 causing him and his family to flee. He had been separated from his parents and he fled to Daquq where he stayed until October 2014 when he left and went to Kirkuk City where he lived with his aunt until April 2015. He then moved to Shwan. It was the events that he claimed occurred in Shwan that formed the second basis of his claim. Secondly, the appellant claimed that, whilst in Shwan, he had a relationship with a young woman who was the daughter of a tribal leader. He lived with the family and during that time, without the family's knowledge, he formed a relationship with the tribal leader's daughter and she became pregnant. When the family discovered their relationship, he fled. The appellant claimed that he feared that he would be subject to a "honour killing" by the family if he returned to Iraq.
4. On 7 April 2017, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and on human rights grounds.

The Appeal

5. The appellant appealed to the First-tier Tribunal. In July 2017, the First-tier Tribunal dismissed the appellant's appeal. The appellant appealed to the Upper Tribunal which, in July 2018, set aside the First-tier Tribunal's decision and remitted it to the First-tier Tribunal for a *de novo* rehearing. That appeal was heard by Judge Wilson on 17 October 2018. He dismissed the appellant's appeal on all grounds.
6. The appellant again appealed, with permission, to the Upper Tribunal. That appeal was heard by me on 30 May 2019. In a determination sent on 26 June 2019, I upheld Judge Wilson's adverse credibility finding and his decision to dismiss the appellant's appeal on asylum grounds. However, I concluded that the judge had erred in law in dismissing the appellant's appeal on humanitarian protection grounds and in finding that Art 15(c) of the Qualification Directive (2004/83/EC) did not apply to the appellant in his home area of Kirkuk. I further concluded that the judge had erred in law in finding that the appellant could internally relocate.
7. The appeal was adjourned and retained in the Upper Tribunal to remake the decision. The adjournment was in order to await the forthcoming country guidance decision in respect of Art 15(c) and Iraq which was subsequently published in December 2019: SMO, KSP & IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 400 (IAC) ("SMO and Others").
8. In light of the COVID-19 crisis, the Upper Tribunal invited submissions as to whether or not the appeal could be completed without a hearing. Following submissions

from the parties, the Upper Tribunal directed that the appeal be listed for a remote hearing.

9. Consequently, on 13 August 2020, the appeal was listed before me. The appeal took place at Cardiff Civil Justice Centre with me based in the court and Ms Gardiner, who represented the appellant, and Mr Jarvis, who represented the respondent, taking part in the hearing remotely via Skype for Business.

The Hearing

10. Before me, the appeal proceeded by way of submissions only. Mr Jarvis relied upon the written submissions made prior to the hearing and Ms Gardiner relied upon her detailed skeleton argument which incorporated written submissions made prior to the hearing. Both representatives developed their arguments orally.
11. The evidence consisted largely of the evidence before the First-tier Tribunal. However, in addition Ms Gardiner sought to rely upon a supplementary bundle of documents. This consists of a witness statement from the appellant dated 18 March 2020 (E1 - E2); an email from his partner, "BT" (E3); the birth certificate of their child, "A" (E4); various photographs (E5-E16). Finally, there is a psychiatric report prepared by Dr Alison Battersby dated 23 February 2020 (E18 - E47).
12. Mr Jarvis did not seek to raise any objection to the admission of these documents under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended). Subject that is to this point, namely his submissions in relation to their relevance under Art 8 and the appellant's reliance upon the now claimed relationships with BT and A amounting to a "new matter" under s.85(5) and (6) of the Nationality, Immigration and Asylum Act 2002 (as amended) (the "NIA Act 2002"). I will return to this issue below.

The Issues

13. The issues in the appeal were common ground between the parties.
 1. Has the appellant established that in his home area on return he would be exposed to an Art 15(c) risk of indiscriminate violence amounting to serious harm? If yes,
 2. Can the appellant reasonably and without it being unduly harsh internally relocate to (i) Kirkuk City; (ii) the IKR; or (iii) Baghdad?
 3. Will the appellant's return to Iraq breach Art 8 of the ECHR (i) on the basis of his private life and para 276ADE(1)(vi) of the Immigration Rules (HC 395 as amended); or (ii) on the basis of an interference with his family life in the UK with his partner (BT) and his son (A)?

In relation to issue 3(ii), the respondent contends that these relationships amount to a "new matter" under s.85(5) and (6) of the NIA Act 2002 which the Secretary of State does not consent to the Upper Tribunal considering.

Article 15(c)

14. In Elgafaji v Staatssecretaris van Justitie (C-465/07) [2009] 2 CMLR 45, the ECJ set out what must be established for Art 15(c) to be engaged (at [43]):

“...Article 15(c) of the Directive, in conjunction with Article 2(e) of the Directive, must be interpreted as meaning that: the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances; the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat.”

(See also, Diakite v Commissaire général aux réfugiés et aux apatrides (C-285/12) [2014] 1 WLR 2477 (CJEU) at [30].)

15. At [39] in Elgafaji the ECJ recognised that, in applying Art 15(c), a decision-maker must apply a ‘sliding scale’:

“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.”

(See also Diakite at [31].)

16. In SMO and Others, the UT helpfully summarised the position as follows ([32]):

“The Court thereby recognised that a person may still be accorded protection even when the general level of violence is not very high if they are able to show that there are specific reasons, over and above them being mere civilians, for being affected by the indiscriminate violence. In this way the Article 15(c) inquiry is two-pronged: (a) it asks whether the level of violence is so high that there is a general risk to all civilians; (b) it asks that even if there is not such a general risk, there is a specific risk based on the “sliding-scale” notion.”

17. The headnote in SMO and Others summarises the application of Art 15(c) in Iraq as follows:

“1. There continues to be an internal armed conflict in certain parts of Iraq, involving government forces, various militia and the remnants of ISIL. Following the military defeat of ISIL at the end of 2017 and the resulting reduction in levels of direct and indirect violence, however, the intensity of that conflict is not such that, as a general matter, there are substantial grounds for believing that any civilian returned to Iraq, solely on account

of his presence there, faces a real risk of being subjected to indiscriminate violence amounting to serious harm within the scope of Article 15(c) QD.

2. The only exception to the general conclusion above is in respect of the small mountainous area north of Baiji in Salah al-Din, which is marked on the map at Annex D. ISIL continues to exercise doctrinal control over that area and the risk of indiscriminate violence there is such as to engage Article 15(c) as a general matter.

3. The situation in the Formerly Contested Areas (the governorates of Anbar, Diyala, Kirkuk, Ninewah and Salah Al-Din) is complex, encompassing ethnic, political and humanitarian issues which differ by region. Whether the return of an individual to such an area would be contrary to Article 15(c) requires a fact-sensitive, "sliding scale" assessment to which the following matters are relevant.

4. Those with an actual or perceived association with ISIL are likely to be at enhanced risk throughout Iraq. In those areas in which ISIL retains an active presence, those who have a current personal association with local or national government or the security apparatus are likely to be at enhanced risk.

5. The impact of any of the personal characteristics listed immediately below must be carefully assessed against the situation in the area to which return is contemplated, with particular reference to the extent of ongoing ISIL activity and the behaviour of the security actors in control of that area. Within the framework of such an analysis, the other personal characteristics which are capable of being relevant, individually and cumulatively, to the sliding scale analysis required by Article 15(c) are as follows:

- Opposition to or criticism of the GOI, the KRG or local security actors;
- Membership of a national, ethnic or religious group which is either in the minority in the area in question, or not in de facto control of that area;
- LGBTI individuals, those not conforming to Islamic mores and wealthy or Westernised individuals;
- Humanitarian or medical staff and those associated with Western organisations or security forces;
- Women and children without genuine family support; and
- Individuals with disabilities."

18. It is accepted that the appellant comes from the village of Albu Najim in the district of Daquq in Kirkuk Governorate. Ms Gardiner accepted, after SMO and Others, that the intensity of internal armed conflict in Kirkuk Governorate was not such that, as a general matter, there were substantial grounds for believing that any civilian returned, solely on account of his presence there, faced a real risk of being subject to indiscriminate violence amounting to serious harm within the scope of Art 15(c). She submitted, however, that following SMO and Others, whether the return of an individual to Kirkuk Governorate, in particular to the appellant's home area, would be contrary to Art 15(c) required a fact sensitive and "sliding scale" assessment (see, Elgafaji at [39]).

19. Ms Gardiner submitted that SMO and Others recognised that there was a continuing internal armed conflict, including government forces, various militia and the remnants of ISIL. The situation in Kirkuk remained complex and ISIL was still present and active in all districts of the Governorate including Kirkuk City. She relied upon [255] and [257] of SMO and Others. She submitted that, applying the sliding scale approach, the appellant was likely to be more vulnerable than an ordinary citizen on return due to four factors. First, the appellant is from a village (i.e. a rural area) near Daquq, and civilians in rural areas are specifically being targeted by ISIL and Daquq in particular is an area of risk. Secondly, the appellant's only previous work was as a shepherd and if he were to return to his home area that would be his usual work and it would put him at greater risk as ISIL are specifically targeting farms and agricultural infrastructure in Kirkuk Governorate. Thirdly, the appellant is a Kurdish, Sunni Muslim and he will be returning to Kirkuk where there is a significant PMU militia presence. Fourthly, the appellant has been diagnosed by Dr Battersby as suffering with moderate PTSD and moderate depressive disorder. That amounts to a "disability" which, as the UT in SMO and Others recognised at [310], is a relevant factor in assessing or in applying the "sliding scale" and taking into account the personal characteristics of an individual.
20. Mr Jarvis submitted that it was for the appellant to show that he was at risk under Art 15(c) in his home area. SMO and Others, he submitted, established that there was no general risk to citizens in Kirkuk Governorate. He submitted: I should reject the appellant's reliance upon mental health problems, the judge had found that the appellant had family and friends that he could contact; the appellant could obtain £1,500 voluntary assistance money to return and, even if the evidence showed that being a shepherd might be a relevant matter, there was no particular reason why he would have to work in that way on return.
21. Following SMO and Others, I am satisfied – and this is not in dispute between the parties – that the level of direct and indirect violence in the former contested areas, such as Kirkuk Governorate, is not such that there are substantial grounds for believing that any citizen returned there, solely on account of his presence, faces a real risk of serious harm contrary to Art 15(c) (see headnote (1) of SMO and Others).
22. However, whether any particular individual would be exposed to an Art 15(c) risk requires a fact-sensitive "sliding scale" assessment (see headnote (3) of SMO and Others) taking into account a number of factors summarised in headnote (4) and (5) of in SMO and Others).
23. The Upper Tribunal set out the evidence relating to "Kirkuk Governorate" at [24]–[50] of its determination. At [251]–[257] the UT set out its conclusions in relation to the "Kirkuk Governorate" as follows:

"Kirkuk Governorate"

251. All of Kirkuk governorate is disputed between the GOI and the IKR. It is an ethnically diverse governorate which has seen a great deal of upheaval in recent decades. We were struck by Dr Fatah's evidence that an individual who had lived in Kirkuk since the 1970's would have seen it change hands several times. Kirkuk

City itself was never taken by ISIL although Hawija was, and Hawija was one of the last places in Iraq to be liberated, in October 2017. The battle for Hawija caused significant damage to its infrastructure. Since control over Kirkuk was taken back from the peshmerga in the aftermath of the Kurdish Independence Referendum, the whole governorate is controlled by the ISF, with a significant presence of PMU militia.

252. ISIL controls no territory as such in Kirkuk governorate but it is certainly present and active, particularly in the areas surrounding Hawija and the Hamrin Mountains. There are pockets of fighters in these areas, or permanently operating attack cells, as they are also called in the background material. We accept Dr Fatah's evidence that around half a million people live in the areas in which these cells operate.
253. The statistics we have recorded above show a sharp fall in the number of civilians killed. We recall just one of the datasets before us: IBC recorded 950 civilian deaths in the governorate in 2017, which fell to 276 in 2018. The intensity fell from 62.9 civilians deaths per 100,000 population in 2017 to 18.3 in 2018.
254. ISIL's main focus in Kirkuk is to attack specific targets, who are usually authority figures or those associated with the security services. More recently, as recorded in the Musings blog, they have also been burning farms and agricultural infrastructure, and it is this activity which was responsible for the increased number of security incidents recorded in the blog in May 2019. It is notable that there have been frequent attacks of this nature in Kirkuk, particularly in the South West of the city, which is the area nearest to the Hamrin Mountain range, in which ISIL retains a constant presence despite some ISF successes in locating and destroying their cells. The White Flag group also operates there, although its activities are limited.
255. All commentators agree that ISIL is attempting to regain control of rural areas in this governorate. Concerns have been expressed about their attempts to regroup in the governorate. The killing of village mukhtars and the attacks on farms are part of that plan. There have also been skirmishes during the day time. Civilians have undoubtedly been affected by the violence, particularly in rural areas, but also in Kirkuk city and during checkpoints attacks. We note that EASO recorded one assessment as being that Hawija and Daquq Districts are actually contested, due to the physical and psychological pressure exerted by ISIL over the population. Dr Fatah declined to use that label when it was put to him, although he said that the situation was bad and that the White Flags also continued to operate in the area.
256. There is a security vacuum in the rural parts of the governorate, left by the departure of the peshmerga in late 2017. ISIL has some support in the region and has been able to move freely and expand its operations in the region as a result of that vacuum. It is regarded as one of the core areas for ISIL's rebuilding efforts by Joel Wing and other respected contributors. We also accept the evidence given by Dr Fatah about the effect of the PMU in Kirkuk governorate. Whilst they lessen the threat from ISIL in the region, they have also brought renewed sectarian tension, for instance by renaming Sunni sites with Shia names. The fact that Kirkuk remains a Disputed Territory also contributes to the uncertainty experienced by residents of the Governorate.
257. The urban areas of Kirkuk and the transport links which connect them therefore suffer primarily from targeted attacks against authority and security figures which cause largely unintended civilian casualties. The rural areas of Kirkuk suffer from targeted attacks of a similar type but also from a security vacuum which is

exploited by ISIL and, to a much lesser extent, the White Flags. The risk to civilians in the rural areas is demonstrably higher, given ISIL's attempts to rebuild in those areas and the way in which they pursue that goal. Nevertheless, we do not consider the proper application of the inclusive approach set out above to justify a conclusion the level of violence in the governorate reaches the Article 15(c) threshold. The levels of civilian casualties are not indicative of such a threat, standing as they did at 276 amongst a population of 1.5 million in 2018. Similar figures emerge from the 2019 evidence. The small numbers of ISIL fighters are thinly spread, operating in small groups, and the scale of their activities is limited. As at 23 May, 329,622 IDPs had returned to Kirkuk governorate according to Musings on Iraq. We take account of indirect forms of violence, as required by HM2 and as described above but we do not consider that the level of risk to an ordinary civilian purely on account of his presence in Kirkuk, or any part of it, is such as to cross the Article 15(c) threshold. The existence and actions of permanently operating attacks cells, the coercion brought to bear on sections of the rural population by ISIL and the other forms of indirect violence from ISIL and other groups (including the PMU) are not at a sufficiently high level to cross that threshold when considered as a whole."

24. Looking at the specific matters relied upon by Mr Gardiner, the first is vulnerability of the rural community, in particular those involved in farming.
25. The UT in SMO and Others at [257], recognised that the risk to "civilians in the rural areas is demonstrably higher" from ISIL. The UT also recognised "coercion brought to bear on sections of the rural population by ISIL" (at [257]). This reflected the evidence referred to by the UT, for example at [35], concerning violent incidents such as ISIL being "responsible for burning farms" and destroying "the livelihood of the farmers". But, in reaching its finding in [257] that the risk to civilians was "not at a sufficiently high level to cross the threshold when considered as a whole", the UT considered the risk to civilians including risks arising to sections of the rural population such as now relied on in relation to the appellant and his being a shepherd/farmer. The UT did not consider that these factors (including the rural element), taken together, created a real risk of serious harm contrary to Art 15(c).
26. In any event, whilst I accept that the appellant's previous employment or work has been as a shepherd, I do not accept that he would necessarily have to work in that capacity in the future. He would, as Mr Jarvis submitted, return with the voluntary assistance of £1,500 which would, no doubt, provide some tangible financial support in the short to medium term.
27. Secondly, Ms Gardiner referred me to the EASO report of 2018 which stated that Daquq District was "contested". She accepted this had been referred to by the UT in SMO and Others at [255]. Whilst, the UT also referred to evidence that ISIL remains "active" in some of Kirkuk Governorate (at [252]) and the EASO evidence (at [255]), the UT did not accept that Daquq was still "contested" and the level of violence reached the Art 15(c) threshold.
28. Thirdly, the presence of the PMU militia was specifically referred to by the UT at [251] and the UT referred to there being a "significant" presence of PMU militia in the whole of the Kirkuk Governorate now controlled by the ISF. Ms Gardiner did

not point me to any background material, other than [251] of SMO and Others itself, to substantiate any heightened risk to the appellant as a “Kurdish Sunni Muslim” returning to his home area (or indeed Kirkuk City).

29. In my view, the matters relied upon by Mr Gardiner (which I have so far considered) were taken into account by the UT in reaching its conclusion on the absence of an Art 15(c) risk to civilians in Kirkuk. The evidence of any ‘heightened’ risk (if these factors are considered personal to the appellant) does not, in my judgment, in itself establish that there are substantial grounds for believing that there is a real risk to him of serious harm from indiscriminate violence in his home area.
30. That, then, leaves the final factor relied upon by Ms Gardiner, namely the appellant’s mental health. Dr Battersby diagnosed the appellant as suffering from moderate PTSD and moderate depressive disorder (see E30). Ms Gardiner relied upon that diagnosis and Dr Law’s earlier report dated 7 June 2017 where he recorded that the appellant was receiving 100mgs daily of Sertraline which is for anxiety and depression. (Ms Gardiner did not refer me, or rely upon, Dr Law’s report beyond that.) Ms Gardiner relied upon Dr Battersby’s opinion that (at E46):

“In Iraq he would be exposed to an increased level of threat and more triggers for his PTSD would in my opinion have a significant negative impact on his mental health and highly likely to significantly increase the severity of his disorders. In this case, I would not consider him likely to be able to seek and maintain employment or have the resilience and emotional skills to care for himself on a daily basis.”
31. In addition, Ms Gardiner relied upon the fact that Dr Battersby reported that the appellant suffered from suicidal ideation and had attempted suicide previously. Ms Gardiner submitted that Dr Battersby had been alert to whether the appellant was exaggerating his symptoms and at E35 in her report had rejected that possibility.
32. Mr Jarvis invited me to give Dr Battersby’s report limited weight. He submitted that Dr Battersby had no professional involvement with the appellant other than a one and a half interview on 20 February 2020 after which she had produced the report. Neither Dr Battersby, nor indeed the Tribunal, had seen any medical records of the appellant. Mr Jarvis pointed out that the appellant had previously been involved with a GP and the only evidence now presented, by way of photographs in the supplementary bundle, was that he was taking painkillers (Ibuprofen) and a treatment for snoring.
33. Mr Jarvis relied on the fact that Dr Battersby based her report upon the appellant’s evidence which had been rejected by Judge Wilson and whose adverse credibility finding had been upheld in my earlier decision. Consequently, he submitted that in determining what caused the appellant to have PTSD and the triggers for it flaring up if he returned, that was based upon evidence that had been totally disbelieved by the F-tT. Indeed, Mr Jarvis submitted that care should be taken in accepting the appellant’s claim, made for the first time to Dr Battersby, that he had self-harmed and had suicidal ideation. Mr Jarvis submitted there was no supporting evidence for this.

34. Finally, Mr Jarvis submitted that the appellant was an unreliable witness and ultimately Dr Battersby's report was entirely dependent upon the appellant's own description of his symptoms and day-to-day life.
35. In substance, I accept Mr Jarvis' submissions in relation to Dr Battersby's report. I accept Dr Battersby's diagnosis that the appellant has moderate PTSD and moderate depressive disorder. However, Dr Battersby's opinion concerning the "triggers" that might exist if the appellant returned to Iraq is based upon his account of what he says happened to him before he came to the UK. That account has been rejected by the F+tT and upheld by the UT as not being credible. The triggers, therefore, that Dr Battersby relies upon are not established as existing. (That was also Judge Wilson's approach to Dr Law's report: see [11] of his determination.) Whilst Dr Battersby saw no other basis for the appellant's PTSD in his life history other than his account (which has not been believed), does not mean that there is not a different basis for his PTSD which is simply not known to Dr Battersby. The point is, however, that the basis for the "triggers" in a deterioration in his mental health on return has not been established and which is the premise for Dr Battersby's opinion on that issue.
36. Further, the appellant has never previously claimed to self-harm or have suicidal ideation. No GP records were produced to the Tribunal or, indeed, have previously been produced. There was some evidence before Dr Law, in his medical report in 2017, that the appellant was taking medication for anxiety and depression. The evidence was photographs of blister packs. There is no such evidence currently. Indeed, the appellant submitted photographs of current medication which did not include that drug. Instead, it consisted of a snoring remedy and a painkiller, namely Ibuprofen - also in the form of blister packs. I do not accept, therefore, that the appellant is currently taking any medication for his mental health as such.
37. Consequently, and standing back and assessing cumulatively, all the factors relied upon by Ms Gardiner, I am not satisfied that there are substantial grounds for believing that the appellant, given his personal circumstances, will be exposed to a real risk of indiscriminate violence amounting to serious harm contrary to Art 15(c) on return to his home area.
38. Both representatives, in assessing the appellant's circumstances on return, addressed me on the issue of whether the appellant would have a CSID on return or, if not, whether he could obtain one either via the Iraqi Embassy in London or through a proxy in Kirkuk. This is relevant to whether the appellant could safely journey to his home area when he arrives in Iraq and, having done so, could live there or in a place of internal relocation.
39. One of the preserved findings made by Judge Wilson was that he rejected the appellant's account that he had lost his CSID. Judge Wilson made an adverse credibility finding in relation to the appellant's account which he relied upon in his asylum claim. That finding was upheld by me on the basis that the judge had not fallen into any error in reaching it (see paras 25 - 26 of my error of law decision). At para 24 of his determination, Judge Wilson said:

“I find that the appellant has not [to] the appropriate standard of proof demonstrated that he has lost his CSID card or that he would be unable to obtain a replacement through the London Embassy with information provided by family contacts within Iraq.”

40. At para 28, Judge Wilson had rejected the appellant’s account that he had no contact with relatives in Iraq, in particular his aunt and nephews in Kirkuk City. He found that:

“The appellant has not, to the appropriate standard of proof, demonstrated that he has lost contact with his family in Iraq in the manner he described or at all.”

41. In my earlier error of law decision, I upheld Judge Wilson’s findings on both these issues and directed that those findings, in particular in relation to the finding that the appellant had not lost his CSID, i.e. he still possessed it, were preserved.
42. Ms Gardiner accepted that she was in some difficulties in relation to seeking to go behind the preserved findings. The difficulties are insurmountable. That finding was not dependent upon any background evidence or country guidance now superseded by SMO and Others. It was based upon Judge Wilson’s assessment of the appellant’s account and his credibility which stands. Consequently, I approach both the issues in relation to Art 15(c) and internal relocation on the basis that the appellant will return to Iraq with his CSID. That is crucial both in terms of his ability to return to his home area once in Iraq and also for him to live and work.
43. In the alternative, I heard submissions on whether, if the appellant did not have a CSID, he could obtain one from the Iraqi Embassy in the UK or via his family from the CSA office in Kirkuk City. The position is set out in SMO and Others at paras (11)-(16) of the headnote. Ms Gardiner submitted that he could not obtain a replacement from the Embassy or the office in Kirkuk City as it was likely to have been destroyed. That submission is not without its difficulties. His evidence, before Judge Wilson, was that his aunt in Kirkuk had the original (see [29]), even though Judge Wilson found he still had his CSID. Judge Wilson also found the appellant had not lost contact with his family ([33]). Mr Jarvis submitted, following SMO and Others, the appellant could obtain a CSID from Kirkuk: he would know the relevant information, he has family in Kirkuk and the appellant had not established the Kirkuk office has been destroyed – it is open. Mr Jarvis acknowledged, however, that the Home Office’s latest policy document, post-dating SMO and Others, made it “highly unlikely” that he would be able to obtain a CSID from the Iraqi Embassy (see, CPIN, “Iraq: Internal Relocation, Civil Documentation and Returns” (June 2020) at para 2.6.16).
44. Mr Jarvis’ submissions undoubtedly have merit but given the preserved finding of Judge Wilson that the appellant has not lost his CSID, i.e. he still has it, I do not consider it necessary to resolve the hypothetical situation if the appellant does not have a CSID, particularly given that Mr Jarvis’ submission, in relation to obtaining a CSID from the Iraqi Embassy, may require consideration of whether to depart from SMO and Others on that point and, on which, I only heard brief argument. I prefer

to determine the appeal on the preserved finding of Judge Wilson that the appellant has not lost, and therefore still has, his CSID.

Internal Relocation

45. My finding that the appellant cannot establish an Art 15(c) risk in his home area, together with the fact that he has his CSID, is determinative of his humanitarian protection claim under Art 15(c). As a consequence, the issue of internal relocation does not strictly arise. I will, however, go on to consider the issue of internal relocation in the light of the submissions made before me
46. Paragraph 399O of the Immigration Rules (reflecting Art 8 of the Qualification Directive) is as follows:

“399O(i) The Secretary of State will not make:

(a) a grant of refugee status 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 a 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.”

47. There are two limbs:

(a) will the appellant be exposed to a real risk of serious harm in the place of proposed internal relocation?; and

(b) if not, will it be reasonable (or unduly harsh) for the appellant to live in the place of proposed relocation?

48. The approach to ‘reasonableness’ and ‘undue harshness’ was analysed by the House of Lords in Januzi v SSHD [2006] UKHL 5 and AH (Sudan) v SSHD [2006] UKHL 49. The Court of Appeal provided a helpful summary of the law, drawing together the earlier cases, in AS (Afghanistan) v SSHD [2019] EWCA Civ 873. At [61] Underhill LJ (with whom King and Singh LJ agreed) said:

“61. I start by summarising the essential points, so far as relevant to this appeal, established by the authorities about the nature of the exercise required by article 8 of the Directive. I emphasise that this is not intended as a comprehensive analysis of all the issues raised by the authorities to which I have referred.

(1) By way of preliminary, internal relocation is obviously not an alternative where there is a real risk that the applicant for asylum will suffer persecution, or serious harm within the meaning of article 15 of the Directive (which includes treatment which would be contrary to article 3 of the ECHR), in the putative safe haven. We are concerned with cases where there is no such risk.

(2) The ultimate question is whether in such a case "taking account of all relevant circumstances pertaining to the claimant and his country of origin, ... it is reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him to do so". That is the formulation of Lord Bingham in *Januzi*, repeated in *AH (Sudan)*. It pre-dates the Directive and is not identically worded: in particular, the reference to whether relocation would be "unduly harsh" is not present in article 8 but derives from the UNHCR 2003 Guidelines (see *Januzi*, para. 20). But it was common ground before us that it states the test required by article 8 [of the Qualification Directive]. When in doubt it is to that question that tribunals should return.

(3) The test so stated is one of great generality (save only that it excludes any comparison of the conditions, including the degree of respect for human rights, between those obtaining in the safe haven and those of the country of refuge – this being the ratio of *Januzi*). It requires consideration of all matters relevant to the reasonableness of relocation, none having inherent priority over the others (*AH (Sudan)*, para. 13). This is the same as Lady Hale's description of the necessary assessment as "holistic" (*AH (Sudan)* paras. 27-28).

(4) One way of approaching that assessment is to ask whether in the safe haven the applicant can lead "a relatively normal life without facing undue hardship ... in the context of the country concerned". That language derives from the UNHCR Guidelines and is quoted by Lord Bingham with approval in *Januzi* (para. 20) and also used by Lord Hope (para. 47); but it does not appear in the Directive or in Lord Bingham's formulation of the test, and it should not be treated as a substitute for the latter. Rather, it is a valuable way of approaching the reasonableness analysis – "one touchstone", as Lord Brown puts it (*AH (Sudan)* para. 42). Its value is because if a person is able to lead in the safe haven a life which is relatively normal for people in the context of his or her own country, it will be reasonable to expect them to stay there (*AH (Sudan)*, para. 47).

(5) It may be reasonable, and not unduly harsh, to expect a refugee to relocate even if conditions in the safe haven are, by the standards of the country of refuge, very bad. That is part of what is decided by *Januzi* itself, and the passages quoted at paras. 34 and 35 above reinforce it. It is also vividly illustrated by the outcome of *AH (Sudan)*, where the House of Lords upheld the decision of the AIT that it was reasonable for Darfuri refugees to be expected to relocate to the camps or squatter slums of Khartoum. That may seem inconsistent with the suggested approach of asking whether the applicant would be able lead a "relatively normal life" in the safe haven; but the reconciliation lies in the qualification "in the context of the country concerned".

(6) Point (5) does not mean that it will be reasonable for a person to relocate to a safe haven, however bad the conditions they will face there, as long as such conditions are normal in their country. Conditions may be normal but nevertheless unduly harsh: this is the point emphasised by Lady Hale in *AH (Sudan)* and is exemplified by *AA (Uganda)*.

(7) The UNHCR Guidelines contain a full discussion of factors relevant to the reasonableness analysis. These are described by Lord Bingham as "valuable" and partly quoted by him (*Januzi* para. 20); and at para. 20 of her opinion in *AH (Sudan)* Lady Hale endorses a submission made in that case by UNHCR which summarises

the factors in question. A decision-maker must consider those factors, so far as material, in each case (though it does not follow that everything said in the detailed discussion in the Guidelines is authoritative).

(8) The assessment must in each case be conducted by reference to the reasonableness of relocation for the particular individual."

49. The burden of proof is upon the appellant to establish the real risk of serious harm in the proposed place of relocation (see SMO and others at [206]).
50. I first consider internal relocation to Kirkuk City.
51. As regards the first limb, the Art 15(c) risk in Kirkuk City is, essentially, determined by SMO and Others as it is no longer a contested area and is an area to which a civilian would not, by reason of that alone, be at real risk of indiscriminate violence amounting to serious harm contrary to Art 15(c). Ms Gardiner did not suggest in either her skeleton argument or oral submissions that the risk to the appellant in Kirkuk City was any greater than that in his home area. In SMO and Others, at para (18) of the headnote the UT in SMO and Others said this:

"With the exception of the small area identified in Section A, the general conditions within the Formerly Contested Areas do not engage Article 15QD(b) or (c) or Article 3 ECHR and relocation within the Formerly Contested Areas may obviate a risk which exists in an individual's home area. Where relocation within the Formerly Contested Areas is under contemplation, however, the ethnic and political composition of the home area and the place of relocation will be particularly relevant. In particular, an individual who lived in a former ISIL stronghold for some time may fall under suspicion in a place of relocation. Tribes and ethnic differences may preclude such relocation, given the significant presence and control of largely Shia militia in these areas. Even where it is safe for an individual to relocate within the Formerly Contested Areas, however, it is unlikely to be either feasible or reasonable without a prior connection to, and a support structure within, the area in question."

52. Despite the presence of Shia militia in Kirkuk City, my attention was not drawn to any evidence which might substantiate a claim that the appellant would be at heightened risk there due to his being a Kurdish Sunni Muslim. Indeed, the appellant has family who continue to live there. There is no evidence that they are at any particular risk. I am satisfied that there would be no Art 15(c) risk to the appellant in Kirkuk City.
53. That, then leaves the second limb: will relocation to Kirkuk City be unreasonable or unduly harsh?
54. The appellant previously lived in Kirkuk City. Judge Wilson accepted that he had an aunt and nephews living there and, with whom, he had previously lived before coming to the UK. The appellant has a CSID which is necessary for living etc in Kirkuk City. There is no reason to believe he could not obtain some employment but he has, in any event, family who could support him. The appellant would, in my judgment, continue to have the support of his family and accommodation available to him. His continued claim that he does not have contact with his family in Kirkuk City is contrary to the preserved finding made by Judge Wilson. The appellant could also return with the voluntary assistance payment of £1,500. Taken with the family

support, including accommodation that would be available to him, I see no basis upon which it can be said that the appellant cannot reasonably relocate there or that his circumstances would be unduly harsh.

55. Consequently, if it were necessary to decide the issue of internal relocation, I find that the appellant could internally relocate to Kirkuk City where he has family to assist and support him.
56. I also heard submissions on whether the appellant could internally relocate to the IKR. With a CSID, the appellant will be able to travel to the IKR and, not having any ISIL association, I am satisfied he would, as a Kurd, be able to enter the IKR (SMO and Others at paras (23)-(25) of the headnote). What of his circumstances there? I note what was said by the UT in SMO and Others at paras (26)- (28) of the headnote:

“26. If P has family members living in the IKR cultural norms would require that family to accommodate P. In such circumstances P would, in general, have sufficient assistance from the family so as to lead a ‘relatively normal life’, which would not be unduly harsh. It is nevertheless important for decision-makers to determine the extent of any assistance likely to be provided by P’s family on a case by case basis.

27. For Kurds without the assistance of family in the IKR the accommodation options are limited:

(i) Absent special circumstances it is not reasonably likely that P will be able to gain access to one of the refugee camps in the IKR; these camps are already extremely overcrowded and are closed to newcomers. 64% of IDPs are accommodated in private settings with the vast majority living with family members;

(ii) If P cannot live with a family member, apartments in a modern block in a new neighbourhood are available for rent at a cost of between \$300 and \$400 per month;

(iii) P could resort to a ‘critical shelter arrangement’, living in an unfinished or abandoned structure, makeshift shelter, tent, mosque, church or squatting in a government building. It would be unduly harsh to require P to relocate to the IKR if P will live in a critical housing shelter without access to basic necessities such as food, clean water and clothing;

(iv) In considering whether P would be able to access basic necessities, account must be taken of the fact that failed asylum seekers are entitled to apply for a grant under the Voluntary Returns Scheme, which could give P access to £1500. Consideration should also be given to whether P can obtain financial support from other sources such as (a) employment, (b) remittances from relatives abroad, (c) the availability of ad hoc charity or by being able to access PDS rations.

28. Whether P is able to secure employment must be assessed on a case-by-case basis taking the following matters into account:

(i) Gender. Lone women are very unlikely to be able to secure legitimate employment;

(ii) The unemployment rate for Iraqi IDPs living in the IKR is 70%;

- (iii) P cannot work without a CSID or INID;
- (iv) Patronage and nepotism continue to be important factors in securing employment. A returnee with family connections to the region will have a significant advantage in that he would ordinarily be able to call upon those contacts to make introductions to prospective employers and to vouch for him;
- (v) Skills, education and experience. Unskilled workers are at the greatest disadvantage, with the decline in the construction industry reducing the number of labouring jobs available;
- (vi) If P is from an area with a marked association with ISIL, that may deter prospective employers."

57. The appellant does not come from the IKR and has no family to assist him in the IKR in obtaining accommodation or access to work. Also, the appellant is a "unskilled worker" who are recognised as being at the greatest disadvantage in the job market in the IKR. It has not been suggested before me that the appellant would be able to obtain remittances from relatives in the UK or have any other source of income. He is unlikely to be able to obtain employment but, at least initially, might well have access to the £1,500 voluntary returns scheme payment. That would not allow him to survive long, given the costs of accommodation etc in the IKR. In my judgment, there is a real risk, taking into account what is said by SMO and Others at para (27) and (28) of the headnote, that the appellant would, in time, have to resort to a "critical shelter arrangement" in the IKR which would be unduly harsh or unreasonable. Consequently, I am satisfied that the appellant could not reasonably be expected to relocate to the IKR.
58. What of Baghdad? Mr Jarvis recognised that the latter was perhaps problematic given that the appellant has no family or other support mechanism there. Given that this is a number of steps away (legally and geographically) from the appellant being able to establish his claim, I do not consider it necessary to determine whether he could internally relocate to Baghdad.
59. However, as I have already concluded, internal relocation to Kirkuk City would be reasonably open to him.
60. For these reasons, therefore, the appellant's humanitarian protection claim under Art 15(c) fails.

Article 8

61. Before Judge Wilson, the appellant did not pursue a claim under Art 8 of the ECHR (see para 39 of the F-tT determination). Ms Gardiner, however, wished to rely upon Art 8 before me. She relied upon Art 8 in two principal respects. First, she relied upon the impact upon the appellant's private life and, in particular, para 276ADE(1)(vi) of the Immigration Rules. Secondly, she relied upon the impact upon the appellant's family life, that the appellant claims to exist, between his partner, BT and his child, A if he were returned to Iraq.

62. Mr Jarvis accepted that the appellant could rely upon his private life and para 276ADE(1)(vi) despite not having relied upon it before Judge Wilson. However, he submitted that the appellant could not rely upon his relationships with BT and A because these were “new matters” and, given that the Secretary of State did not consent to those matters now being raised, s.85(5) of the NIA Act 2002 prevented the UT from considering them.

The ‘new matter’ argument: s.85(4)

63. Before dealing with substance of the Art 8 claim, I will address the ‘new matter’ argument.

64. Sections 85(4)–(6) of the NIA Act 2002, which are included within Part 5, provide as follows:

“(4) On an appeal under section 82(1) ... against the decision of the Tribunal may consider ... any matter which it thinks relevant to the substance of the decision, including ... a matter arising after the date of the decision.

(5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.

(6) A matter is a ‘new matter’ if –

(a) it constitutes a ground of appeal of a kind listed in Section 84, and

(b) the Secretary of State has previously considered the matter in the context of –

(i) the decision mentioned in Section 82(1), or

(ii) a statement made by the appellant under Section 120.”

65. Section 81 of the NIA Act 2002 provides a definition that:

“In this Part ‘the Tribunal’ means the First-tier Tribunal.”

66. The reference to “this Part” is a reference to Part 5 of the NIA Act 2002 which sets out the provisions relating to appeals in respect of international protection, humanitarian protection and human rights claims and includes s.85.

67. It is common ground that the appellant’s reliance upon his relationships with BT and A (not previously raised) amount to reliance upon a “new matter” within s.85(6) (see, Mahmud (S.85 NIAA 2002 - 'new matters') [2017] UKUT 488 (IAC) at [31]).

68. However, Ms Gardiner submitted that s.85(5) did not apply to the Upper Tribunal following the UT’s decision in Birch (Precariousness and mistake; new matters) [2020] UKUT 00086 (IAC). She submitted that the UT had concluded that s.85 applied to “the Tribunal” which was defined in s.81 as meaning the “First-tier

Tribunal” and so did not include the Upper Tribunal. Ms Gardiner submitted, therefore, that she was entitled, even without the consent of the Secretary of State, to rely upon the appellant’s relationships with BT and A as an aspect of his Art 8 claim in the Upper Tribunal.

69. Mr Jarvis submitted that the decision in Birch was wrong and contrary to the earlier decision of the Court of Appeal in Alam and Others v SSHD [2012] EWCA Civ 960. There, the Court of Appeal had concluded that the (then) s.85A applied to the Upper Tribunal even though it was within Part 5 of the NIA Act 2002. The UT in Birch, Mr Jarvis submitted, had not been referred to the decision in Alam and Others.
70. On the face of it, when ss.85(4) and (5) refer to “the Tribunal” it would appear that they must be referring only to the “First-tier Tribunal” because of the definition in s.81. That, indeed, is the interpretation placed upon that phrase by the Upper Tribunal in Birch. At [21]-[23] the Upper Tribunal (Lane J, President and Ockelton VP) said this:
- “21.While the matter remains in this Tribunal, however, the prohibition on the consideration of "a new matter" does not apply.
22. The reason for that is that in s 81 of the 2002 Act the phrase "the Tribunal" is defined for the purpose of the ensuing Part [5] (including s 85) as meaning the First-tier Tribunal. The phrase specifically does not apply to the Upper Tribunal. No other legislation to which our attention has been drawn suggests that the Upper Tribunal is to be considered as falling within that definition, even when determining an appeal begun under s 82 (which continues in the Upper Tribunal as an "appeal under s 82", rather than under the appeals provisions of the Tribunals, Courts and Enforcement Act 2007: see LB (Jamaica) v SSHD [2011] EWCA Civ 1420). The provisions of s [85](4) are not needed to enable the Upper Tribunal, a superior court of record, to take relevant matters into account, so it cannot be said that without acceding to the restriction in subsection (5) this Tribunal could not take anything into account at all.
23. Furthermore, it is clear that in general procedure before the Upper Tribunal is not identical to that before the First-tier Tribunal: there are two different sets of Procedure Rules; and the Upper Tribunal alone has the powers given by s 25 of the 2007 Act. Although s 12(4)(a) of the 2007 Act provides that on an appeal the Upper Tribunal may make any decision that the First-tier Tribunal could make, there is no suggestion that the route to a decision, or the reasons for the decision, are confined to those that would be open to the First-tier Tribunal; and paragraph (b) of that subsection specifically provides that the Upper Tribunal may make "such findings of fact as it considers appropriate".
71. The effect of the decision in Birch is that, unlike the First-tier Tribunal when initially considering an appeal or on remittal by the Upper Tribunal, when re-making a decision the Upper Tribunal’s power to consider a “new matter” is not governed by s.85(5).
72. As the UT pointed out in Birch, the Court of Appeal in LB (Jamaica) concluded that the statutory phrase “an appeal under section 82(1)” applied, not only to the initial appeal made to the First-tier Tribunal, but also to subsequent onward appeals, though technically made under the Tribunal, Courts and Enforcement Act 2007 (the

“TCE Act 2002”) to the Upper Tribunal or, indeed, beyond to the Court of Appeal and Supreme Court, which were nevertheless appeals “under section 82(1)”.

73. LB (Jamaica) concerned the abandonment provision in s.104(4A) which determined whether an appeal “under section 82(1)” was pending when a person was granted leave to enter. That provision provides as follows:

“(4A) An appeal under section 82(1) brought by a person while he is in the United Kingdom shall be treated as abandoned if the appellant is granted leave to enter or remain in the United Kingdom (subject to sub-section (4B)).”

74. Consequently, the grant of leave to a person who has brought an appeal in-country is treated as abandoned if that appeal is “pending” whether before the Upper Tribunal, the Court of Appeal (as in LB (Jamaica)) or, even, the Supreme Court.

75. Section 104(4A) does not make any reference to “the Tribunal”. Indeed, it makes no reference to any judicial body when stating that a pending appeal has been abandoned by virtue of the individual having been granted leave to enter. Consequently, the Court of Appeal in LB (Jamaica) did not have to grapple with the issue determined in Birch when the statutory provision, although referring to an “appeal under section 82”, also referred to the provision governing “the Tribunal”. The point in Birch was simply not relevant to the interpretation of s.104(4A).

76. What of the Court of Appeal’s decision in Alam and Others? That concerned, inter alia, the application of the (then) s.85A to the Upper Tribunal. Prior to 20 October 2014 when it was repealed and the present ss.85(5)-(6) were inserted, s.85A set out a number of exceptions to s.85(4) so limiting when “the Tribunal” could consider any matter it thought relevant to the substance of the decision, including a matter arising after the date of decision.

77. The (then) s.85(5), in force prior to the present “new matter” provisions being inserted, provided that sub-section (4) was subject to the exceptions in s.85A. In s.85A sub-section (2) set out Exception 1 concerned with appeals against, for example, refusals of entry clearance. Sub-section (3), set out Exception 2 which imposed limits on evidence that could be considered in appeals against decisions under the ‘Points Based System’. The precise detail is not relevant here. What is relevant is how Exception 1 and Exception 2 were phrased. As regards the former, sub-subsection (2) of s.85A stated that:

“Exception 1 is that in relation to *an appeal under section 82(1)* against an immigration decision of a kind specified in section 82(2)(b) or (c) *the Tribunal* may consider only the circumstances appertaining at the time of the decision.” (my emphasis)

78. Sub-section (3) of s.85A provided for Exception 2 and sub-section (4) stated that:

“Where Exception 2 applies *the Tribunal* may consider evidence adduced by the appellant only if it...” (my emphasis)

It then set out the circumstances when particular evidence may be taken into account.

79. As can be seen, s.85A whilst being concerned with “an appeal under section 82(1)”, also referred specifically to “the Tribunal” and imposed limits on what evidence it could consider. Section 85A was, until its repeal, found in Part 5 of the NIA Act 2002 and to which the definition of “the Tribunal” in s.81 applied. It would appear, therefore, that s.85A only applied to the First-tier Tribunal and not to the Upper Tribunal if the reasoning in Birch is correct.
80. However, in Alam and Others the Court of Appeal decided that s.85A was applicable to the Upper Tribunal when it was remaking a decision under its powers in s.12(2)(b)(ii) of the TCE Act 2007. The point was raised under ‘Ground 2’ of the appellant’s grounds of appeal in the Court of Appeal.
81. The Court of Appeal rejected the submissions of Mr Malik, on behalf of the first appellant, that s.85A only applied to appeals heard by the First-tier Tribunal. At [39]–[40] Sullivan LJ (with whom Maurice Kay and Moore-Bick LJ agreed) said this:

“39. Mr. Malik submitted that the exceptions in section 85A related to appeals under section 82(1) of the 2002 Act. The right to appeal from the Tribunal to the Upper Tribunal was conferred by section 11(1) of the Tribunals, Courts and Enforcement Act 2007, so the Upper Tribunal’s power to hear fresh evidence was not constrained by section 85A. This submission was considered by the Upper Tribunal in Shahzad as Issue D: see paragraph 14 of the Upper Tribunal’s determination. The Upper Tribunal rejected the submission in paragraph 48 of its determination. On this issue, I agree with the Upper Tribunal.

40. The Upper Tribunal said that its conclusion that section 85A applied when the decision was remade by a judge of the Upper Tribunal was supported by the decision of this Court in LB (Jamaica) v Secretary of State for the Home Department [2011] EWCA Civ 1420. The issue in that case was whether an appeal from the Upper Tribunal to the Court of Appeal was to be treated as abandoned under section 104 (4A) of the 2002 Act because, after the grant of permission to appeal, the Secretary of State had granted the appellant indefinite leave to remain in the UK. Subsection (4A) referred to “An appeal under section 82(1)...” Mr. Malik’s submission that an appeal to the Court of Appeal was not an appeal under section 82(1) was not accepted by the Court. Moses LJ (with whom Baron J and Maurice Kay LJ agreed) said in paragraphs 12 and 13:

“12.....In my view, the reference in subsection (4A) to an appeal under section 82(1) has to be read with the identification of the period during which an appeal under section 82(1) remains pending as identified in (1) and (2) of section 104. The appeal remains alive throughout the period until it is finally determined or abandoned. Subsection (2) identifies that period during which it is not finally determined by specific reference to the period pending final determination of an appeal to the Court of Appeal: see section 104(2)(b).

13. In those circumstances it seems to me impossible to confirm the construction of what is meant by an appeal under section 82(1) to an appeal to the First Tier Tribunal without incorporating within it all those circumstances identified in the earlier part of the same section, namely an application for permission to the Court of Appeal that is awaiting determination or permission to appeal and the period up until final determination of that appeal.”

In my judgment, this approach to the meaning of “an appeal under section 82(1)” applies with equal force to the provisions of section 85A.”

82. As can be seen, the Court of Appeal relied upon its earlier decision in LB (Jamaica). That decision, of course, concerned only the phrase “an appeal under section 82(1)”. The Court of Appeal, applying what had been said in LB (Jamaica), concluded that the phrase in s.85A bore the same meaning and so an appeal in the Upper Tribunal was also “an appeal under section 82(1)”. Section 85A, therefore, applied to an appeal before the Upper Tribunal when it was re-making the decision under s.12(2)(b)(ii) of the TCE Act 2007.
83. The Court of Appeal does not appear to have had s.81 drawn to its attention and no submissions made that s.85A could not apply to the Upper Tribunal because s.85A only applied to “the Tribunal” which was defined only to mean the First-tier Tribunal. In other words, the argument accepted in Birch was not raised before, and therefore addressed by, the Court of Appeal. Nevertheless, the Court of Appeal decided that s.85A applied to the Upper Tribunal when remaking a decision. That was part of the ratio of the case which would have been decided differently if s.85A did not apply.
84. Logically, therefore, the Court of Appeal decided that the provisions in Part 5 of the NIA Act 2002 (even when they refer to “the Tribunal”) not only apply to the First-tier Tribunal but also to the Upper Tribunal when remaking a decision. The Court of Appeal’s decision is, in my judgment, binding authority to that effect and Part 5 now includes the “new matter” provisions in ss.85(5)-(6).
85. That said, there is no doubt that the Court of Appeal’s decision was made *per incuriam* as its reached its decision without reference to the definition of “the Tribunal” which is an inconsistent statutory provision (see Morelle Ltd v Wakeling [1955] 2 QB 379). Nevertheless, it is binding upon the Upper Tribunal even if the decision was reached *per incuriam*. That is only a basis upon which the Court of Appeal could, in a future case, choose to depart from its binding decision in Alam and Others (see the well known exceptions to *stare decisis* in Young v Bristol Aeroplane Co [1944] KB 714). The doctrine of precedent does not entitle a court or tribunal lower in the judicial hierarchy to depart from an otherwise binding decision of a court or tribunal higher in the judicial hierarchy on the basis that the latter decision was reached *per incuriam* (see Cassell & Co Ltd v Broome and another [1972] AC 1027).
86. Were it not for the binding effect of Alam, I would have reached the same conclusion as the UT in Birch. The definition in s.81 is compelling even though the resulting scope of Part 5 is not necessarily without difficulties. Clearly, the initial appeal set out in s.82 to “the Tribunal” is intended only to envisage the F-tT otherwise an initial appeal could (absurdly) be brought in the Upper Tribunal. Section 84, likewise, sets out the grounds on which such an appeal must be brought. Thereafter, however, the statutory provisions in ss.85 and 86 deal with issues that may well arise, not only at an initial appeal to the F-tT, but also when the Upper Tribunal re-makes a decision under s.12(2)(b)(ii) of the TCE Act 2007. Parliament does not appear to have thought they should apply to such proceedings. This may not be problematic because, as the

UT in Birch stated, the UT can regulate its own procedure without the need for ss.85 and 86 ([22]-[23]).

87. In addition to the reasons given by the Upper Tribunal, there are further supporting reasons for the interpretation of s.85(5) adopted in Birch.

88. First, when Parliament intended in Part 5 to apply a provision specifically to the Upper Tribunal it did so in addition to referring to “the Tribunal”. So, s.107(3) the NIA Act 2002 deals with Practice Directions which may make decisions authoritative within the IAC structure. It provides as follows:

“(3) In the case of proceedings under section 82 ... or by virtue of section 109, or proceedings in the Upper Tribunal arising out of such proceedings, Practice Directions under section 23 of the Tribunals, Courts and Enforcement Act 2007 –

- (a) may require the Tribunal to treat a specified decision of the Tribunal or Upper Tribunal as authoritative in respect of a particular matter; and
- (b) may require the Upper Tribunal to treat a specified decision of the Tribunal or Upper Tribunal as authoritative in respect of a particular matter.”

89. Plainly, Parliament has deliberately chosen to bring within this statutory provision the effect of Practice Directions on the “Upper Tribunal” and of decisions of the “Upper Tribunal” in addition to “the Tribunal”.

90. Secondly, some assistance can be gleaned from other statutory provisions applying within the IAC structure. Section 72 of the NIA Act 2002 deals with the application of Art 33(2) to the Refugee Convention and whether an individual has been convicted of a “particularly serious crime” and “constitutes a danger to the community of the United Kingdom.” Having set out the provisions dealing with presumptions that those matters are established, sub-subsection (9) goes on to deal with how, in an appeal, a certificate that the presumptions arise should be applied. Sub-subsection (10) then states as follows:

“The ... Tribunal or Commission hearing the appeal –

- (a) must begin substantive deliberation of the appeal by considering the certificate, and
- (b) if in agreement that presumptions under sub-sections(2), (3) or (4) apply having given the appellant an opportunity for rebuttal, must dismiss the appeal insofar as it relies on the ground specified in sub-section(9)(a).”

91. There, as will be seen, s.72(10) refers to “the Tribunal”. Section 72 is in Part 4 of the NIA Act 2002 and so the definition in s.81 (which specifically only applies to Part 5) does not apply. There is, in fact, no equivalent definition or provision in Part 4 or elsewhere in the NIA Act 2002. However, Parliament clearly intended the phrase “the Tribunal” to mean only the First-tier Tribunal because in sub-subsection (10A) specific provision is made for sub-subsection (10) to apply to the Upper Tribunal. It states:

“Sub-section (10) also applies in relation to the Upper Tribunal when it acts under Section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.”

92. Sub-subsection (10A) was inserted into s.72 from 15 February 2010 by the same legislative provisions amending Part 5, including s.81, to include the phrase “the Tribunal” as a result of the abolition of the unitary Asylum and Immigration Tribunal, to which Parts 4 and 5 previously applied and which was abolished from that date to be replaced by the First-tier Tribunal and Upper Tribunal in asylum and immigration cases (see The Transfer of Functions of the Asylum and Immigration Tribunal Order 2010 (SI 2010/21)). That is, in my judgment, an additional persuasive argument why Parliament intended the phrase “the Tribunal” in Part 5 to be limited to the First-tier Tribunal as the UT found in Birch.
93. A similar regime exists in s.55 of the Immigration, Asylum and Nationality Act 2006 in respect of certificates that Art 1F of the Refugee Convention applies (ss.55(3) and (4) - “the Tribunal”; s.55(5A) - applying those provisions to the “Upper Tribunal” when acting under s.12(2)(b)(ii) of the TCE Act 2007).
94. Thirdly, a similar approach can be seen in s.8 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. That provision, as is well-known, deals with the assessment of a claimant’s credibility and identifies a number of “behaviours” which are potentially damaging of a claimant’s credibility. Those provisions apply to a “deciding authority” which includes an Immigration Officer or the Secretary of State and, by virtue of s.8(7)(c), also the First-tier Tribunal. That was inserted in s.8(7)(c) with effect from 15 February 2010, again by the same statutory instrument, when the Asylum and Immigration Tribunal was abolished. Thus far, therefore, these provisions would not apply to the Upper Tribunal when remaking a decision. However, by sub-subsection (9A) the “deciding authority” is specifically stated to include a reference to the Upper Tribunal when acting under s.12(2)(b)(ii) of the TCE Act 2007.
95. Of course, this provision does not differentiate between “the Tribunal” and the “Upper Tribunal” unlike ss.72(9) and (10A) of the NIA Act 2002. However, what it indicates, in my judgment, is that where Parliament intends a provision to apply to the Upper Tribunal, it specifically provides for the provision to apply to the Upper Tribunal.
96. Despite my view that Birch correctly concluded that ss.85(5) and (6) do not apply to the Upper Tribunal because only the First-tier Tribunal is covered by the phrase “the Tribunal”, I am constrained by the decision of the Court of Appeal in Alam and Others to conclude that the statutory provisions in Part 5 notwithstanding that they are specifically said only to apply to “the Tribunal” must be understood also to apply to the Upper Tribunal. It is for the Court of Appeal, if it agrees with the interpretation of s.85 in Birch and with which I agree, to decide whether to depart from Alam and Others. I should add that the UT in Birch does not appear to have been referred to Alam and Others.

97. Even though Mr Jarvis has not given consent to the Upper Tribunal considering the “new matter” relied upon by the appellant, given the view the Court of Appeal might well take of the application of ss.85(5) and (6) given s.81, I will express my views *de bene esse* on the application of Art 8 to the “new matter” in case that should become relevant at some future time.
98. However, I deal first with the appellant’s claim based upon his private life which, if it is accepted, is not a “new matter”. Ms Gardiner focused upon para 276ADE(1)(vi) of the Immigration Rules. Both in her submissions, and those of Mr Jarvis, it was common ground that whether or not the appellant could establish “very significant obstacles” to his integration in Iraq essentially turned upon the same arguments and conclusion on whether he could internally relocate.
99. Paragraph 276ADE(1)(vi) provides as follows:
- “(1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
-
- (vi) subject to sub-paragraph (2), is aged 18 years or over, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant’s integration into the country to which he would have to go if required to leave the UK.”
100. In SSHD v Kamara [2016] EWCA Civ 813, Sales LJ (with whom Moore-Bick LJ agreed) said this, albeit in the context of s.117C(4) (at [14]):
- “In my view, the concept of a foreign criminal’s ‘integration’ into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that parliament has chosen to use. The idea of ‘integration’ calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual’s private or family life.”
101. I have already concluded that the appellant can return safely to his home area and could reasonably, and it would not be unduly harsh to, relocate, if it were necessary, to Kirkuk City. The appellant has been in the UK since October 2016. He lived in Iraq until he was 21 years of age. He could return to his home area or to Kirkuk City where he has family with whom he could live and could support himself whilst he sought employment. He previously worked as a shepherd and there is no reason why he could not do so again. He has family support, at least in Kirkuk City. He plainly has no language difficulties or cultural disconnect with society back in his home area and in Iraq. Thus, no doubt, given the problems that Iraq has faced there will be some difficulty in the appellant establishing himself, I am not satisfied that

the level of difficulty reaches the high threshold of “very significant obstacles” to his integration. To borrow the words of Sales LJ in Kamara, I am satisfied that the appellant would be

“enough of an insider in terms of understanding how life in the society ... is carried on and the capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis ... and to build up within a reasonable time a variety of human relationships to give substance to [his] private or family life.”

102. I am not satisfied that the appellant meets the requirements of para 276ADE(1)(vi).
103. In the light of that, as regards the appellant’s private life he can only succeed outside the Rules under Art 8 if the consequences of his return would give rise to unjustifiably harsh consequences so as to outweigh the public interest in effective immigration control. Ms Gardiner made no submissions on this issue. She did not contend that the appellant could succeed outside the Rules. Given the findings that I have already made, I see no conceivable basis on which it could be said that the public interest in effective immigration control is outweighed by “unjustifiably harsh consequences” if he is returned to Iraq. That, then, deals with the appellant’s private life claim.
104. I now turn to consider Art 8, despite my conclusion that the “new matter” provisions in ss.85(5) and (6) apply, in relation to the appellant’s reliance upon his relationships with his partner, BT and his son, A. I do so solely for the reason I set out above at para 97.
105. The appellant did not rely upon his relationship with BT before Judge Wilson. I was told that that was because the relationship was relatively new and at that time he had no prospect of succeeding on that basis. Now, however, it is said that the appellant’s relationship with BT has been in existence for three years, they have gone through a religious marriage and they have a son, A who was born on 12 March 2020. The supplementary bundle (at E4) contains a photocopy of A’s birth certificate naming the appellant’s claimed partner as A’s mother and the appellant as his father.
106. The evidence of the actual relationship between the appellant, on the one hand, and BT and A, on the other hand, is very limited. Neither the appellant nor BT gave oral evidence before the Upper Tribunal. No application was made for either to do so. Instead, Ms Gardiner relied upon a short witness statement from the appellant and a short email from BT.
107. The appellant’s witness statement says this about his relationships with A and BT at para 5:
- “My child’s name is [A]. His date of birth is 12/3/20. He was born in Bristol to my partner [BT]. We have had a ‘niqah’ wedding. We don’t live together at the moment. [BT] still lives with her mum. We don’t have a proper place to live together as I am destitute and on Nass (*sic*) support.”
108. BT’s email dated 30 April 2020 is (as typed) as follows:

"This is [the appellant's] girlfriend [The appellant] has a son named [A] And he has been helping me so much with him and coming over to my mum's house as it's a lot stress and sleepless night for me and him. I don't no where I would be without him here with me But [the appellant] is still not sleeping very well And still gets very bad headaches and flashbacks. He also has a lot of medicine to try and help him we have been together for 3 years And my family have been supporting him I have attached some photos of the medicine and also a photo of our child birth certificate. We don't live together and we live at separate houses he's not allowed to live with my family as my house is to small. I really need his help and he need help as well I don't no what to do as I'm stressed."

109. The only additional evidence is that the appellant reported to Dr Battersby, in his interview with her on 22 February 2020, that he and BT had been together for three years and, in the words of Dr Battersby's report, their "relationship is okay but they also have problems".
110. Ms Gardiner relied upon Art 8 and, in particular s.117B(6) of the NIA Act 2002, and contended that the appellant has a "genuine and subsisting parental relationship" with A and it would "not be reasonable to expect [A] to leave the United Kingdom".
111. In applying Art 8, it is necessary first to decide whether "family life" exists between the appellant and BT and/or A; then to determine whether the appellant's removal would interfere with that family life; and then finally to determine whether any interference would be justified, in particular would be disproportionate taking into account the factors set out in s.117B, including sub-section (6), of the NIA Act 2002.
112. As I have already indicated, the evidence is very limited.
113. As regards the appellant's relationship with BT, it is said that they married by a religious ceremony and that their relationship has been ongoing for three years. Although, as regards the latter, there was some discussion at the hearing as to whether the relationship was in fact quite that length, I will assume that it is. That said, there is no evidence supporting the appellant's claim that he and BT have been through a religious wedding. Further, they do not live together and, apart from having a child together, there is a dearth of evidence as to the nature of their relationship. The appellant's statement recites no more than that they have gone through a religious wedding, they have a child together but they do not live together. BT lives with her mother. It is for the appellant to establish, on a balance of probabilities, that the nature of his relationship with BT amounts to the close ties (and 'dependency') that are the hallmark of a family relationship. On this very limited evidence, I cannot be so satisfied.
114. Turning to the appellant's relationship with A, the birth certificate establishes, in my judgment, that the appellant is the father of A. As such, there is a presumption of family life between the appellant and A. There is, however, a dearth of evidence concerning the nature of his relationship with A. He does not live with A. The evidence does not expose what on a day-to-day basis is his relationship with A. There are photographs in the supplementary bundle (at E9 and E11) which I take to show the appellant with a baby who is A. However, neither the evidence of the

appellant or BT speaks to the relationship that the appellant has, if any, with his son A.

115. I am prepared to assume that the presumption of “family life” between a parent and his child is not rebutted in this case despite the absence of any evidence concerning the nature of the relationship. Where, however, that absence of evidence is crucial is applying s.117B(6). It would, no doubt, be unreasonable to expect A to leave the UK (albeit hypothetically) as a very young child, with or without BT, to live in Iraq with the appellant (see JG (s.117B(6): “reasonable to leave” UK) [2019] UKUT 0072 (IAC)). Indeed, Mr Jarvis did not seek to argue otherwise when I raised the issue with him. A is undoubtedly a “qualifying child” as he is a British citizen under 18 years old (see s.117D(1)). However, s.117B(6) will only make the appellant’s removal not in the public interest if, in addition, the appellant has a “genuine and subsisting parental relationship” with A. Whether or not A has a “genuine and subsisting parental relationship” must necessarily be fact sensitive and turn upon the role actually played by the appellant in caring for and making decisions about the child (see R (RK) v SSHD [2016] UKUT 0031 (IAC) at [42]-[43] approved by the Court of Appeal in SSHD v AB (Jamaica) and Another [2019] EWCA Civ 611 at [89]). Here, the evidence goes no further than showing that the appellant is A’s father. There is no evidence of the nature of his relationship and whether he has taken on the role of being A’s father, apart from a photograph of the appellant and A together. On the evidence, I do not accept that a “subsisting parental relationship” has been established. Consequently, I am satisfied that s.117B(6) does not apply in this appeal.
116. Given these conclusions, had it been necessary to consider the appellant’s claim under Art 8 based upon the “new matter”, I would conclude that the public interest in effective immigration control outweighs any interference with any family life which he could establish. There is insufficient evidence to substantiate a claim based upon “unjustifiably harsh consequences” to the appellant or indeed A and BT if the appellant is removed to Iraq and, as will probably occur, BT and A remain in the UK.

Decision

117. For the reasons set out in my earlier decision sent on 26 June 2019, the decision of the First-tier Tribunal to dismiss the appellant’s appeal involved the making of an error of law. That decision was, as a result, set aside.
118. The appellant’s appeal is dismissed on all grounds. The First-tier Tribunal’s decision to dismiss the appellant’s appeal on asylum grounds stands. I re-make the decision and dismiss the appellant’s appeal, in addition, on humanitarian protection grounds and under Art 8 of the ECHR.

Signed

Andrew Grubb



Judge of the Upper Tribunal
24 August 2020