Case Nos: C5/2013/0007/AITRF, C5/2013/0008/AITRF,
C5/2013/0009/AITRF and C5/2012/3109/AITRF

Neutral Citation Number: [2013] EWCA Civ 1276

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ASYLUM & IMMIGRATION)
MR JUSTICE COLLINS sitting with Upper Tribunal Judge Storey and Upper Tribunal Judge Allen
HM and others (Article 15(c)) Iraq CG [2012] UKUT 00409(IAC)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (ASYLUM & IMMIGRATION)
Upper Tribunal Judge Allen sitting with Upper Tribunal Judge Kekié and Upper Tribunal Judge Coker
MK (documents-relocation) Iraq CG [2012] UKUT 00126 (IAC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2013

Before :

LORD JUSTICE MAURICE KAY,
VICE PRESIDENT OF THE COURT OF APPEAL
LORD JUSTICE ELIAS
and
LORD JUSTICE FULFORD

- -

Between :

(1) HF (IRAQ)	**Appellants**
(2) HM (IRAQ)	
(3) RM (IRAQ)	
(4) MK (IRAQ)	
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Mr Michael Fordham QC and **Tassadat Hussain** (instructed by Parker Rhodes Hickmotts Solicitors) for the **First Appellant**
Mr Michael Fordham QC, Ms Sonali Naik and **Ms Bryony Poyner** (instructed by Sutovic & Hartigan) for the **Second and Third Appellants**
Mr Hugh Southey QC and **Mr Tassadat Hussain** (instructed by Halliday Reeves Solicitors) for the **Fourth Appellant**
Mr James Eadie QC and **Mr Christopher Staker** (instructed by The Treasury Solicitor) for the **Respondent**

Hearing dates : 17, 18 July 2013

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Judgment

Lord Justice Elias :

1. The appeals in this case challenge the two most recent country guidance decisions relating to Iraq.

2. In the first case, *HM and others (Article 15(c)) Iraq CG* [2012] UKUT 409 ("*HM2*"), the principal issue before the Upper Tribunal was whether the level of indiscriminate violence in the five central governorates of Iraq (Baghdad, Diyala, Tameen (Kirkuk), Nineveh and Salah Al-Din) created such a risk of serious harm as to confer a right of humanitarian protection on the appellants pursuant to Article 15(c) of Council Directive 2004/83/EC ("the Qualification Directive"). The right to such protection would prevent the Secretary of State removing them to Iraq notwithstanding that none of the appellants had been able to establish the right to refugee status. The Tribunal also provided guidance on the risk on return at Baghdad Airport, and the availability of relocation to other parts of Iraq. It was accepted that there were some governorates which were safe and so the question arose as to whether they could provide areas of viable relocation.

3. In the second case, *MK (documents-relocation) Iraq CG* [2012] UKUT 126 ("*MK*"), the Upper Tribunal had to consider the question whether, even if there was a real risk of serious harm in parts of the area in Iraq controlled by the Government in Baghdad (known as "GOI"), there could be relocation to the other parts of Iraq, in particular that area controlled by the Kurdistan Regional Government (known as "KRG"). It is well established that there is a greater degree of security for persons living in the KRG than elsewhere in Iraq. This case was heard before *HM2* and the guidance on relocation was taken as the starting point for the analysis in *HM2* of the relocation issue.

4. In each of these appeals the appellants were unsuccessful before the Upper Tribunal but were given leave to appeal on certain specific grounds. The appeal in *HM2* is focused principally upon the country guidance with respect to humanitarian protection, which is alleged to be flawed; although the appeal also challenges the Upper Tribunal's conclusions on the risk at Baghdad Airport on return and the possibility of relocation. In *MK* the appeal is mainly directed at the Upper Tribunal's guidance on relocation, which is also said to be flawed, but there are additional grounds of appeal peculiar to the particular facts of the case. I will deal with the latter aspect of the appeal at the end of this judgment.

The applicable law.

5. The relevant principles of law are not in dispute. The key provision is Article 15(c) of the Qualification Directive which is given effect in the United Kingdom by paragraph 339C of the Immigration Rules. Recital 24 of the Directive states that minimum standards of what is termed "subsidiary protection" must be provided and confirms that subsidiary protection confers a status which is "complementary and additional to" the refugee protection afforded by the Geneva Convention. In domestic law it is referred to in paragraph 339C as "humanitarian protection" which is the phrase I will use in this judgment. Since paragraph 339C is intended to do no more than to give effect to it and has to be construed compatibly with it, there is no purpose in focusing on the domestic rule; the relevant law is to be found in the Directive.

6. Articles 2(e) and (f) of the Directive are as follows:

> "For the purposes of this Directive….
>
> (e) 'person eligible for subsidiary protection' means a third country national or stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk unwilling to avail himself or herself of the protection of that country;
>
> (f) 'subsidiary protection status' means the recognition by a Member State of a third country national or a stateless person as a person eligible for subsidiary protection."

7. Article 15 defines serious harm as follows:

> "Serious harm consists of:
>
> (a) death penalty or execution; or
>
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
>
> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

In practice those facing the risks identified in paragraphs (a) or (b) are likely to be entitled to claim refugee status because their treatment will be likely to engage either Articles 2 or 3 of the European Convention of Human Rights (provided that they could establish that the harm they feared was on account of one of the grounds specified in the Convention).

8. Article 8 of the Qualification Directive recognises that there will be cases where someone at risk in his or her home territory can reasonably be expected to avoid this by relocating to another part of the country:

> "1. As part of the assessment of the application for international protection, Member States may determine that an applicant is not in need of international protection if in a part of the country of origin there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country.

> 2. In examining whether a part of the country of origin is in accordance with paragraph 1, Member States shall at the time of taking the decision on the application have regard to the general circumstances prevailing in that part of the country and to the personal circumstances of the applicant.
>
> 3. Paragraph 1 may apply notwithstanding technical obstacles to return to the country of origin."

9. In *Elgafaji v Staatssecretaris van Justitie* [2009] ECR 1-921 the European Court of Justice resolved certain difficulties in the construction of Article 15(c). The court observed that the provision seeks to elevate the humanitarian state practice of not returning unsuccessful asylum seekers to war zones or situations of armed anarchy into a minimum standard. Although the protection arises only in situations of armed conflict, the indiscriminate violence need not arise directly from the armed conflict itself; it may result from the breakdown of law and order consequent upon civil strife. It is conceded that this is the position in parts of Iraq. The court held that it is not necessary for a person to be specifically targeted by reason of factors peculiar to his particular circumstances in order to claim humanitarian protection. It is enough that he will by his presence in the relevant country face a real risk of being subject to a serious threat of harm because of indiscriminate or random violence. However, where a person can show that he is at risk of being specifically targeted because of factors particular to his personal circumstances, this will lower the level of indiscriminate violence necessary to attract humanitarian protection. The Tribunal in *HM2* referred to this as the "sliding scale".

10. The Tribunal in *HM2* identified the issue it had to determine in the following way (para 43):

> "The CJEU requires us to decide whether the degree of indiscriminate violence characterising the armed conflict taking place reaches such a high level as to show the existence for an ordinary citizen of a real risk of serious harm in the country or in the particular region."

The background to HM2.

11. The case has a complex procedural history but since much of that history is immaterial to the issues now before the court, it can be dealt with briefly.

12. Both HM and RM, who are brothers, came to this country and applied for asylum. They had been living in Kirkuk, which is in the Tameen Governorate of Iraq. Their applications for asylum were rejected and they appealed to the immigration judge. The judge found that they were not credible witnesses and rejected their appeals. He did not specifically deal with their claims for humanitarian protection. Accordingly, the case was remitted to consider whether, simply as two male civilians from Kirkuk, they would face a real risk of harm on return there so as to be entitled to humanitarian protection. This was before the clarification of the law in *Elgafaji*. Thereafter these two cases, together with two others, were selected as appropriate cases to lay down

country guidance with respect to Iraq on the application of Article 15(c) as interpreted in those cases. This resulted in the decision of the Upper Tribunal in *HM and others (Article 15(c)) Iraq* [2010] UKUT 331 ("*HM1*").

13. The Upper Tribunal concluded in *HM1* that the degree of indiscriminate violence in Iraq was typically not of a sufficiently high level as to engage Article 15(c) and that even if it exceptionally did reach that level in any particular region, internal relocation would in general provide appropriate protection and would not be unduly harsh.

14. An appeal against that decision was successful on the purely procedural ground that the appellants had been unrepresented as a result of their lawyers ceasing to act shortly before the hearing. The Upper Tribunal had reasonably drawn the inference with respect to HM and RM that their legal representatives had withdrawn in the light of a negative expert report which meant that they could no longer properly make a claim on public funds pursuant to their contracts with the Legal Services Commission because the prospects of success were not sufficiently strong. In the case of another appellant, AA, that was expressly stated to be the case. The Upper Tribunal gave careful reasons why they thought it right to go ahead in the particular circumstances notwithstanding the lack of representation, not least because there were many cases awaiting the outcome of this judgment.

15. In *HM (Iraq) & Anor v Secretary of State for the Home Department* [2011] EWCA Civ 1536 the Court of Appeal (The Master of the Rolls, Maurice Kay and Richards LJJ) accepted that although in principle the Upper Tribunal was entitled to continue with the case notwithstanding the absence of representation, it was wrong to do so in the particular case. The court sympathised with the position in which the Upper Tribunal had found itself but held that it had failed to consider alternative ways of securing proper argument, a matter of particular importance in a country guidance case. Accordingly, the court quashed the determination in *HM1* and remitted the case for a rehearing as a country guidance case. Two of the judges who sat on *HM1* also sat on *HM2*. The President of the Tribunal in the later case was Collins J, a highly experienced judge in the field.

16. In fact the possible solutions suggested by the Court of Appeal for securing representation failed to bear fruit. The reasons are explained by the Upper Tribunal, in a judgment to which all three members contributed, in *HM2*, paragraphs 9-15, and they need not be repeated here. We would only observe in passing that we entirely endorse the observations made by the Upper Tribunal to the effect that it may be desirable to amend the legal funding rules to ensure that in a case of this kind, with important ramifications for other cases, the state will, if necessary, pay for legal representation even if the chances of success are less than even.

17. When the case was remitted, some of the original appellants dropped out, but a further case was added to HM and RM, namely HF. This concerned a young Sunni Muslem from Baghdad who alleged that he was at risk because his father had links with the Ba'ath party. His appeal against refusal of asylum was also unsuccessful, the judge not finding him to be a credible witness. Again it was held that the judge's approach to the question of humanitarian protection had demonstrated an error of law, and so the case was remitted and was subsequently incorporated into the country guidance case.

MK.

18. I will discuss the details of this case later in this judgment. In essence it concerned a mother, MK, an ethnic Kurd, who had come to the UK with her three children alleging that she had been the subject of targeted violence in Kirkuk because her husband had acted as an interpreter for the US forces. Her claim was for refugee status under the Geneva Convention; breach of Article 3 of the ECHR; and humanitarian protection. The immigration judge rejected all of these claims: she was not a refugee because she had not established that she was a target of persecution rather than random violence; she was not eligible for humanitarian protection; and her claim did not engage Article 3 of the Convention. In any event she could relocate from Kirkuk to the KRG.

19. The case was chosen as a country guidance case in relation to relocation to the KRG. This required an analysis, amongst other matters, of the documents required to enter into, and thereafter to reside in, the KRG.

20. The Upper Tribunal upheld the immigration judge's findings and rejected the appeal. It laid down general guidance as to the circumstances in which an ethnic Kurd could relocate to the KRG and concluded that even if, contrary to its analysis, the appellant faced a real risk of serious harm in Kirkuk, she could reasonably be expected to relocate to the KRG so as to eradicate the risk. The appellant now seeks to challenge various of the Upper Tribunal's conclusions submitting in particular that the country guidance established by the Upper Tribunal was erroneous and ought not to be followed. This aspect of the *MK* decision impacts directly on the analysis of relocation to the KRG in *HM2* because, as I have said, the guidance was taken as the starting point for the relocation analysis in *HM2* and the Tribunal simply asked whether subsequent evidence demonstrated that that guidance was no longer reliable. Mr Eadie QC, counsel for the Secretary of State, properly concedes that if the *MK* guidance cannot stand, that necessarily renders this aspect of the *HM2* decision invalid also.

Country guidance cases.

21. Country guidance cases play an extremely important role in the field of asylum. Whether an individual will be safe on return to any particular State is ultimately a factual question which is likely to depend upon the particular characteristics of the individual and the risks to which he or she will be subject on return. There is frequently detailed and extensive evidence about this, including country reports emanating from a variety of expert bodies both national and international, of which the reports of the United Nations' High Commissioner for Refugees (UNHCR) are usually given particular weight; reports from non-governmental organisations; information gleaned from the media; and expert evidence from individuals with specialist knowledge and understanding of the country in question. It would plainly be unnecessarily time consuming and expensive if in each case the particular tribunal had to re-assess that evidence afresh, and there would be a real risk of inconsistent answers giving rise to claims of unfairness. The justification for country guidance was put succinctly by this court in *SG (Iraq) v Secretary of State for the Home Department* [2012] EWCA Civ 940 para 46:

> "The system of Country Guidance determinations enables appropriate resources, in terms of the representations of the parties to the Country Guidance appeal, expert and factual evidence and the personnel and time of the Tribunal, to be applied to the determination of conditions in, and therefore the risks of return for persons such as the appellants in the Country Guidance appeal to, the country in question. The procedure is aimed at arriving at a reliable (in the sense of accurate) determination."

22. Once a decision is categorised as a country guidance decision, therefore, it has a significance which transcends the particular appeal. Consistent with the purpose underlying the principle of such guidance, failure to follow it will constitute an error of law, unless the tribunal gives good reasons why it has not done so: *R (Iran) v Secretary of the Home Department* [2005] EWCA Civ 982: and it can only be challenged if there is fresh evidence casting doubt on the original conclusions: *Ariaya v Secretary of State for the Home Department* [2006] EWCA Civ 48. Hence the reason why the Upper Tribunal in *HM2* was obliged to take as its starting point in relation to relocation to the KRG the guidance issued in *MK*.

The guidance issued by the Upper Tribunal in HM2.

23. The Upper Tribunal identified the following issues on which it proposed to provide guidance (para 24):

> "(i) whether there is a risk to the appellants of indiscriminate violence arising from armed conflict within the meaning of Article 15(c) of the EU Qualification Directive in their home areas in Iraq (in the case of HM and RM Kirkuk and in HF Baghdad);
>
> (ii) apart from their age and gender it is envisaged that the other characteristics of the appellants that may be relevant to assessment of risk of indiscriminate harm are: they are all Sunni Muslims, they speak respectively Kurdish Sorani and Arabic (HF), and may be of Kurdish ethnicity;
>
> (iii) whether any of the appellants will suffer inhuman or degrading treatment contrary to Article 3 ECHR and/or Article 15(b) of the Qualification Directive on return to Baghdad Airport or any place connected with the process of return;
>
> (iv) if there is such a risk as in (i) above then whether internal relocation to any part of Iraq is available to them and whether they will be able to access such protection without suffering ill-treatment as per (iii) above ….."

24. The Tribunal carried out a highly impressive and very detailed consideration of a wide range of evidence. It lists in the appendix some 720 pieces of documentary

evidence. Its judgment is over a hundred pages, but it contains no unnecessary fat. There was a vast range of material to digest and analyse which included the background to the case; the UNHCR eligibility guidelines entitled "Guidelines for Assessing the International Protection Needs of Iraqi Asylum Seekers"; an array of other specialist reports; the written and oral evidence of Dr George and Dr Fatah, two experts called by the appellants; and a raft of relevant statistics. The Tribunal considered in detail the situation both in Iraq as a whole and in the various provinces. This involved assessing such questions as the level and intensity of the violence, the extent and nature of targeted violence against particular groups, the particular difficulties faced by individuals returning to Baghdad International Airport, and the problems faced by those travelling internally within Iraq. The Upper Tribunal set out the submissions of the parties on the issues before it, analysed the material, and stated its general conclusions.

25. The conclusions were the result of a careful and reasoned assessment of all the relevant evidence. Moreover, the Tribunal sought to ensure that the material was as up to date as possible and in that context focused particularly on the UNHCR eligibility guidelines. Shortly after the hearing in *HM2*, on 31 May 2012, the UNHCR issued new eligibility guidelines for Iraq. This report recognised that the situation in Iraq had stabilised and levels of violence had declined since its earlier report but nonetheless concluded that in certain places the indiscriminate violence reached levels where humanitarian protection was required. It concluded that generalisations on the basis of broad geographical distinctions were not possible, however, and adjudicators would need to assess on a case by case basis whether the asylum seeker could be safely returned to his or her particular area. The bottom line, therefore, was that sometimes Article 15(c) humanitarian protection would be required. The Upper Tribunal reconvened specifically to hear further argument in the light of this new guidance. It concluded that in fact the analysis of the Upper Tribunal in *HM1* to the effect that Article 15(c) was not generally engaged was correct, even though this departed from the guidance issued by the UNHCR. It summarised its conclusions with respect to this aspect of the appeal as follows:

> "i. Whilst the focus of the present decision is the current situation in Iraq, nothing in the further evidence now available indicates that the conclusions that the Tribunal in HM1 reached about country conditions in Iraq were wrong.
>
> ii. As regards the current situation, the evidence does not establish that the degree of indiscriminate violence characterising the current armed conflict taking place in the five central governorates in Iraq, namely Baghdad, Diyala, Tameen (Kirkuk), Ninewah, Salah Al-Din, is at such a high level that substantial grounds have been shown for believing that any civilian returned there would solely on account of his presence there face a real risk of being subject to that threat.
>
> iii. Nor does the evidence establish that there is a real risk of serious harm under Article 15(c) for civilians who are Sunni or Shi'a or Kurds or have former Ba'ath Party connections: these characteristics do not in themselves amount to "enhanced risk

categories" under Article 15(c)'s "sliding scale" (see [39] of *Elgafaji).*"

26. The Tribunal then set out its conclusion that so far as relocation was concerned, there should be no departure from the guidance given in *MK*:

> "iv. Further evidence that has become available since the Tribunal heard *MK (documents - relocation*) Iraq CG [2012] UKUT 126 (IAC) does not warrant any departure from its conclusions on internal relocation alternatives in the KRG or in central or southern Iraq save that the evidence is now sufficient to establish the existence of a Central Archive maintained by the Iraqi authorities retaining civil identity records on microfiche, which provides a further way in which a person can identify themselves and obtain a copy of their CSID, whether from abroad or within Iraq."

27. As to the risk at Baghdad Airport, it concluded that whilst in theory there was an Article 3 risk for someone returning without documents, this was wholly academic since it was government policy not to return such persons in any event:

> "v. Regarding the issue of whether there would be a risk of treatment contrary to Article 3 ECHR arising from returns from the UK to Baghdad International Airport (BIAP):
>
> a) If a national of Iraq who has failed to establish that conditions inside Iraq are unsafe is compulsorily returned to Baghdad International Airport (BIAP) on either a current or expired Iraqi passport, there is no real risk of detention in the course of BIAP procedures (except possibly in respect of those who are the subject of a judicial order or arrest warrant). Nor is there such a risk if such a person chooses to make a voluntary return with a laissez passer document which can be issued by the Iraqi embassy in the UK.
>
> b) If, however, such a person is compulsorily returned to BIAP without either a current or expired Iraqi passport, he may be at risk of detention in the course of BIAP procedures and it cannot be excluded that the detention conditions might give rise to a real risk of treatment contrary to Article 3 ECHR. Such a risk is however, purely academic in the UK context because under the current UK returns policy there will be no compulsory return of persons lacking such documents."

28. I will deal with the reasoning and analysis lying behind these conclusions in the context of, and to the extent that they are material to, the grounds of appeal.

The grounds of appeal.

29. Each of these conclusions is challenged in this appeal in three distinct grounds. They are as follows:

i) The Tribunal erred in law in rejecting the proposition that departure from UNHCR's Eligibility Guidelines "should only take place for a cogent and identified reason." Here there was a departure and no good reasons were given at all. In the absence of such reasons, the Tribunal ought to have found that there might be cases where Article 15(c) protection was required, as the UNHCR had concluded.

ii) The Tribunal erred in law in its consideration of relocation. In particular, it erroneously concluded that it was possible to enter and thereafter reside in the KRG even without a sponsor to verify the standing of the applicant. In reaching this conclusion, the Upper Tribunal had confused the requirements for entering the region for a short period, which did not necessarily require support of a sponsor, with the need to register and obtain an information card to reside, which did generally require one.

iii) The Tribunal erred in law in failing to determine whether or not the risk to those who returned without documents and were detained at Baghdad Airport for investigation reached the Article 3 level of ill-treatment. The Upper Tribunal had wrongly characterised the issue as academic because the Secretary of State had adopted a policy not to return individuals without the necessary documentation. That was not a legitimate position for the Tribunal to adopt: it should have posed the question whether, if the appellants had been returned, they would have suffered ill-treatment amounting to a breach of Article 3. Mr Fordham QC, counsel for the appellants in *HM2*, submits that there was cogent evidence that they would, although he accepts that if he succeeds on this argument, we would need to remit the case for the matter to be considered again.

30. As I have said, the analysis on the question of relocation took as its starting point the guidelines in *MK*. Accordingly it is convenient to deal with the relocation issue by considering the two appeals on this point together. I shall then consider the remaining grounds in *MK* at the end of the judgment.

The status of the UNHCR eligibility guidelines.

31. The first issue concerns the significance which should be afforded to the UNHCR eligibility guidelines. The Upper Tribunal adopted what has been the conventional view that it is an important document which, because of its provenance and the rigour and depth of its analysis, should typically be given considerable weight. However, ultimately it was merely one source of material and the Upper Tribunal had to reach its conclusion on the basis of the whole body of evidence before it.

32. Mr Fordham submitted to the Tribunal, as he does before us, that this paid too little deference to the status of the document. There has been a growing recognition of the importance of the role of the UNHCR and the quality of its research and that should now be given full legal force by adopting an appropriate legal principle in domestic law. This would be achieved by establishing a presumption that the guidance emanating from the UNHCR should be followed unless there are cogent reasons for

not doing so. Mr Fordham accepts that there is no authority which establishes that principle but he refers to various authorities, both domestic and from Strasbourg, which he says point strongly in favour of this step. It is, he submits, a development of the common law whose time has come.

33. The Upper Tribunal was not persuaded. It summarised the argument and its rejection in the following terms (paras 276-277):

> "In previous country guidance cases the Tribunal has almost always attached very considerable weight to UNHCR guidelines on risk categories in particular countries, although it has seen the degree of weight to be attached to be dependent on a number of factors including whether or not UNHCR has a presence on the ground in the country concerned. A similar approach has been adopted by the ECtHR, e.g. in *NA v UK* and *Sufi and Elmi*.
>
> Mr Fordham sought to persuade us that we should indeed accord a more primary status to UNHCR Guidelines so as to reflect its status and mandate, its detailed assessment and rigorous standards of due diligence such that it is not appropriate to depart, "save for a cogent and identified reason", from UNHCR's guidelines."

After referring to a passage from the judgment of Sir Stephen Sedley in the case of *EM (Eritrea) & Ors v Secretary of State for the Home Department* [2012] EWCA Civ 1336 (reproduced in para 37 below) which emphasises the special status of the UNHCR, the Tribunal continued:

> "However, we are unable to accept Mr Fordham's proposition, not out of lack of respect for UNHCR's considered views on country conditions or its immensely thorough and heavily footnoted 2012 Guidelines, but out of concern to ensure we discharge our duty to decide cases on the basis of the evidence and arguments presented to us; bearing in mind that in this, as well as most country guidance cases, we have a very comprehensive body of background evidence together with expert reports and detailed submissions to put alongside the UNHCR materials. We would be very surprised if indeed UNHCR took a different view of what should be our function, but in any event, as Mr Staker pointed out, Mr Fordham's submission on this matter is also contrary to authority: see *Mhute v SSHD* [2003] EWCA Civ 1029 and *R (Golfa) v SSHD* [2005] EWHC 2282 (Admin)."

34. Mr Fordham submits that this reasoning is unpersuasive and fails to respect the authority and standing of the UNHCR. A principle giving special status to UNHCR guidance does not undermine the function of the Tribunal; it remains free to reach its

own conclusion provided it can identify a good reason to depart from the UNHCR guidelines. It is merely a recognition of the particular value of such a specialist body.

35. He focused on two sets of related arguments. First, he emphasised the quality of the guidelines: they are objective; carried out by an independent body; and their reliability is ensured by a rigorous process of gathering, verifying and where possible corroborating the evidence. The detailed and comprehensive analysis in the eligibility guidelines for Iraq, where each source is fully and carefully footnoted, reflects the approach. The difficulty with this submission is that other state reports and NGO reports from such bodies as Amnesty International will frequently share these characteristics. So if special status is to be afforded to the UNHCR, the rationale for so doing must in my view lie elsewhere than in the quality of its reports.

36. Mr Fordham submits that it lies in the character of the organisation itself. He says that wherever it is exercising functions in accordance with its supervisory jurisdiction, such as where it is producing guidance on Article 15(c) of the Qualification Directive, it should be conferred that pre-eminent status. In that context he referred to numerous occasions where the highest courts have referred with strong approval to its work. For example, Lord Bingham spoke very approvingly of UNHCR guidelines in *Secretary of State for the Home Department v K* [2007] 1 AC 412 para 15; as did Lord Woolf in *R v Secretary of State for the Home Department, ex p Robinson* [1998] QB 929,938; and Lord Steyn stated in *R v Secretary of State for the Home Department, ex p Adan* [2001] 2 AC 477, 520 that the UNHCR played a "critical role" in the application of the Refugee Convention and that the UNHCR handbook "has high persuasive authority".

37. Perhaps the high water mark of his case is the observation of Sir Stephen Sedley in the case of *EM* expressly referred to by the Upper Tribunal at paragraph 277 of its judgment in this case. In *EM* the question was whether the authorities in Italy dealt procedurally properly with claims from asylum seekers in a manner infringing their human rights. This depended on whether there was a systemic failure to apply the relevant standards properly. The UNHCR had concluded in a detailed report that there was no such failure, notwithstanding that there were some lapses in individual cases. In giving judgment Sir Stephen said this (para 41):

> "It seems to us that there was a reason for according the UNHCR a special status in this context. The finding of facts by a court of law on the scale involved here is necessarily a problematical exercise, prone to influence by accidental factors such as the date of a report, or its sources, or the quality of its authorship, and conducted in a single intensive session. The High Commissioner for Refugees, by contrast, is today the holder of an internationally respected office with an expert staff (numbering 7,190 in 120 different states, according to its website), able to assemble and monitor information from year to year and to apply to it standards of knowledge and judgment which are ordinarily beyond the reach of a court. In doing this, and in reaching his conclusions, he has the authority of the General Assembly of the United Nations, by whom he is appointed and to whom he reports. It is intelligible in this situation that a supranational court should pay special regard

> both to the facts which the High Commissioner reports and to the value judgments he arrives at within his remit."

38. This certainly places great weight on the UNHCR report, although it is pertinent to note that in the very next paragraph Sir Stephen recognised the potential value of other reports:

> "This said, we also take note of what the Grand Chamber of the ECtHR said recently in *Hirsi v Italy* (27765/09; 23 February 2012), at paragraph 118:
>
> > "[A]s regards the general situation in a particular country, the Court has often attached importance to the information contained in recent reports from independent international human-rights-protection associations such as Amnesty International, or governmental sources ….""

39. Mr Fordham identified a number of cases where in domestic law the courts have held that a decision maker should not depart from the considered views of an expert body without cogent reasons. For example, in *R* (*on the application of Bradley) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36; [2009] QB 114 the ombudsman, in the exercise of statutory powers, made findings of maladministration against a government department and concluded that it had caused the complainants damage. He made five recommendations. The Secretary of State rejected all the conclusions of maladministration and refused to accept four of the recommendations. Sir John Chadwick, with whose judgment Wall LJ and Blackburne J agreed, accepted that whilst as a matter of law the ombudsman's findings of maladministration were not binding on the Secretary of State, in the particular circumstances this was not a legitimate position for the Secretary of State to adopt. The relevant legal principle was that "the party seeking to reject the findings must himself avoid irrationality". Here the rejection of the ombudsman's conclusions was irrational: there was no ground for asserting that the ombudsman had reached an obviously flawed conclusion and no cogent reason had been given for departing from his findings. The question was not whether the Secretary of State could cogently conclude that there had been no maladministration; it was whether he had a proper reason, other than simply a preference for his own view, for rejecting the considered decision of the ombudsman.

40. In reaching this conclusion Sir John Chadwick referred to two other cases, also relied upon by Mr Fordham, where a similar argument had been successfully advanced. In *R v Warwickshire County Council ex parte Powergen plc* [1997] EWCA Civ 2280; (1997) 96 LGR 617 the Council as highway authority had refused to enter into an agreement under section 278 of the Highways Act 1980 with Powergen for road safety reasons notwithstanding that an inspector, following an inquiry at which the Council had made its objections clear, had found that the proposed development did not create a road safety threat. The Court of Appeal held that this was an irrational conclusion; there was no proper basis which justified the Council departing from the inspector's analysis.

41. The other case was R *v Secretary of State ex parte Danaei* [1997] EWCA Civ 2704 in which the Secretary of State disbelieved the story given by an asylum seeker as to why he would be at risk if returned to Iraq, notwithstanding that an immigration adjudicator had earlier found his account to be true. The Court of Appeal held that absent fresh evidence, it was unreasonable for the Secretary of State to continue to maintain her own original view of the applicant's credibility.

42. Mr Fordham submitted that there is a direct analogy in this case. The Upper Tribunal should be held bound by the considered guidance issued by the UNHCR unless it could point to flaws in the analysis or there was fresh evidence providing a proper basis for departing from that guidance.

43. Attractively as the point was put, I do not accept this submission. In my judgment, there is no justification for requiring the court in this context to approach its task any differently from other cases where it has to draw conclusions from primary findings of fact. The court must assess all the evidence affording such weight to different pieces of evidence as it thinks fit. No principle of international or domestic law dictates any different approach. The authorities which demonstrate the considerable respect which the courts afford to UNHCR material are entirely consistent with the conventional view that questions of weight are for the court. I do not believe that Sir Stephen Sedley was saying anything more than that in *EM*. He was not, in paragraph 41, asserting that the UNHCR report was presumptively binding, and indeed that submission had not been advanced before the court. Moreover, in the very next paragraph he noted that other reports will sometimes demand considerable respect also.

44. There is, in my view, no justification for conferring this presumptively binding status on UNHCR reports merely because of their source. Frequently the court is faced, as in this case, with a raft of reports from various international, state and non-governmental organisations, and although the guidance enunciated in a UNHCR report will typically command very considerable respect, for the reasons given by the Tribunal in paragraph 277, it will do so because of its intrinsic quality rather than the status of its author. Ultimately each piece of evidence has to be put into the balance but the relative weight to be given to the different reports is for the decision maker.

45. Support for this conventional approach can also be gleaned from a note of introduction to the guidance itself which states:

> "it is hoped that the guidance and information contained in the Guidelines will be considered carefully by the authorities and the judiciary in reaching decisions on asylum applications."

It does not, therefore, claim any special status for itself.

46. Moreover, consistent with this approach is a passage to which Mr Eadie referred us in a book by Professor Hathaway, "*The Rights of Refugees under International Law*" (CUP 2005), in which the author suggests that the views of the UNHCR on the substance of refugee law will be "considered and weighed as part of a more holistic assessment of the current state of refugee law obligations." (The author suggests that there is a strong case for contending that there is a legitimate expectation that the guidelines will be followed where they have been adopted by the Executive

Committee of the UNHCR, which consists of representatives from 87 States. But even if that is right, that is not the position with these eligibility guidelines.)

47. In my judgment, the domestic authorities relied upon are not truly analogous at all. They are all cases where a specialist body has reached a finding or findings of fact in the exercise of its statutory function. It is generally not rational for another executive body simply to reject such findings without good reason. If the only evidence available to the Upper Tribunal about risk on return had been the UNHCR report, no doubt there would be room for the same principle to apply. But that was not the position and nor is it ever likely to be the case where country guidance is being formulated. There will typically be a range of reports from a variety of bodies, as well as the expert evidence called by the parties. It cannot conceivably be characterised as irrational for the Upper Tribunal to have regard to all this evidence before reaching a concluded view on the facts.

48. I also agree with the Upper Tribunal that Mr Fordham's submission is inconsistent with certain domestic authorities. In *Mhute v Secretary of State for the Home Department* [2003] EWCA Civ 1029 the appellant had submitted that the Immigration Tribunal was not entitled to go behind a letter sent to the Immigration Law Practitioners' Association by a representative of UNHCR urging the Government to suspend temporarily the removal of asylum seekers to Zimbabwe. Simon Brown LJ, with whom Ward LJ agreed, categorically rejected that submission observing that "every case has to be judged on its individual facts." Mr Fordham points out that he is not suggesting that the court cannot go behind advice or guidance, only that it should have cogent reasons for so doing. Even so, the observation of Simon Brown LJ is a strong confirmation of the conventional approach.

49. *Mhute* was applied in *R (Golfa) v Secretary of State for the Home Department* [2005] EWHC 2282 (Admin). The UNHCR had expressed the view in a number of documents that returns should not be enforced to Liberia, and various UN bodies had called upon states to co-operate with the UNHCR. Moses J, as he was, noted that UNHCR "should command universal respect, support and sympathy" but recognised that "its responsibilities are not co-extensive with those of individual states and certainly not with that of the United Kingdom": (para 48). He specifically noted its broad range of responsibilities, including in relation to humanitarian protection. In a submission identical to this one, the claimant argued that the Secretary of State was "bound to follow the recommendation or it would be irrational for him not to do so in the absence of any good reason". Moses J rejected the argument in the following terms (para 54):

> "So, it is said, the Secretary of State is bound to support and cooperate with the UNHCR. He could only do so by adopting the recommendations. Novel though that proposition be, and much though cooperation and support is to be encouraged, it is hopeless. It is contrary to both principle and authority. There is no basis for contending that this claimant can rely, contrary to the Immigration Act and the Rules made thereunder, on the General Assembly Resolution or Executive Committee conclusions."

50. Finally, in *Jasim v Secretary of State for the Home Department* [2006] EWCA Civ 342 the Court of Appeal was faced directly with the question what status should be given to guidance issued by the UNHCR on relocation in Iraq. The Immigration Appeal Tribunal, in an observation which is almost the converse of the submission now advanced by Mr Fordham, had gone so far as to suggest that it would be an error of law to follow the guidelines since they "do not accord with United Kingdom jurisprudence on the subject and again stray into areas of general humanitarian concern." Sedley LJ held that this was in turn an error of law. He described the approach which the courts should adopt with respect to such reports in entirely conventional terms (para 32):

> "It would be an error of law, in my judgment, for an immigration judge dealing with return to Iraq to refuse on principle to consider any UNHCR Advisory Report on Iraqi asylum-seekers and refugees upon which reliance was placed. His or her task is to decide what passages, if any, are relevant and to gauge the weight to be given to them in the context of the rest of the evidence and argument. That, notwithstanding his citation of the IAT decision in *GH*, is what the immigration judge in this case sought to do."

51. Although Sedley LJ dissented on the facts in that case, both the majority judges, Sir Peter Gibson (para 38) and Lord Justice Pill (para 45), adopted essentially the same analysis of the judge's function.

52. Similarly, we were referred to numerous cases where the Strasbourg court has referred to UNHCR country guidance without giving it any pre-eminent status: see e.g *Sufi and Elmi v United Kingdom* [2011] ECHR 1045 where guidelines dealing with Somalia were not even referred to in the court's judgment although they had been relied on in submissions; and *S.H.H. v United Kingdom* [2013] ECHR 102 where the court did not follow the eligibility guidelines on Afghanistan. Mr Fordham points out that in some of these cases the guidelines were not directly on point. Nonetheless, they have never been given the presumptive status he claims that they should even where they were directly relevant.

53. Apart from these considerations, it seems to me that there would be unattractive consequences if the court were to accede to Mr Fordham's blandishments. The fact-finding court would have the onerous task of continually having to assess expert evidence against the UNHCR guidelines. There would be considerable room for argument - and no doubt numerous appeals - as to whether the court had good reasons to depart from them and, if so, whether it had adequately explained those reasons. And what would count as a cogent reason? Could the court simply say - as indeed in this case - that in its view the quality of the conflicting evidence from other sources was such as to cast doubt on the reliability of the conclusions in the UNHCR report? It is difficult to see why not. Yet if that is a satisfactory explanation, we are in substance back to the conventional position that it is for the court to decide what weight to give to the various pieces of evidence, including the UNHCR report.

54. For these various reasons, I would reject this ground of appeal.

Reliability of the UNHCR guidelines.

55. There is one further matter raised in argument which requires comment. The Upper Tribunal had expressed some tentative concerns which might be said to cast some doubt on the reliability of the UNHCR guidelines on two distinct grounds (para 26):

> "We pay great respect to the views of UNHCR in particular, whose sources include not only widely available background data but also feedback from UNHCR operations, UN agencies and other partners in Iraq. At the same time we cannot ignore the fact that UNHCR is a major international actor in Iraq, being heavily involved, inter alia, in programmes to assist returns to Iraq by externally displaced persons (EDPs) among others. We are not in a position to say whether UNHCR's role in Iraq means that its assessment of risk on return is influenced by its concerns about the viability of returning refugee flows. Nor are we in a position to know why, at least prior to 31 May 2012, UNHCR felt able to say on the one hand that no one from the 5 central governorates should be forcibly returned to Iraq because of high levels of indiscriminate violence there, yet on the other hand to engage in UNHCR-facilitated voluntary returns to Iraq, including to those governorates. … What these factors do demonstrate to us, however, is that we must make our own assessment of Article 15(c) risks based on the evidence as a whole and the UNHCR materials are only a part of that evidence."

56. Notwithstanding these concerns, the Upper Tribunal said in terms that it would not downgrade the weight to be given to the report for these reasons, and I see no proper basis for going behind that assertion.

57. However, the appellants submit, and I agree, that there is in fact nothing inconsistent in the UNHCR concluding that it is unsafe to return yet nonetheless lending its assistance to facilitate the return of someone who voluntarily insists, notwithstanding the risks, on taking that step. There is no reason why the Commissioner should wash his hands of someone prepared to take the chance, and the fact that he is willing to do so does not in my view undermine in any way the risk analysis.

58. However, in my judgment, it was not inappropriate for the Upper Tribunal to comment upon the potentially conflicting interests of the UNHCR, notwithstanding that they did not affect the standing of the report in this case. The UNHCR is responsible not merely for objectively assessing risk but also for assisting returnees, and a court is entitled to be alive to the possibility that the latter function may possibly colour the risk assessment, even if only subconsciously. That possibility is arguably exacerbated where the report itself runs together both security concerns and the practical difficulties facing returnees as the European Court of Human Rights noted was indeed the position with UNHCR's eligibility guidelines on Iraq: see *Al Hamdani v Bosnia and Herzogovina* [2012] ECHR 229 (para 51).

59. I do not suggest - and nor did the Upper Tribunal - that this dual function is likely to compromise in any significant way the independence and objectivity of the UNHCR's risk analysis, but in my judgment it does provide an additional reason why it would be undesirable to give the UNHCR reports the presumptively binding force which the appellants would wish.

The issue of relocation.

60. The question of internal relocation was first considered in *MK*. The Tribunal concluded that in general Iraqis displaced from the central regions could relocate, albeit with bureaucratic difficulties, to other parts of the GOI region and in any event could go to the KRG from the GOI areas. Mr Southey QC, counsel for the appellant, focused on the finding with respect to relocation to the KRG and submitted that there were errors in the Tribunal's analysis.

61. In *HM2* the Tribunal reconsidered the guidance in *MK* in the light of fresh evidence. There were three reports considered in *HM2* which post-dated *MK* but the Upper Tribunal in *HM2* was not satisfied that the material in those reports warranted any departure from the conclusions reached in *MK*. Mr Fordham submits that this conclusion was also erroneous and that the court should have departed from the analysis in *MK*, even assuming that the guidance enunciated in that case was correct.

MK.

62. I first consider the conclusions in *MK*. The principal issue was whether women with children in Iraq could relocate to a place of safety, and in particular to the KRG. (The conclusion that women could so relocate necessarily applied to men also, at least in the absence of some particular circumstance). A related question was whether life would be viable for them.

63. The Tribunal considered evidence from a variety of sources on the question of relocation, including from two expert witnesses, Dr George and Dr Fatah as well as the UNHCR report. The Tribunal also placed particular weight on a report of the Danish Immigration Services' fact-finding missions dated April 2010, which was updated in June 2011. The Upper Tribunal considered that the Danish report was the most reliable and it rejected criticisms of that report made by the other experts.

64. The evidence was not all of a piece, and indeed one of the conclusions was that there is not a universal set of procedures applicable at all checkpoints when displaced persons are seeking to enter the KRG.

65. The Tribunal sought to identify the documents that might be necessary to enter into the region and then to remain there. The most important public document is a Civil Status Identity Card (CSID), without which it is impossible to access any other official document. These include the Iraqi Nationality Certificate (INC) and the PDS card, which entitles each Iraqi to a monthly food basket at nominal cost.

66. The Tribunal then focused upon the documents which would be required to enter and reside in the KRG. There are three types of entry card which can be sought on arrival: a tourist card or work card, both valid for limited periods only; and an information card, which is for the purpose of residence. The key documents which are required at a checkpoint are the CSID and the INC. The Tribunal concluded that if necessary it was possible to get a fresh CSID from outside Iraq.

67. An important issue in this appeal relates to the question whether a sponsor is necessary to reside in the KRG. Both Dr George and Dr Fatah recognised that whilst a sponsor would not necessarily be required in order to enter into the region it would normally be required in order to register with the Asayish (the security office) and to

obtain an information card. Both, however, accepted that sometimes support from a well known employer in the region would suffice.

68. The Tribunal was, however, more persuaded by the report of the Danish mission. In that report, there was evidence that some governorates (such as Sulemaniyah) did not require a sponsor; that the reason for obtaining a sponsor was for security purposes and that in practice this was a very easy requirement to satisfy. Moreover, the failure to obtain a sponsor would not typically lead to removal from the region. The Tribunal expressly dealt with this point (para 54):

> "The report also noted that there were no accounts of Iraqi nationals, irrespective of religious or ethnic background, or place of origin in Iraq, being discriminated against at KRG checkpoints or in the KRG, nor of any such people having been deported from the KRG to elsewhere in Iraq, including the disputed areas. Nor were there any records of Iraqi nationals having been deported from the KRG to elsewhere in Iraq, including the disputed areas, for not having a sponsor/ guarantor and, although such a person was legally responsible for the person they were sponsoring, there were no accounts of any sponsor/guarantor having been arrested or detained by KRG authorities."

69. The Tribunal then summarised its conclusions on relocation to the KRG as follows (para 57):

> "Drawing this evidence together, we accept that, though there may be a unified procedure in theory at all KRG checkpoints, it is subject to variations and change from time to time, especially at times of actual or perceived heightened risk. We also accept the generally consistent evidence as to the three types of entry card (tourist work and information), and the fact that a Kurd wishing to enter the KRG will not need a guarantor or sponsor (kafil), though an Arab may. There is a requirement of registration with the Asayish, at which time the CSID, the INC, the PDS card, a copy of a rental or house purchase agreement, a letter of recommendation from the mukhtar of the area of proposed residence and, perhaps a letter from a sponsor will have to be provided."

It is not entirely clear whether the observation about the sponsor in the last sentence is simply reflecting the difficulty of reaching a clear conclusion given that there was contradictory evidence on the point, or whether it was envisaged that such a letter would sometimes be required, perhaps in some governorates.

70. The Tribunal reiterated its conclusions on this point at paragraph 88(2) but, somewhat confusingly, in terms which differed in certain respects from paragraph 57. There, after stating that the lack of documentation would not typically be an insuperable problem and would be unlikely to make return unsafe or unreasonable, the Tribunal concluded:

> "Entry into and residence in the KRG can be effected by any Iraqi national with a CSID, INC and PDS, after registration with the Asayish (local security office). An Arab may need a sponsor; a Kurd will not."

This seems to suggest that there is no need for a sponsor's letter either for entry or residence, save possibly for an Arab. But the evidence was that this distinction between Kurd and Arab was in respect of entry rather than the later stage of registration.

71. Mr Southey submits that this conclusion of the Upper Tribunal is flawed for two principal reasons. First, he submits that the Tribunal has failed properly to distinguish between the right to enter and the right subsequently to reside in the KRG. If one simply focuses on paragraph 88(2) (see para 70 above) it is easy to see why he advances that submission since the distinction is not clearly drawn. However, reading the judgment as a whole I do not think it is a criticism that can fairly be sustained. The evidence from all the relevant experts clearly drew that distinction and although paragraph 57 is admittedly somewhat cryptic, the distinction is appreciated, and is indicated by the reference to registration with the Asayish, which is only required when a person seeks to remain in the region as a resident.

72. Mr Southey's second ground of complaint is that the conclusion in paragraph 88(2) is simply not sustainable. Nor, he says, is the reference to the word "perhaps" in paragraph 57. The evidence was that a sponsor is always necessary for those wishing to reside in the region.

73. The reference to "perhaps" is in my view entirely consistent with all the evidence. As I have indicated, the evidence on sponsorship was equivocal but in any event it was generally agreed that some professionals might be admitted without a sponsor and in some cases an employer's recommendation will suffice. Accordingly, in that context the word "perhaps" is not inappropriate even if sponsorship is in general required.

74. I accept, however, that paragraph 88(2) does not on the face of it sit happily with paragraph 57. However, contrary to Mr Southey's submission, there was evidence in the Danish mission report that a sponsor was not required in order to register with the local Asayish, certainly not in all circumstances, and paragraph 88 is consistent with that evidence.

75. Moreover, in my judgment, even if paragraph 88 is put too high, and a sponsor is sometimes strictly required, all the evidence suggests that in practice it is of little significance. As I have indicated, the Upper Tribunal in paragraph 54 concluded that there was no real evidence of prejudice resulting from the failure to obtain a sponsor; in practice there was no evidence of anyone being removed from the region for failing to obtain a sponsor; or even whether required, it was not an onerous task to find one. In practical terms, therefore, it may fairly be said that residence can be effected without a sponsor.

76. Accordingly, whilst I would accept that there is some confusion resulting from the way in which the Upper Tribunal has summarised its conclusions in paragraphs 57 and 88(2) respectively, looking at the decision as a whole, the Tribunal was entitled to conclude that in general relocation is possible to the KRG. Even if there is any formal

requirement for a sponsor, it is not likely to pose any practical difficulties; where sponsors are necessary they can readily be found, and it is very exceptional for anyone to be removed from the region even if they cannot.

The relocation decision in HM.

77. The starting point for the Upper Tribunal in this case was that it was bound by the guidance in *MK* unless there was fresh evidence justifying a departure from that guidance.

78. There were in fact three reports which post-dated the evidence available to the court in *MK* and they were subject to very detailed consideration by the Upper Tribunal. First, there was the 2012 UNCHR report which had dealt not only with Article 15(c) risk on return but had also issued guidance on relocation to the KRG; second, there was a Finnish/Swiss fact finding mission to Amman and the KRG conducted in May 2011; and third, a joint report of the Danish Immigration Service and the United Kingdom Border Agency following a fact finding mission to Erbil and Dahuk conducted in November 2011. The Tribunal stated in terms in paragraph 347 that it preferred the Danish/UK report to the UNHCR because it was "very much more detailed and also sourced." Accordingly, had it been the case that cogent reasons were needed to depart from the UNCHR report, they were given. It also preferred that report to some of the material in the Finnish/Swiss report because relevant information in the latter was not sourced and was briefer.

79. The first issue considered by the Upper Tribunal was whether it was necessary to find a sponsor to enter into or reside in the region. It heard evidence to the effect that the need for a sponsor to enter the region had virtually disappeared, and there was no evidence suggesting that the position had changed since *MK* with respect to the need for a sponsor in order to register. It summarised its conclusion as follows (para 348):

> "Taking the evidence as a whole, we consider that if anything, it tends to show that no-one needs a sponsor, rather than, as was concluded in *MK*, that a Kurd will not and an Arab may. By needing a sponsor we refer not only to entry but also to residence in the KRG. However, since we accept that what we identify is a trend in the evidence rather than a fixed conclusion, we do not propose to go beyond the guidance in *MK*, and on this evidence we are confident that it can properly be endorsed."

80. The Tribunal also considered the viability of living conditions in the KRG. Again it agreed with the conclusions about this in *MK*, namely that whilst life would be hard, there would be access to housing, public health and schools. The principal difficulty lay in obtaining necessary food. More than half of Iraqis rely upon the Public Distribution System which requires a PDS card. But this, as the Tribunal noted in *MK*, has to be obtained from the home area and it is difficult to transfer it to the KRG (although the Upper Tribunal referred to some evidence that in some cases it could now be transferred). Absent such a transfer, however, displaced persons would have to return home once a month to obtain a food rations using the PDS card, and that in practice would in some cases render the option of relocation unreasonable, as the Upper Tribunal recognised.

81. Mr Fordham submits that there are two basic objections to this analysis. First, notwithstanding the fact that the Tribunal in paragraph 348 expressly stated that sponsors were not required for either entry or residence, he says that the evidence even from the Danish/UK report itself simply failed to support that conclusion. The Tribunal did not properly address residence as a separate requirement and had it done, it could not have reached the conclusion it did.

82. Second, the Tribunal had also wrongly concluded that there were viable living conditions for those displaced persons relocated to the KRG.

83. I do not accept either of these submissions, which in my view are essentially seeking to reopen findings of fact. A discussion on the security procedures required to reside in the KRG is found in section 8 of the Danish/UK report. It is true that the evidence is to some extent conflicting, and also it appears that different procedures might apply in the three different governorates. But there was support for the proposition that no sponsor was needed, typically at least in order to reside in the region. For example, the Head of Asayish (the security body) said that a sponsor or guarantor was not generally required although a letter from a local mukhtar would be. It would only be in exceptional circumstances, such as where a person was completely unknown to anyone in the KRG, that a sponsor would be needed, and this would typically occur in about two or three cases per month. Admittedly other interlocutors stated that a reference would be required, but even they accepted that it was very easy to satisfy the requirements and that there was virtually no evidence of persons without a card being deported from the region. This largely reflects the evidence considered and accepted in *MK*.

84. In my view, this evidence supported the Tribunal's conclusion that the position had certainly not become stricter than when *MK* was decided, and that was essentially what the Upper Tribunal had to consider. Mr Fordham submitted that the Upper Tribunal did not specifically refer to part 8 of the Danish/UK report in this context. I do not accept that. The Tribunal said that it had taken into account the evidence as a whole, and there was no need for it to repeat in terms evidence which was consistent with the analysis in *MK*. Moreover, if the Tribunal had added that even if a sponsor was sometimes required, it was largely a notional requirement very readily satisfied, this would have accurately reflected the body of the evidence before it which confirmed the approach in *MK*. The critical point, in my view, is that sponsorship does not in practice pose a problem for someone seeking internal relocation in the region.

85. As to the submission that the Upper Tribunal erred in concluding that the conditions were viable, there was again no reason to depart in this respect from the findings in *MK*. Mr Fordham submitted that if the relevant information card had not been obtained then benefits were not accessible. But the evidence in *MK* was that the information card could readily be obtained. Difficulties might arise where someone would have to go back to their home territory in order to obtain a PDS, but the Upper Tribunal was alive to that point. Accordingly, I would reject this ground of appeal.

Article 3: Mis-treatment on arrival.

86. The background to this ground of appeal is as follows. There was some evidence before the Tribunal that when individuals had been returned to Baghdad International

Airport without the appropriate documentation, they were detained in a nearby prison pending a determination of their identity, in extremely poor conditions which at least arguably involved a breach of Article 3. There was, in particular, evidence that this had happened to those returned on charter flights in 2009 and 2010. For example, various individuals claimed to have been kept in large numbers in a small room with no proper air, no exercise and no adequate sanitation facilities. In some cases they were allegedly there for some ten days.

87. The Secretary of States accepts that these accounts, if true, would prima facie constitute a breach of Article 3, although she cast doubt on their veracity and wanted to rely on other evidence which was inconsistent with these allegations. Both she and the appellants encouraged the Upper Tribunal to analyse the evidence and reach a conclusion on the question whether Article 3 would be infringed by such returns or not. The Upper Tribunal expressed reluctance to do so because it felt that it had only limited evidence on the current, as opposed to the historic, position; and it concluded that in fact it did not need to do so because it was satisfied that the appellants would not be returned so as to place them at risk.

88. The reason for this was that there had been a change in October 2011 in the procedures for dealing with returns. The position now is that those who have appropriate documentation will not be detained and therefore will not face ill treatment. Appropriate documents include a passport, whether in force or expired, and a *laissez passer* document, a one-way travel document issued by the Iraq embassy in London. However, it requires the co-operation of the individual himself before that document can be issued. In effect, therefore, enforced returns are now, as the Upper Tribunal put it, "pre-cleared during pre-clearance visits to the UK by Iraqi Immigration Officers", thereby virtually eliminating the risks of ill treatment whilst detained on return.

89. The question which then potentially arises is how someone will be treated who is forcibly returned without the appropriate document. The Upper Tribunal concluded that this would not happen because the Secretary of State had stated that in practice she would not return anyone to Iraq who did not have the relevant identity documentation. It was suggested that this was her "policy" but in fact this is something of a misnomer: the policy was effectively forced upon her. Her evidence, as recorded by the Upper Tribunal, was that "without the necessary documentation there was no guarantee that they would be accepted by the Iraqi authorities in Baghdad."

90. It was for this reason that the Upper Tribunal considered that the issue was now academic: with the appropriate documentation, the appellants would not be at risk on return from ill-treatment arising out of detention; without it, they would not be returned. It was of course within their control which category they fell into.

91. Mr Fordham submits that this analysis is inconsistent with the decision of the Court of Appeal in *JI v Secretary of State for the Home Department* [2013] EWCA Civ 279. In that case the Special Immigration Appeal Commission ("SIAC") had concluded the Secretary of State was acting lawfully in deciding that the applicant, who had links with terrorist organisations, should be deported to Ethiopia. The Ethiopians had given certain assurances to the UK Government which SIAC believed in the main would ensure no risk of potential Article 3 ill treatment on return. The one area where SIAC

still had concerns was whether the Ethiopian Human Rights Commission could effectively monitor and report on any ill treatment carried out by junior officials in the Ethiopian administration. There was still work to be done to develop a proper monitoring capability. SIAC left it to the Secretary of State to determine whether and when that had been achieved, and to give the appellant 5 days' notice before deporting him. This would enable the appellant to challenge that decision by way of judicial review.

92. The appellant submitted that this was unlawful: SIAC could not leave this issue to be resolved by the Secretary of State at some future date. The applicant claimed that he was entitled to a determination by SIAC itself, at the time of the hearing, whether, if returned to Ethiopia, he would be at risk of Article 3 ill treatment or not. The only conceivable answer to that question in the light of the court's concerns was that he would be at risk and therefore he should have been granted asylum.

93. The Court of Appeal agreed. In the light of such authorities as *CL (Vietnam) v Secretary of State for the Home Department* [2008] EWCA Civ 1551 [2009] 1 WLR 1873 and *MS (Ivory Coast) v Secretary of State for the Home Department* [2007] EWCA Civ 133 the court held that it was unlawful for SIAC to leave it to the Secretary of State to determine when it would be safe to return. That was a matter for the court to decide at the time of the hearing on the hypothetical basis that the appellant would be returned at that time. I sought to encapsulate the reason why this constituted an error of law in the following way (para 97):

> "There are three reasons why it is in principle wrong for the court to allow the Secretary of State to determine any element of the asylum claim. First, it involves an unlawful delegation of the judicial function allowing the Executive to determine matters falling within the jurisdiction of the court. Second, it means that the case will be determined not on the basis of the evidence before the court but on speculation as to what the facts are likely to be at some time in the future. Third, it leaves the asylum seeker in an unacceptable state of limbo pending the future clarification of his status. He is technically illegally in the country and yet he is unable to return to his home State until further steps have been taken sufficient to guarantee his safety. If he is entitled to refugee status or protection from removal on human rights grounds, even if only on the basis that he should be given leave to remain for limited duration, he ought to be given that status or protection from removal at least for the period when his safety is potentially compromised."

94. There was some disagreement in the court as to whether the Secretary of State's undertaking could have any relevance to the assessment of risk but the court was unanimous that it was obligatory for the Secretary of State to reach a conclusion on his refugee status one way or the other.

95. Mr Fordham submits that in the light of that decision the Upper Tribunal was obliged to decide this question; it could not simply rely on an assurance from the Secretary of

State that the appellants would not be returned. Whilst it is true that the individual would not be at risk whilst the Secretary of State's policy was in place, nonetheless the Tribunal was obliged to ask itself the hypothetical question whether there would be a real risk of ill treatment constituting either a breach of Article 3 or entitling the appellants to humanitarian protection. The appellants were entitled to have their position determined not least because it affected their status, and hence their rights, whilst they remained in the United Kingdom.

96. Moreover, Mr Fordham submitted that the fact that they could secure safe return by obtaining the relevant documents was not to the point. It was immaterial to the Tribunal's decision that the appellants may only be at risk because of their refusal to co-operate. That is similarly the position with certain *sur place* cases, such as those where an asylum seeker deliberately participates in activities in the UK which are designed to catch the attention of the home state and thereby place him at risk on return. If there is a real risk of serious harm on return, the applicant should be granted asylum even though he has by his own actions deliberately chosen to bring that risk upon himself, perhaps specifically to secure asylum.

97. I agree with Mr Fordham that if the reason for the Upper Tribunal declining to deal with the matter was simply that the Secretary of State had a policy not to return persons who could be returned but would be at risk of ill treatment in their home state, that would constitute an error of law, essentially for the reasons elucidated in *JI*.

98. However, Mr Eadie submits that this is a misrepresentation of the true position. His contention is that, properly analysed, the practice of not returning those without the appropriate travel documents is not a voluntary policy of the Secretary of State at all. The lack of documentation creates an impediment to return which the Secretary of State cannot circumvent. Iraq will not receive anyone from the UK without the relevant travel document. If an unsuccessful applicant for asylum refuses to co-operate to obtain the *laissez passer* document, he is in precisely the same situation as any other failed asylum seeker whom the Secretary of State is unable to return for one reason or another. The assurance of the Secretary of State that she would not return someone to Iraq without the relevant documents is of no special significance; it simply reflects realities. The general position of someone who cannot be returned, whether because he cannot obtain the requisite documents or for some other reason, is that he may be detained or granted temporary admission pursuant to section 67 of the Nationality, Immigration and Asylum Act 2002, provided at least there remains a possibility of his being returned at some stage in the future: see *R (on the application of AR and FW) v Secretary of State for the Home Department* [2009] EWCA Civ 1310. As Lord Justice Sedley pointed out in that case, the condition of someone with that status is harsh, although being granted temporary admission does at least allow the unsuccessful asylum-seeker to be free of actual detention.

99. Mr Eadie submits that these appellants are precisely in the situation of any other failed asylum seekers who would not be at risk in their own state but cannot for technical reasons be returned home. The existence of such technical difficulties does not entitle them to humanitarian protection. Article 8(3) of the Qualification Directive makes that plain where, as here, relocation is an option, and it is *a fortiori* the case where they are not at risk in their home area. Moreover, they can hardly be in any better position than any other asylum seeker who cannot be returned technical reasons given that the technical difficulty stems from a deliberate refusal to co-operate.

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

101. In my judgment, this analysis is correct. I accept, as Mr Fordham submits, that it would be necessary for the court to consider whether the appellants would be at risk on return if their return were feasible, but I do not accept that the Tribunal has to ask itself the hypothetical question of what would happen on return if that is simply not possible for one reason or another. Section 67 of the 2002 Act envisages that there may be practical difficulties impeding or delaying making removal arrangements, but those difficulties do not alter the fact that the failed asylum seeker would be safe in his own country and therefore is in no need of refugee or humanitarian protection. I agree with the Secretary of State that the *sur place* cases are distinguishable because there the applicant could be returned and would be at risk if he were to be returned. They are not impediment to return cases.

102. There are two further arguments which strictly only arise if and when it becomes possible for the Secretary of State to return the appellants without documents. First, Mr Eadie submits that even if that were the case the appellants ought not to be granted humanitarian protection simply on the basis of their assertion that they will not co-operate so as to obtain the necessary *laissez passer*. It is a criminal offence not to co-operate under section 35 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004 and it should not readily be assumed that an asylum seeker would risk imprisonment by refusing to co-operate. I would accept that a tribunal would be entitled to assume that the asylum seeker will act lawfully, although presumably in some cases there may come a point where it might become clear that he will not, and thereafter the tribunal would have to determine asylum status on that basis.

103. Second, he contends that as a general proposition an asylum claim ought not to succeed where the risk on return arises only because of the refusal by the asylum seeker to co-operate. He should not be able to secure the benefit of humanitarian protection where he could be returned safely and is at risk of serious ill treatment solely because of his own conduct - *a fortiori* where, as with the refusal to co-operate, that conduct is criminal - and where he can up to the very moment of return eliminate the risk by co-operation.

104. I accept that submission. The claim for humanitarian relief in such circumstances is wholly unprincipled and subverts the true purpose of asylum law. Whether in those circumstances the appellants could properly be sent back to Iraq (assuming that Iraq would take an undocumented person) is no doubt problematic; but even if that would infringe their human rights, it does not follow in my view that they should then be entitled to claim humanitarian status with all the benefits which that confers.

105. Accordingly, in my judgment, there was no obligation on the Upper Tribunal to determine the issue of Article 3 status in the circumstances of this case.

The case-specific features of MK.

106. I turn finally to consider the particular grounds of appeal in *MK*. The facts were as follows. MK was aged 52 at the time of the Upper Tribunal's determination. She is an

ethnic Kurd. She arrived in the UK on 5 February 2009 having travelled overland for twenty days with her three children. They were her sons, Barzan and Bestoon, aged respectively 19 and 18 at the time of the Upper Tribunal's decision, and her daughter S, then aged 9. She claimed asylum immediately on arrival. She is illiterate and she arrived in the UK with no documents. She said that her husband had worked as an interpreter for the US armed forces. He had been asked to assist when eleven terrorists were arrested; he was asked by one of them to help him escape but refused. She alleged that her family had been subject to three serious incidents which she said was the result of her husband having been targeted by the terrorists. First, there was a grenade attack on her house which injured no-one but led to security protection. About a year later there was a further grenade attack resulting in the death of her husband and her oldest son, and her back was injured. Finally, shortly thereafter her second child was kidnapped. She fled from her own house and stayed for some two and a half months in her brother's house, also in Kirkuk and just a short distance away, before he assisted her to leave. She claimed that she had now lost touch with him.

107. Immigration Judge Doyle ("IJ Doyle") found her to be a credible witness, at least on the substance of her claims, but considered that she had failed to satisfy him that there was an "agent of persecution" responsible for the attacks. She was not able to show that her family members had been anything other than the victims of three arbitrary and random acts of violence. He observed that no-one had ever claimed responsibility for the three incidents, and that MK had not been warned, threatened or approached and nor had she even been asked for a ransom for her kidnapped son. Accordingly, she had not been able to demonstrate a well founded fear of persecution for a Convention reason. The judge also dismissed her claims for humanitarian protection, wrongly relying on the pre-*Elgafaji* jurisprudence.

108. Senior Immigration Judge Nichols ordered reconsideration on 8 June 2009. She noted that IJ Doyle appeared to have been under the misapprehension that the three incidents were over three years apart whereas in fact they were only some fourteen months apart. She obviously had some difficulty with the conclusion that the three incidents were unrelated. Under the procedural rules then in force, the effect of her order was that the Upper Tribunal had first to decide whether the original tribunal had made a material error of law, and if it had so that a reconsideration was necessary, it could on reconsideration either reach a fresh decision or dismiss the appeal notwithstanding the error.

109. The case came before Senior Immigration Judge King TD who concluded that there had been errors of law. In relation to the question of risk on return, a matter which had obviously concerned Senior Immigration Judge Nicholls, he noted that IJ Doyle had not found any causal connection between the three attacks, and then added this (para 6):

> "It may be considered that the reasoning of the Immigration Judge was unduly restrictive. The appellant's evidence was that the family had been victims of a targeted campaign by insurgents/terrorists from November 2007 until she left in January 2008. From the nature of the events which were described such was capable of the finding of specific targeting, it was contended therefore that the Immigration Judge erred in

> finding such were random acts of violence in the circumstances. It is perhaps unnecessary in those circumstances to identify the precise identity of the agent of persecution."

110. He noted that both counsel had agreed that there were errors of law but unfortunately he did not identify in terms precisely what those errors were, although it seems clear that one at least was the judge's approach to Article 15(c). He did, however, identify the issues on reconsideration as being "the risk on return, internal relocation, and Article 15".

111. It was thought that this was an appropriate case in which to give country guidance on internal relocation. As we have seen, the guidance was that relocation to the KRG was in principle available, and the Upper Tribunal concluded that there was no reason why MK could not avail herself of that option.

112. However, quite apart from that, the Upper Tribunal had to deal with the other issues identified by SIJ King, including the arguments concerning risk on return. As to that, the Upper Tribunal said this about SIJ King's conclusions, and in particular his observations in paragraph 6 (paras 95-97):

> "We remind ourselves of the findings of the judge on the appellant's history. We note the point made by Mr Hussain concerning the comment by the Senior Immigration Judge at the error of law hearing that, in effect, the event the appellant described was such as being incapable of giving rise to a finding of specific targeting while noting the contention that the judge erred in finding that these were random acts of violence in the circumstances and that it was perhaps unnecessary to identify the precise agent of persecution.
>
> This does not, in our view, amount to a conclusion that the judge erred in finding that the appellant could not show a link between the grenade attack, the death of her husband and eldest son and the kidnapping of the other son. Nor does it amount to a finding that the judge erred in finding that the appellant had not shown that she was specifically targeted by a person or group. The Senior Immigration Judge's remarks in this regard are tentative. The judge seems to have adopted joint submissions before him that there were material errors of law in the approach taken by the Immigration Judge, relating in part to the approach to Article 15(c) of Directive 2004/83/EC, and concluding that reconsideration was properly to be ordered.
>
> There is therefore, as can be seen, some difficulty with these findings, but it is our view, as expressed above, that they do not amount to a finding that the judge erred in his conclusion that, in effect, the appellant and her family had been the victims of random violence and had not been able to identify an agent of persecution. *As part of remaking the decision we conclude that the appellant on the evidence taken as a whole, has not shown that she and her family were the victims of specific targeting*

and has not shown anything other than random violence." (Italics added).

113. The Tribunal went on to say that its conclusion that the violence had been random had "a clear significance to risk on return". That is plainly right because if the appellant and her family had been targeted because of a perception that her husband was a collaborator, that would necessarily affect whether she could safely return to Kirkuk. It would raise questions whether the state might have been implicated in these actions and if not, whether the state would be able to provide protection from the acts of non-state agents.

114. Mr Southey QC submits that the Upper Tribunal has erred in its reading of SIJ King's analysis. He contends that SIJ King had concluded that IJ Doyle had erred in his approach to risk on return and therefore the Upper Tribunal ought to have considered that risk afresh. Mr Staker of counsel, who argued this point on behalf of the Secretary of State, agrees that the Upper Tribunal was obliged to reconsider the point, but he says that it did, relying in particular on the last sentence of paragraph 97 (which I have italicised).

115. Although paragraph 6 of the judgment is somewhat opaque, and accordingly the reasoning of SIJ King is not entirely clear, I agree that the judge was intending to conclude that there was an error of law in IJ Doyle's analysis of the question whether the three incidents had a common cause or not. I also accept, as Mr Staker submitted, that the final sentence in paragraph 97 might, read on its own, suggest that the Upper Tribunal had looked at the matter afresh. But in my view, when the relevant paragraphs are read together, they strongly suggest that the Upper Tribunal did not think that SIJ King had identified any error of law in IJ Doyle's analysis of risk on return. Moreover, if the Upper Tribunal had been intending to consider the matter afresh, it would in my view have had to provide much fuller reasons for its conclusion that the violence was random. The last sentence of paragraph 97 is little more than an assertion. The Tribunal went on to find that there was no other basis for concluding that she would be at risk in Kirkuk.

116. The Upper Tribunal also found, consistent with its country guidance enunciated earlier in the judgment, that MK would if necessary be able to relocate to KRG. The Tribunal was satisfied that she would be able to obtain an information card to reside in KRG. The Tribunal accepted, however, that she would need to return regularly to Kirkuk in order to use the PDS card and take advantage of the food subsidies, but found that this would not be unreasonable.

117. Generally a finding that an asylum seeker can safely relocate will defeat a claim to asylum or humanitarian protection even if the tribunal errs in its assessment of risk on return because the error is not material to the outcome. However, the Secretary of State properly accepted that in the circumstances of this case, if MK was able to show that she might be targeted in Kirkuk as she claims, that would not only impact on the Article 3 conclusion but would also potentially bear on the relocation finding. She might be running an unacceptable risk of harm by regular returns to Kirkuk which could make relocation unreasonable. This issue was never addressed by the tribunals below because it did not arise once there was a finding that the violence was random.

Accordingly, the relocation finding is not in the circumstances of this case a complete answer to her claim for protection.

118. Strictly it is not necessary to consider a further ground advanced by Mr Southey. He claimed that the Upper Tribunal made certain findings which were inconsistent with the appellant's evidence, yet SIJ King had said that the credibility findings should stand. These findings included in particular a finding that her brother still lived in Kirkuk although she had said that she had not been able to contact him for some years; and the fact that, contrary to her evidence, she must have been able to remember or otherwise had access to information which would have allowed her to obtain a fresh Civil Status Identity Card. This was material to her ability to obtain other cards necessary for her to function in Iraq.

119. MK had not given oral evidence before the Upper Tribunal. There had been a case management hearing at which it was agreed that MK should not give such evidence, no doubt because credibility was not thought to be in issue. Mr Southey submits that at the very least it was unfair for the Tribunal to conclude, contrary to her evidence, that she must have been able to remember or have access to information without giving her the opportunity specifically to deal with the point. I think that there is considerable force in that submission. I suspect that following the ruling that credibility findings should stand, there was some uncertainty about which issues could be reopened and which could not. However, if aspects of her original evidence were to be rejected, I think that fairness required that she should at least have been informed of the Tribunal's preliminary view and given the opportunity to deal with them.

Disposal.

120. I would dismiss the appeals in *HM2* and the appeal directed at the country guidance in *MK*. I would, however, uphold that particular appeal of MK against the decision of the Upper Tribunal and remit the case for reconsideration. The factual findings of IJ Doyle, namely that the three incidents had occurred as she alleged, should stand.

Lord Justice Fulford:

121. I agree.

Lord Justice Maurice Kay:

122. I too agree with the judgment of Elias LJ in all its essentials. However, there is one point upon which I would express a differently nuanced view. It relates to the dual role of the UNHCR as described in paragraphs 55-59 above. Like Elias LJ, I accept the assertion of the Upper Tribunal that it did not reduce the weight it accorded to the UNHCR report because of the dual role. In these circumstances, nothing turns on the point. However, this leads me to the view that it would have been better if the Upper Tribunal had not raised the point in the first place. For my part, I would not consider it appropriate to draw any adverse inference about weight from such circumstances unless there were cogent reasons for so doing. Nor do I think it right to fly a kite which gives the impression that this is a consideration which might cause concern in future cases about the reliability of UNHCR Eligibility Guidelines as a matter of course. The UNHCR remains entitled to considerable respect and the fact that, in a

particular country, it may be discharging these two important roles should not, without more, be allowed to erode the value of its assessments. There is a risk that insinuation, even if disavowed, will corrode. For this reason, it (or the appearance of it) should be avoided, in the absence of a real reason for concern. I would resist the temptation to refer to the dual role as an additional reason for rejecting the presumption sought by the appellants.