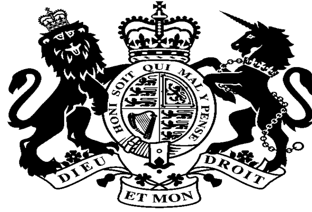

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02410/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 18th January 2022	**On 8th February 2022**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

FH
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms F Allen, of Counsel, instructed by Freedom Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

Interpretation: Mr MA Zandkarimi, in the Kurdish Sorani language

DECISION AND REASONS

© CROWN COPYRIGHT 2022

Introduction

1. The appellant is a citizen of Iraq born in March 1991. He arrived in the UK in September 2015 and claimed asylum on arrival. His asylum claim was refused and dismissed by Judge of the First-tier Tribunal Cox in a decision promulgated on 22nd May 2018. The appellant then made fresh submissions on 16th December 2019 which were accepted as a fresh human rights/asylum claim but refused in a decision dated 26th February 2020. His appeal against this second refusal decision was dismissed by First-tier Tribunal Judge DS Borsada in a determination promulgated on the 9th February 2021.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Welsh on 26th April 2021 to the respondent and permission to appeal was also granted to the appellant to cross-appeal out of time by Judge of the First-tier Tribunal Davidge on 4th October 2021. I found that the First-tier Tribunal had erred in law for the reasons set out in my decision appended to this one was Annex A.

3. The matter now comes before me to remake the appeal. The matters which need to be remade are:

   - whether the appellant is at Article 15 (c) risk on return to his home area of Saadiyah, Kirkuk;
   - whether the appellant retains his CSID;
   - Whether there is any evidence of appropriate strength moving the situation on from that as established in SMO regarding whether the appellant would be able to obtain a replacement INID in the UK or Baghdad or travel to Kirkuk without identity papers;
   - whether the appellant would be at Article 3 ECHR medical risk on return to Iraq.

4. At the start of the hearing Mr Lindsay said that he had been shown the appellant's current medication this morning and accepted that he continued to suffer from the mental health issues as found by the First-tier Tribunal and in the findings of the First-tier Tribunal that I had preserved on this issue. In relation to the issue of replacement of any lost CSID Mr Lindsay accepted that the appellant could not travel within Iraq without it, and would need to do so to replace it in Kirkuk if it were lost. He also accepted that it had been with the appellant in the UK and so there could be no question of his being able to have it sent by family in Iraq. The appellant would therefore be entitled to succeed in his appeal if I found that he had lost his CSID in the UK, and whether this had

genuinely happened therefore remained the only matter for me to resolve in relation to the CSID aspect of the appeal.

5. The appellant is a vulnerable witness, given his mental health condition, and so efforts were made to keep questioning to a minimum and to ensure that the hearing was conducted in an appropriate way to ensure the appellant was able to participate with a minimum of distress.

Evidence & Submissions – Remaking

6. In short summary the appellant's relevant evidence in relation to the matters I must determine in his appeal statement and oral evidence is as follows.

7. The appellant explained that his home town of Saadiyah is between the governances of Diyala and Kirkuk, and has a mixed population of Kurds, Arabs and Turkmen people. In oral evidence he said that he was not entirely which of these authorities Saadiyah comes under but he agreed that he had said it was under Kirkuk in his statement. Before he left Iraq he had worked as a shepherd looking after his father-in-law's flock of some 90 to 100 sheep.

8. In relation to dangers on return to Iraq the appellant says that he would be at risk from the government and Shia militias as he is a Sunni Kurd. He says people like him have been forced out to Saadiyah. He says that both Kurds and Arabs want the Kirkuk region because it has oil, and he believes that pockets of ISIS continue to exist there too. There are therefore continued outbreaks of fighting, and he believes that he would be killed if he were to return there. He says he would also be vulnerable as a person with a disability. Although he has been found to be able to function normally with his hearing aids he would not be able to do so if they were lost or he could not replace the batteries. In relation to his mental health the appellant's evidence is that he continues to suffer from depression, anxiety, insomnia, flashbacks, post-traumatic stress disorder and suicidal thoughts. He continues to take Phenergan and Mirtazapine for these conditions. He says that he would not be able to cope living in an area of conflict as he would be anxious and scared all of the time. He also fears that those connected to violence might see him as a spy due to his having been abroad. He does not believe that he would be able to obtain his medications in his home area of Iraq, or see a psychologist or a psychiatrist, as he does in the UK to monitor his progress on the medications, as he does not believe that there are any in his home area. He believes without his medications he would decline quickly, as he did when he was homeless, and become dangerously suicidal again.

9. In relation to the issue of his lost CSID he says as follows. He lost his CSID because after his appeal was dismissed in May 2018 he was homeless and was having a hard time. He was living in the green areas around the University of Norwich. He got his food from scavenging and sometimes from the Red Cross. He had no personal security for himself or his belongings, and just kept his personal belongings including his case papers in a plastic bag, and his Iraqi identity documents in his coat pocket. One day he found that his CSID and documents were not there. He does not know how or where he lost them. He tried to look in the places he had been sleeping but they were not there. As a result, by the time he made his fresh claim. he no longer had his CSID. When it was put to him that he had previously be found to have concealed having his CSID so he should not be believed now when he says that it is lost he responded that he swears on the Koran that it is the truth that his CSID is lost in the way he has described.

10. Mr Lindsay submitted for the respondent that reliance was placed on the relevant parts of the reasons for refusal letter**,** in the context of the narrowed issues as outlined above and his other submissions.

11. In relation to the determination of the appeal under Article 15(c) he submitted, in summary, as follows. It is unclear from the country of origin materials whether Saadiyah was in Diyala or Kirkuk governorate but it did not make any difference as the situation, as outlined in SMO, KSP & IM (Article 15 (c); identity documents) Iraq CG [2019] UKUT 00400, was very similar in both governorates. There are pockets of conflict in the more rural areas, but the numbers of civilian casualties is low and so there is not an Article 15(c) real risk of serious harm from indiscriminate violence to all in the general population. It was necessary however to apply a sliding scale assessment based on the appellant's individual characteristics. For the appellant it was argued that his characteristics did not elevate his risk. It is a preserved finding of the First-tier Tribunal that his hearing loss does not present a problem in everyday life; he has not shown that he has no family in his home area to turn to for support; and there is no evidence that his mental health problems put him at greater risk than the general population.

12. In relation to whether the appellant has lost or retains his CSID. It is argued that although it is plausible that he might have lost it in the way he claims this ultimately I should not find this to be the case. This is because of the preserved finding from the First-tier Tribunal decision of Judge DS Borsada is that generally the appellant is not a credible witness; and the starting point finding in relation to the specific issue of the CSID in the previous First-tier Tribunal decision, the 2018 decision of First-tier Tribunal Judge Cox at paragraphs 66 to 67, finds that the appellant had been untruthful

in relation to his CSID, firstly saying he did not have one at his screening interview and then producing his CSID to his solicitors and before the First-tier Tribunal whilst denying that he had any contact with anyone in Iraq and failing to explain how he had acquired it if he had not had it all along. Mr Lindsay argued that whilst it would be very difficult for the appellant to produced corroborating evidence he had lost his CSID whilst homeless as he claims the fact that he now had to do so was his own fault as he had lied about having it in the past and so his oral evidence, however plausible, was not sufficient to meet the lower civil standard of proof. He relied upon the decision of the Supreme Court in MA (Somalia) v SSHD [2010] UKSC 49 in support of this position. It is contended that like MA the appellant had told a lie with respect to a central issue in his case, and therefore it should be of great significance when assessing whether his oral evidence could now be given weight.

13. With respect to the Article 3 ECHR medical claim Mr Lindsay submitted that given the preserved findings of the First-tier Tribunal with respect to the appellant's mental health and particularly risk of suicide, and the acceptance that essentially the position remains the same with the appellant taking anti-depressants it was open to the Upper Tribunal to find, applying the principles from Paposhvili v Belgium , as set out in AM (Zimbabwe) v SSHD [2020] UKSC 17, that an Article 3 ECHR medical risk as a result of suicide risk existed for the appellant on return to Iraq. He submitted however that the high threshold had not been met of showing a serious decline in his health or reduction in life expectancy, and so ultimately the appeal should also be dismissed on this basis.

14. Ms Allen submitted for the appellant, in summary as follows.

15. With respect to the appeal based on the CSID loss Ms Allen argued that the fact that the appellant had lied was not sufficient to mean that his evidence on this issue could not suffice to satisfy the burden of proof. His evidence was accepted as being plausible, it was highly so, and should be accepted as realistically there would be no way in which it could be corroborated by other evidence.

16. With respect to the Article 3 ECHR medical claim Ms Allen welcomed the concession by Mr Lindsay that it was open to the Upper Tribunal to allow the appeal on this basis even if ultimately he submitted that this should not happen. Ms Allen referred me to the CPIN Iraq Medical and Health Care Provision January 2021 which shows that all of the places where mental health medications were available, and indeed psychiatric or psychological help was available, were either in Erbil or Baghdad, and the appellant could not safely live in Baghdad and had no basis to enter the KRI to go to Erbil, a place where he had no

family and had never been. It is clear therefore that the necessary treatment for his mental health conditions that he receives in the UK is not available to him in Iraq and that he is therefore at real risk of serious harm from suicide if he is returned there to live in his home area. He would also be at risk of being retraumatised by the continuing violence in his home area, and would be at risk at check-points if he were to try to travel.

17. Ms Allen submitted that she agreed with Mr Lindsay that the governorates of Diyala and Kirkuk were similar in terms of their conditions when assessing Article 15(c) risks and so it was no matter within which Saadiyah fell. She referred me to the Oxfam Report, Protection Landscapes in Diyala and Kirkuk of March 2020, which supports the conditions found in SMO continuing with problems for internally displaced people and security incidents. She accepted that the sliding scale assessment as per SMO is the correct test to apply when deciding if the appellant could succeed on Article 15(c) grounds. She argued that his Kurdish ethnicity puts him at risk as check points, as they could be manned by people of another ethnicity given the diversity in his area and if they were they might take a harsher and more suspicious view of the appellant. These type of situations would also make the appellant's mental health condition relevant to increasing his risk as he could suffer severe anxiety or flashbacks and would be unable to respond adequately to questioning, and would be retraumatised in a way which meant that the appellant suffered serious harm as a result of the remaining indiscriminate violence in his home area.

Conclusions – Remaking

18. The findings that I retain from the First-tier Tribunal are:

- that the appellant suffers from mental health problems as set out at paragraph 17 of the decision, which in summary are findings of severe mental ill-health with accepted attribution of PTSD to being near a suicide bomb which killed many people including women and children, and which is found to include suicidal ideation with a risk of suicide on return, and feelings of hopelessness and desperation and depression that might mean that the appellant was unable to hold down a job for long as set out at paragraph 19 of the decision.

- that the appellant's hearing loss is not a matter which affects his general functioning as set out at paragraph 16 of the decision.

- that the appellant's father's history of Baathist party membership is not found credible and is not relevant to any risk on return to Iraq as set out at paragraph 10 of the decision.

- that the appellant is not a credible witness for the reasons set out at paragraph 11 of the decision.

- that the appellant has not shown he does not have close family in his home area of Iraq as set out at paragraph 12 of the decision.

- the appellant does not have the option to live safely (without real risk of serious harm) in Baghdad due to his ethnicity as set out at paragraph 18 of the decision

19. The appellant might succeed in his appeal in one of three ways: he might firstly show he has lost his CSID in which case he will be entitled to succeed in his appeal on asylum grounds as it is accepted that he cannot replace it prior to re-entering Iraq and cannot travel from Baghdad, where he will be at risk of persecution due to his ethnicity, without it; secondly he might show that he is at Article 15(c) Qualification Directive risk on return to his home town of Saadiya applying the test in SMO which would mean that he would succeed on the basis that he is entitled to humanitarian protection; thirdly he might succeed on the basis of his Article 3 ECHR medical claim.

20. I turn first to the issue of the CSID and thus whether the appellant is entitled to succeed in his asylum appeal. The history that the appellant now provides regarding the loss of his CSID is detailed and highly plausible in the context of his homelessness at the time he says it was lost to protect his valuables, and the medical evidence in support of his case that he was mentally unwell at this time. Before me he also swore on the Koran that this evidence was the truth. If it stood alone without a history in which the appellant has been found to have not told the truth about how his CSID came to the UK and has been found to be generally not a credible witness his oral evidence would undoubtedly satisfy me to the lower civil standard of proof that he had lost it as claimed. However, this is not the case.

21. I have preserved the finding of the First-tier Tribunal in their decision of 9th February 2021 that generally the appellant is not a credible witness. I have also to start from the point reached by the previous First-tier Tribunal Judge, Judge Cox, that the appellant had told an untruth with regarding his CSID. In 2018 Judge Cox found that the appellant said to the Asylum Screening Unit he did not have a CSID, and this is assessed to be likely to be true as it would be normal for someone from Iraq to have produced it if he had it. It is then found that the appellant produced this document to his solicitors and the First-tier Tribunal but failed to give a proper explanation as to how it was sent from Iraq as he claimed not to have any contact with anyone there. It is found therefore, by Judge

Cox, that he must have lied about having contact with some family in Iraq to send the document.

22. Mr Lindsay submits that applying the judgement of the Supreme Court in MA (Somalia) I cannot find the appellant's evidence sufficient as it stands alone and is not corroborated by any independent evidence. Considering MA (Somalia) I find that it is relevant that this is not a scenario where it is inevitable that the appellant has lost his CSID due to his mental health issues and homelessness, so I must be able to give his evidence some weight for the appeal to succeed on this basis. I find it relevant to consider whether the original lack of openness as to how the CSID was sent to the UK was a central part of his case at that time. I find that there has never been a challenge to the appellant being an Iraqi Kurd from the Kirkuk area (as is set out at paragraph 76 of the decision of Judge Cox) and his central case was that he was at risk due to his father being in the Baath party and his step-father forcibly recruiting him to join Hashd-Al-Shaabi. It was not a case relating to possession of a CSID, and from a time prior to the First-tier Tribunal hearing the appellant has been consistent and has been believed that the document is in the UK. Now, through changes in the identity card system from CSID to INID, and thus not through any action of the appellant himself, the whereabouts of the document has become a key issue.

23. The facts of this case are therefore that the appellant has been found to have told a lie relating to how his CSID appeared in the UK, which was a subsidiary matter when told and was a lie found to have been told to obscure the fact that he had family contact with Iraq, and also he has been found to have presented a central claim relating to other matters which was not credible. I find that this puts him in a weak position for his current evidence, which stands alone, to satisfy the lower civil standard burden of proof. Ultimately I find, weighing all of the evidence, that as the appellant has never provided a candid explanation to the First-tier Tribunal or Upper Tribunal as to how his CSID arrived in the UK I cannot find that the appellant has satisfied me to the lower civil standard of proof that it is now lost. The appeal under the Refugee Convention cannot therefore succeed.

24. Article 15(c) risks on return to Iraq must be determined in accordance with the country guidance in SMO. SMO finds that there continues to be internal armed conflict in parts of Iraq however the intensity of that conflict is not such that in general there are substantial grounds for thinking that all civilians would face a real risk of indiscriminate violence simply by virtue of his presence. SMO requires, however, the assessment for a person such as the appellant from the Kirkuk/Diyala governates has to be a fact sensitive sliding scale assessment looking at matters including his disabilities, family support, westernisation and ethnic

group given that there is some level of indiscriminate violence in those places. These individual elements may entitle an appellant to succeed on this basis. It was not contended by any party that the level of indiscriminate violence differs from that found to exist at the point of time SMO was decided.

25. The appellant is Kurdish, and it is contended that given the multi-ethnic community in which he lives, that this means he is more likely to face danger from the internal conflict because other ethnic groups may subject him to a greater risk of indiscriminate violence, for instance, at a check-point, on this basis. I accept that is the case but at other check-points or other places where indiscriminate violence may break out he may be more protected by his ethnicity so I find that overall the appellant's ethnicity has not been shown to increase his generalised risk from indiscriminate violence. I was provided with no submissions explaining how the appellant would be at risk due being westernised, so whilst he has lived in the UK for more than six years I do not find that this is a relevant factor to increasing his personalised risk. Likewise, there were no submissions relating to his family presence, so again I find this is not a factor which increases his personalised risk.

26. I do however find that the appellant's serious mental health problems, and particularly his suicidal ideation, depression, anxiety and PTSD, will limit his ability to make good decisions in circumstances where he feels retraumatised by the threat of indiscriminate violence thereby putting him at greater risk from generalised violence, particularly (as I set out below in relation to the Article 3 ECHR medical claim) given his very probable inability to access the medication on which he relies and given the origins of his mental health problems coming from his proximity to a suicide bomb. I also find, that given the likelihood of discrimination by society and thus by those perpetrating civil conflict as highlighted at paragraph 312 of SMO there will be an additional increase his personalised risk for this reason given his mental health issues. In these circumstances I find that the appellant is entitled to protection under Article 15(c) of the Qualification Directive as he has shown an additional personalised risk factor (his mental health) which satisfies the burden on him to show that he faces a real risk of serious harm from indiscriminate violence simply by virtue of his presence in the context of the on-going armed conflict in his home area of Iraq, and in a context where it is not submitted he could reasonable relocate elsewhere.

27. Article 3 ECHR medical claims require an appellant to show that return to his home country would subject him to significantly reduced life expectancy or a serious, rapid or irreversible decline in health resulting in intense suffering as set out in AM (Zimbabwe) and as applied in MY (suicide risk after Paposhvili) Occupied

Palestinian Authority [2021] UKUT 232. This is a test with a high threshold.

28. The preserved medical findings are: severe mental ill-health with accepted attribution of PTSD to being near a suicide bomb which killed many people including women and children, and which is found to include feelings of hopelessness and desperation and depression that means that the appellant is at suicide risk, and unable to hold down a job for long. It is accepted for the respondent that the appellant's mental health situation remains the same. I find that the appellant is reliant on Phenergan and Mirtazapine, the latter for his depression, and from his oral evidence that his medication is monitored by a psychiatrist (which is also consistent with the letter from City Reach Health Services dated 28th October 2019) who is in a position to ensure that the medication remains correct.

29. I find that on return to Saadiyah in Kirkuk/Diyala the appellant would not have access to either his medication or a psychiatrist to monitor that medication. The CPIN Iraq Medical and Health Care Provision January 2021 outlines a massive mental health crisis in Iraq, and gives details only of hospitals and pharmacies prescribing medication for depression (including Mirtazapine) in Erbil and Baghdad. It was not submitted by Mr Lindsay that there were psychiatrists or anti-depressant medication in Saadiyah or Kirkuk which the appellant could access, and none are listed in the reasons for refusal letter. I find that return to Iraq would leave him without his medication and access to other psychiatric services. I find that without this provision even with family support he would be at real risk of attempting suicide and thus of a significantly reduced life expectancy and/or a serious irreversible decline in his health resulting intense suffering. In finding thus I note that this is not a case where mental health issues have arisen in the UK as a result of feelings of insecurity and desperation caused by rejection and limbo in the immigration system without family support but where they have been found to have arisen due to a horrific traumatic event in Iraq. There is no reason to suppose therefore that they would resolve by return to a family context in Iraq, particularly given the acknowledged risk of continuing indiscriminate violence set out above in SMO. I therefore find that the appellant is also entitled to succeed in his appeal on the basis of his Article 3 ECHR medical claim as he is at real risk of a significantly reduced life expectancy due to a completed suicide attempt and intense suffering and/or a serious decline in health following an incomplete suicide attempt.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal allowing the appeal on Article 3 and Article 8 ECHR grounds.

3. I remake the appeal dismissing it under the Refugee Convention.

4. I re-make the appeal by allowing it on humanitarian protection and Article 3 ECHR grounds for the reasons set out above.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim in light of his mental health problems.

Signed: Fiona Lindsley Date: 25th January 2022
Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Iraq born in March 1991. He arrived in the UK in September 2015 and claimed asylum on arrival. His asylum claim was refused and dismissed by Judge of the First-tier Tribunal Cox in a decision promulgated on 22nd May 2018. The appellant then made fresh submissions on 16th December 2019 which were accepted as a fresh human rights/asylum claim but refused in a decision dated 26th February 2020. His appeal against this second refusal decision was dismissed by First-tier Tribunal Judge DS Borsada in a determination promulgated on the 9th February 2021.

2. Permission to appeal was granted by Judge of the First-tier Tribunal Welsh on 26th April 2021 to the respondent on all grounds but primarily on the basis that it was arguable that the First-tier judge had erred in law in failing to give adequate reasons for finding that the appellant would face a real risk of indiscriminate violence in his home area of Sahdiya, near Kirkuk in light of the country guidance in SMO, KSP & IM (Article 15 (c); identity documents) Iraq CG [2019] UKUT 00400 as it was arguable that the First-tier Tribunal had not carried out a sliding scale assessment. It is arguable that the failure in this respect also meant that the finding that the appellant would be at real risk of serious harm on the basis of his mental health if returned to Iraq was tainted because if he could safely return to his home area where he was found to have family then this risk might not have been made out.

3. Permission to appeal was also granted on all grounds out of time to the appellant to cross-appeal by Judge of the First-tier Tribunal Davidge on 4th October 2021. She extended time for appealing and found that despite the extensive findings that the appellant was not a credible witness and despite the grounds not having obvious merit she agreed that they could be argued in light of the grant of permission to the respondent. It was therefore permitted to be argued that the findings in relation to the loss of the documents were not lawfully made given the findings that the appellant would not be able to function sufficiently to support himself due to his mental health problems if he were to be returned to Iraq.

4. The matter came before me to determine whether the First-tier Tribunal had erred in law, and if so whether any such error was material and the decision of the First-tier Tribunal allowing the appeal on Article 3 and Article 8 ECHR grounds should be set aside. The hearing took place remotely via Teams, a format to

which no party raised any objection. There were no significant problems of audibility or connectivity.

5. The appellant also was present online for this hearing with the assistance of Ms M Wilkinson from the Red Cross. The appellant and Ms Wilkinson struggled with their video but were able to connect successfully with their audio. I explained that no interpreter was available for this hearing as it was simply a hearing about matters of law and therefore submissions by the legal representatives.

Submissions – Error of Law

6. In the grounds of appeal and in oral submissions from Ms Oboni it is argued by the respondent in summary as follows. It is argued by the respondent that the First-tier Tribunal erred in law firstly because there are inadequate reasons and a mistake of fact/misdirection of law in finding that Kirkuk is a contested area or an area subject to Article 15(c) risks. Secondly, it is argued that the findings on the medical claim are also inadequately reasoned and involve misdirections of law. It is argued that it was wrong to rely upon the medical evidence and find it credible given the comprehensive credibility findings against the appellant; that the appellant ought to have been found to have family to turn to given that it had been found he had family in Iraq; that there was insufficient evidence that return to Iraq would result in a substantial reduction in life expectancy for the appellant or that he would not be able to access appropriate treatment in Iraq. The appellant’s Article 8 claim is entirely reliant on his medical Article 3 claim being correctly decided, which, it is argued, it is not.

7. In the grounds of appeal and in oral submissions from Mr Schwenk it is argued for the appellant as follows. It is firstly argued that the finding that the appellant had not lost his Iraqi identification documents in the UK despite being homeless fails to take into account the findings about his mental health, namely that he suffers from PTSD, anxiety, insomnia and depression. It is said that this would have had an impact on his ability to safeguard his documents and so was a material fact that ought to have been considered. It is secondly argued that there is an error based on the country guidance in SMO in finding that the appellant could obtain a new CSID identity card with help from his family. He would now have to obtain an INID card and this cannot be issued to a family member or overseas at an Embassy. As a result as the appellant no longer has his identity documents he would be stuck in Baghdad, as he would not be able to travel onwards without this document, a place where it is accepted that he cannot live without a real risk of serious harm as he is Kurdish Sunni man without support in that place. As such the error of law with respect to his having lost his documentation is highly material.

Conclusions – Error of Law

8. I find that the conclusion that the appellant would face Article 15(c) risks on return to Iraq is insufficiently reasoned at paragraph 18 of the decision as all that is said is that the First-tier Tribunal gives "the benefit of the doubt about return to his home area given the evidence that there is instability in this region." The country guidance in SMO requires the assessment for an appellant from the Kirkuk region to be a fact sensitive sliding scale assessment looking at matters such as disabilities, family support, westernisation and ethnic group. Such an analysis is clearly not set out in the decision. Mr Schwenk tried to persuade me that although the reasoning was not great I should find that because elsewhere in the decision issues of the appellant's health etc were discussed this sufficed to make the decision sufficiently reasoned. I do not agree however as the findings were not applied to reason how on the balance of probabilities this appellant would face Article 15(c) risks in his home area.

9. I find that in light of this error that the assessment of the appellant's mental health risks under Articles 3 and 8 ECHR cannot be relied upon because it if had been found that he was able to return to home area of Kirkuk then the assessment as to whether he would be at Article 3 risk as set out in AM (Zimbabwe) v SSHD [2020] UKSC 17 might be different as he would have direct and greater access to family support than was factored into the consideration at paragraph 19 of the decision, in the context of the finding that the appellant had not shown that he had no close family in Iraq. Mr Schwenk accepted that if I found an error of law in relation to the Article 15(c) decision then the medical Article 3/Article 8 ECHR decision would be unsafe. As this is the basis on which the appeal is allowed it follows that the decision allowing the appeal must be set aside.

10. In relation to the cross appeal by the appellant I am also satisfied that there was an unlawful failure to consider the accepted mental health findings (which amount to a finding of severe mental ill-health with accepted attribution of PTSD to being near a suicide bomb which killed many people including women and children, and which is found to include feelings of hopelessness and desperation and depression that might mean that the appellant was unable to hold down a job for long at paragraph 19 of the decision) when considering that it was not plausible that the appellant had lost his Iraqi identity documents, particularly as it was accepted that he was homeless for a period of time at paragraph 13 of the decision. Ms Aboni accepted that mental health had not been included in the consideration of whether the appellant had lost his Iraqi identity documents whilst homeless and that was an error in failing

to consider a material factor but she argued that it was not a material error. I find for the reasons set out below that this error was material however.

11. I find that the First-tier Tribunal erred by finding that the appellant would be able to obtain a replacement CSID as the evidence in SMO is that the new INID system was being rolled out Kirkuk district. The finding the appellant had not lost his CSID in the UK whilst homeless erred by failure to consider relevant evidence. If when the full evidence is considered it is found that the appellant has shown to the lower civil standard of proof that he has lost his CSID the evidence in SMO is that unlike with a CSID he cannot obtain an INID by proxy using a family member, or from the Embassy in the UK. It is also the evidence in SMO then he would be unable to travel to his home area without a CSID or INID. As a result it would appear that the conclusion would be if the appellant is found to have lost his CSID that he would be entitled to refugee status as he would be at real risk of serious harm on account of his ethnicity in Baghdad where he would be stuck due to a lack of identity papers. It is found that the appellant is at real risk of serious harm in Baghdad due to his ethnicity at paragraph 18 of the decision.

12. The findings that I retain from the First-tier Tribunal are:

    that the appellant suffers from mental health problems as set out at paragraph 17 of the decision. (I do not accept the respondent's grounds of appeal on this issue show any error of law and Ms Aboni, whilst not abandoning these grounds, did not attempt to persuade me otherwise.)

    that the appellant's hearing loss is not a matter which affects his general functioning as set out at paragraph 16 of the decision.

    that the appellant's father's history of Baathist party membership is not found credible and is not relevant to any risk on return to Iraq as set out at paragraph 10 of the decision.

    that the appellant is not a credible witness for the reasons set out at paragraph 11 of the decision.

    that the appellant has not shown he does not have close family in his home area of Iraq as set out at paragraph 12 of the decision.

    the appellant does not have the option to live safely (without real risk of serious harm) in Baghdad due to his ethnicity as set out at paragraph 18 of the decision.

13. The matters which will need to be remade are:

- whether the appellant is at Article 15 (c) risk on return to his home area of Sahdiya, Kirkuk;
- whether the appellant retains his CSID;
- Whether, in light of submissions from Ms Aboni, there is any evidence of appropriate strength moving the situation on from that as established in SMO regarding whether the appellant would be able to obtain a replacement INID in the UK or Baghdad or travel to Kirkuk without identity papers;
- whether the appellant would be at Article 3 ECHR medical risk on return to Iraq.

I retain this matter in the Upper Tribunal for remaking due to the limited scope of the issues.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. I set aside the decision of the First-tier Tribunal allowing the appeal on Article 3 and Article 8 ECHR grounds.
3. I retain findings of the First-tier Tribunal as set out at paragraph 12 above but set aside the rest of the findings.
4. I adjourn the re-make of the appeal

Directions:

1. Any updating evidence which either party wishes to rely upon must be served on the other party and filed with the Upper Tribunal 10 days prior to the date of the remaking hearing.
2. The remaking hearing will be fixed if possible on a date on which counsel for the appellant (Mr M Schwenk) is available in light of the appellant being mentally unwell. Mr Schwenk will therefore provide dates he is available in January and February 2022 to the Listing Team forthwith.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings

or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of his protection claim in light of his mental health problems.

Signed: Fiona Lindsley Date: 26th October 2021
Upper Tribunal Judge Lindsley