Neutral Citation Number: [2017] EWCA Civ 944

Case No: C5/2016/0144

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
Upper Tribunal Judge Lane, Upper Tribunal Judge O'Conner, Upper Tribunal Judge Finch
AA/06175/2009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/07/2017

Before :

LORD JUSTICE SALES
and
LORD JUSTICE IRWIN

- -

Between :

AA (IRAQ)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Danny Bazini and Jessica Smeaton (instructed by **Parker Rhodes Hickmotts Solicitors**) for the **Appellant**
David Blundell (instructed by **The Government Legal Department**) for the **Respondent**

Hearing date: 22 June 2017

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Judgment Approved

1. This is the judgment of the Court to which we have both contributed. This case presents the unusual situation where both the Appellant and the Respondent Secretary of State agree there is an error in a Country Guidance Case, and agree that the appeal should be allowed albeit on a narrow ground. The point concerns an Iraqi Civil Status Identity Document ("CSID"). There is also a jurisdictional issue between the parties, affecting the appeal itself.

The Facts

2. For present purposes, the facts are not in contention. This case has a long and complex litigation history. The Appellant is a national of Iraq. He was born on 3 September 1991. He is Kurdish. He claims to come from Dubis, in Kirkuk governorate, where he lived for all but five years of his life before coming to the United Kingdom ("UK").

3. The Appellant entered the UK unlawfully on 8 January 2009. He claimed asylum the same day. His asylum claim was refused on 18 June 2009. His appeal against that decision was dismissed on 8 September 2009. Reconsideration was refused by Senior Immigration Judge Eshun on 30 September 2009. On 27 January 2010, Burnett J granted an order for reconsideration. His appeal was re-heard by the Upper Tribunal ("UT") on 22 February 2011. In a determination dated 7 April 2011, Designated Immigration Judge Wynne dismissed the appeal.

4. The basis of his asylum appeal was a claimed fear of ill-treatment on account of his father's alleged status as a former high-ranking member of the Ba'ath Party. He also claimed his uncle was of a lesser rank in the Ba'ath Party. He relied on Article 15(c) of the Qualification Directive.

5. The Appellant was found not to be credible. At [68], DIJ Wynne held that he had "grave concerns as to his testimony". He held that he was not satisfied that the Appellant had demonstrated that his father was a high-ranking Ba'ath Party official or that his uncle was of a lesser rank: [78]. Even if these allegations were true, there was no evidence that his relatives had faced any form of ill-treatment. His asylum appeal thus failed: [79].

6. As regards his Article 15(c) claim, he relied on an assertion that his remaining family had left Iraq for Syria and so he could not relocate to the KRG. DIJ Wynne held:

> "86. I reject this submission. I do so because I do not accept there is any reliable evidence the Appellant's family have left Iraq for Syria. In any event, even if his mother uncle and sisters have done so, this ignores the existence of his cousin Abdul Sattar who assisted him in leaving Iraq. This gentleman operates a business. I refer in this regard to paragraph 10 of the Appellant's witness statement of 29 October 2010 in which he states amongst other things –
>
> > "My cousin, Abdul Sattar was not living with the rest of the family in Syria, as he is a lorry driver and travels to

> different places but he was visiting the family when I spoke to my mother and him in May 2010."
>
> 87. It is thus likely on the Appellant's own account Abdul Sattar remains in Iraq from time to time and whilst to a certain extent itinerant in the course of business is likely to be based in Kirkuk. There is no adequate explanation forthcoming from the Appellant or any other source as to the reason why Abdul Sattar cannot act as the Appellant's sponsor / guarantor."

7. Accordingly, the Article 15(c) claim also failed.

8. Permission to appeal to the Court of Appeal was initially refused on the papers on 1 July 2011. A renewed application to the Court of Appeal was refused on the papers by Moses LJ on 5 December 2011. On 13 December 2011, the Court of Appeal handed down judgment in *HM (Iraq) v. Secretary of State for the Home Department* [2011] EWCA Civ 1536 ("*HM1*"). The Court remitted that country guidance case for redetermination because of a procedural error at the original hearing.

9. Following the hand-down of *HM1*, the Appellant amended his grounds of appeal. Permission was granted on the amended ground by Laws LJ on 8 March 2012. In light of developments in the *HM* litigation on Article 15(c) in Iraq, the Secretary of State conceded the Appellant's appeal and agreed to its remittal to the UT. The Court of Appeal so ordered on 25 October 2012.

10. The Tribunal listed the appeal for country guidance on the issue of the application of Article 15(c) of the Qualification Directive to Iraq. It was heard on 18 and 19 May 2015. On 30 October 2015, the Tribunal promulgated its determination. Detailed country guidance is summarised at [204]. The Appellant's individual case is dealt with at [205]-[210]. It was remitted to the First-tier Tribunal ("FtT") for further fact-finding: [210].

11. Permission to appeal was refused by UTJ O'Connor on 30 November 2015. Permission was granted following an oral hearing by Christopher Clarke and Sharp LJJ on 21 July 2016, on one, reformulated ground, as follows:

> "The Upper Tribunal erred in concluding, at paragraph 170 of the determination, that the question of whether a CSID card could be obtained by an applicant arose for consideration only where the Secretary of State asserts that his removal to Iraq is feasible. As part of an assessment as to whether an individual requires international protection a decision maker is (a) bound to consider whether the individual concerned has a CSID card or could obtain one either prior to, or shortly after removal to Baghdad, failing which (in the absence of an alternative means of support) his circumstances are likely to amount to a breach of article 3 ECHR and (b) not entitled to postpone any decision on that question if it is not feasible for him to be returned to Iraq."

The Jurisdictional Issue

12. It will be understood that the UT has allowed the appeal and remitted the case to the FtT for further fact finding, and at the same time permission has been granted to appeal to this Court. The Secretary of State has expressed concern about this, and about whether this Court has jurisdiction to hear an appeal in such circumstances. Indeed, with some diffidence Mr Blundell for the Secretary of State has submitted we do not. The Secretary of State does not seek to prevent the Court dealing with the identified error. Rather the opposite: both parties would wish it to be addressed. However, the concern arises from the decision of the Upper Tribunal (Immigration and Asylum Chamber) in *VOM (Error of law when appealable) Nigeria* [2016] UKUT 00410 (IAC).

13. The Upper Tribunal in *VOM*, in a constitution headed by the President of UTIAC, McCloskey J, had to consider the statutory basis of appeal from the UT to the Court of Appeal. The procedural position in that case was that the UT heard combined appeals from both sides on two critical but discrete issues. The essential ruling and order was recited in [5]:

> "….
>
> > "The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law insofar as the assessment of exceptional circumstances in paragraph 398 of the Immigration Rules is concerned. I set aside the decision insofar as it relates to that finding. The First-tier Tribunal did not err in law in its findings with regard to Article 3 and I do not set aside that decision".
>
> The UT Judge formulated certain consequential case management directions relating to the provision of evidence and, further, provisionally relisting the appeal for hearing on 15 March 2016 for the purpose of remaking the decision of the FtT."

14. The Appellant in *VOM* sought permission from the UT to appeal that conclusion, on the basis that the UT was wrong as to the error of law on the part of the FtT, and wrong to set aside the decision. For present purposes, whether those criticisms were correct or not is immaterial. McCloskey J and his colleagues had to decide whether, in such circumstances, an appeal lies to the Court of Appeal.

15. The UT in *VOM* re-emphasised that appellate jurisdictions, including the jurisdiction of this Court, are based on statute. Appeal to this Court from the UT is no exception. The relevant provisions are contained in Sections 82 and 104 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), Sections 11, 12 and 13 of the Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), Article 3 of the Appeals (Excluded Decisions) Order 2009, as amended, and Rules 2 and 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008. The UT in *VOM* also made reference to Section 13(6) of the 2007 Act, which provides for the "second appeal" test governing appeals from the UT. In the report in *VOM*, the statutory provisions are set out in full. We do not need to repeat them all here.

16. The most important provisions for present purposes are Sections 12 and 13 of the 2007 Act, and the critical parts read:

> "Section 12
>
> **Proceedings on appeal to Upper Tribunal**
>
> (1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal –
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either–
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision.
>
> (3) In acting under subsection (2)(b)(i), the Upper Tribunal may also –
>
> (a) direct that the members of the First-tier Tribunal who are chosen to reconsider the case are not to be the same as those who made the decision that has been set aside;
>
> (b) give procedural directions in connection with the reconsideration of the case by the First-tier Tribunal.
>
> (4) In acting under subsection (2)(b)(ii), the Upper Tribunal–
>
> (a) may make any decision which the First-tier Tribunal could make if the First-tier Tribunal were re-making the decision, and
>
> (b) may make such findings of fact as it considers appropriate.
>
> Section 13
>
> **Right to appeal to Court of Appeal etc.**
>
> (1) For the purposes of subsection (2), the reference to a right of appeal is to a right to appeal to the relevant

appellate court on any point of law arising from a decision made by the Upper Tribunal other than an excluded decision.

…

(6) The Lord Chancellor may, as respects an application under subsection (4) that falls within subsection (7) and for which the relevant appellate court is the Court of Appeal in England and Wales or the Court of Appeal in Northern Ireland, by order make provision for permission (or leave) not to be granted on the application unless the Upper Tribunal or (as the case may be) the relevant appellate court considers–

(a) that the proposed appeal would raise some important point of principle or practice, or

(b) that there is some other compelling reason for the relevant appellate court to hear the appeal.

(6A) Rules of court may make provision for permission not to be granted on an application under subsection (4) to the Court of Session that falls within subsection (7) unless the court considers –

(a) that the proposed appeal would raise some important point of principle [or practice] , or

(b) that there is some other compelling reason for the court to hear the appeal.

(7) An application falls within this subsection if the application is for permission (or leave) to appeal from any decision of the Upper Tribunal on an appeal under section 11.

(8) For the purposes of subsection (1), an 'excluded decision' is –

(a) any decision of the Upper Tribunal on an appeal under section 28(4) or (6) of the Data Protection Act 1998 (c. 29) (appeals against national security certificate),

(b) any decision of the Upper Tribunal on an appeal under section 60(1) or (4) of the Freedom of Information Act 2000 (c. 36) (appeals against national security certificate),

(c) any decision of the Upper Tribunal on an application under section 11(4)(b) (application for permission or leave to appeal),

(d) a decision of the Upper Tribunal under section 10–

(i) to review, or not to review, an earlier decision of the tribunal,

(ii) to take no action, or not to take any particular action, in the light of a review of an earlier decision of the tribunal, or

(iii) to set aside an earlier decision of the tribunal,

(e) a decision of the Upper Tribunal that is set aside under section 10 (including a decision set aside after proceedings on an appeal under this section have been begun), or

(f) any decision of the Upper Tribunal that is of a description specified in an order made by the Lord Chancellor.

(9) A description may be specified under subsection (8)(f) only if –

(a) in the case of a decision of that description, there is a right to appeal to a court from the decision and that right is, or includes, something other than a right (however expressed) to appeal on any point of law arising from the decision, or

(b) decisions of that description are made in carrying out a function transferred under section 30 and prior to the transfer of the function under section 30(1) there was no right to appeal from decisions of that description.

(10) Where –

(a) an order under subsection (8)(f) specifies a description of decisions, and

(b) decisions of that description are made in carrying out a function transferred under section 30,

the order must be framed so as to come into force no later than the time when the transfer under section 30

> of the function takes effect (but power to revoke the order continues to be exercisable after that time, and power to amend the order continues to be exercisable after that time for the purpose of narrowing the description for the time being specified).
>
> (11) Before the Upper Tribunal decides an application made to it under subsection (4), the Upper Tribunal must specify the court that is to be the relevant appellate court as respects the proposed appeal.
>
> (12) The court to be specified under subsection (11) in relation to a proposed appeal is whichever of the following courts appears to the Upper Tribunal to be the most appropriate –
>
> (a) the Court of Appeal in England and Wales.
>
> …"

17. By the Appeals (Excluded Decisions) Order 2009, various kinds of decision are specified as being "excluded decisions". Article 3(m) of the Order provides that the following decisions are "excluded decisions":

> "any procedural, ancillary or preliminary decision made in relation to an appeal against a decision under section 40A of the British Nationality Act 1981, section 82 of the Nationality, Immigration and Asylum Act 2002, or regulation 26 of the Immigration (European Economic Area) Regulations 2006."

18. In *VOM* the Secretary of State argued against any interlocutory or interim appeals from the UT to the Court of Appeal. Such a process "cannot have been the intention of Parliament". As summarised by the UT in VOM, the Secretary of State submitted that the statutory regime:

> "…contemplates a single, indivisible appeal (our formula) from the UT to the Court of Appeal only at the stage when the UT appeal process is finally completed. This, it was submitted, would give effect to the presumed parliamentary intention of a sensible, coherent and workable appeal model. Ms Anderson's alternative submission was that the appeal which the Appellant purports to pursue is precluded by Article 3(m) of the 2009 Order in any event." (*VOM*, Paragraph 14)

19. The Appellant argued that the words "a decision made by the UT" in Section 13(1) of the 2007 Act embrace:

> "…a finding that the decision of the FtT involved the making of an error on a point of law and/or a consequential decision of the UT setting aside the decision of the FtT. Mr Khubber submitted that the statutory language is sufficiently broad and

> unqualified to warrant this construction. He further submitted that this is supported by the restrictive nature of the second appeal test." (*VOM*, paragraph 13)

20. In considering these submissions, the UT in *VOM* recited *Halsbury's Laws of England*, *Volume 37 (4th Edition Reissue)* paragraph 1501, *Evans v Bartlam* [1937] AC 473 at 480, and *In Re D (A Child)* [2016] UKSC 34, to the effect that appellate jurisdictions are statutory. They directed themselves that particular statutes are enacted for particular purposes and must be construed accordingly (*R v Z* [2005] UK HL 35, Lord Bingham at [18]; *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687, Lord Bingham at p. 695).

21. With those principles in mind, the UT considered the statutory framework for appeals: the need for a "user-oriented service" in the Tribunal ([17]); the need for expedition and finality in litigation ([19]); and the need to resist "satellite" litigation ([20] and [21]). They then proceeded to analyse Section 12 of the 2007 Act as follows:

> "22. The key to answering the question of whether the Appellant can seek to pursue an appeal to the Court of Appeal at this stage of the proceedings, via an application for permission to appeal, lies, firstly, in the construction of Section 12 of the 2007 Act. Our analysis and dissection of Section 12 are as follows:
>
> (a) The function, and responsibility, of the UT is to determine whether an appealable decision of the FtT is vitiated by error of law: see Section 11.
>
> (b) In performing this function, the first task of the UT is to determine whether the decision of the FtT "involved the making of an error on a point of law": per Section 12(1).
>
> (c) If the UT "finds" (the statutory word) that the decision of the FtT did not involve the making of an error on a point of law, the appeal is dismissed and the decision of the FtT affirmed.
>
> (d) If the UT finds that the decision of the FtT involved the making of an error on a point of law, it must then progress to a second stage which entails deciding whether to set aside the decision of the FtT – see Section 12(2)(a) – an exercise which entails the assessment of whether the error of law diagnosed is material. This is the rationale underpinning the discretionary power conferred on the UT in this respect.
>
> (e) Where the UT, having found that the decision of the FtT involved the making of an error on a point of law, concludes, at the second stage, that the error was not material the appeal is dismissed and the decision of the FtT affirmed.
>
> (f) If, on the other hand, the UT decides that the error of law was material, this completes the second stage and triggers a third stage, at

which a further decision must be made, namely whether to remit the case to the FtT with directions for its reconsideration or to remake the decision of the FtT.

(g) The operation of Section 12, therefore, throws up a series of possible steps, stages and outcomes. The chief characteristic of some of these is that they are intermediate in nature. This analysis applies to:

(i) A finding that the decision of the [FtT] was erroneous in law.

(ii) A determination, whether in tandem with or separate from (a), to set aside the decision of the FtT.

(iii) A determination, normally made in tandem with a positive set aside determination, of whether to remit the case to the FtT or retain it in the forum of the UT for the purpose of remaking the decision."

22. Proceeding to the specifics of the case before them, the UT observed that their case combined the three elements of (1) finding an error of law in one respect of the FtT decision, (2) setting aside that decision, and (3) "retaining the appeal in the forum of the UT for the purpose of remaking the decision of the FtT" ([23]). That situation is different from the instant case, in that in this case the UT, having identified an error of law and set aside the decision of the FtT, have remitted the case to be reheard below, rather than retain the matter with a view to a final decision being made in the UT.

23. The UT in *VOM* rejected the Appellant's submissions. For a series of reasons, set out in paragraphs 25 to 30 of their judgment, they concluded that the sequence of conclusions (1) that there was an error of law below, (2) that the FtT decision would be quashed and (3) that the UT would proceed to remake the decision, did not, taken together, represent a "decision" of the UT within the meaning and intent of Section 13 of the 2007 Act. The UT had not completed its functions of "deciding an appeal". The intermediate steps taken by the UT were just that: the "decision" on the appeal is not complete until the functions of the UT are complete. Only then is the statutory route to appeal from the UT triggered.

24. The heart of the UT's reasoning is that the "intermediate decision" of the UT cannot have been intended to establish a right to seek permission to appeal to the Court of Appeal (*VOM*, paragraph 25). A "decision" of the UT means "deciding an appeal": *VOM*, paragraph 28. That process only concludes with the "ultimate outcome" of the Appeal: *VOM*, paragraph 28.

25. The UT added to their reasoning. If the Appellant in *VOM* had been correct, the consequence would be that many appeals entertained by the Court of Appeal, based on the contention that the UT should not have found an error of law on the part of the FtT, would have been commenced out of time (*VOM*, paragraph 30).

26. A further conclusion in *VOM* was that a decision to quash and conclude the case before the UT is a "procedural, ancillary or preliminary" decision made in relation to an appeal under section 82 of the 2002 Act, and is therefore an "excluded decision" within the meaning of Article 3(m) of the 2009 Order.

27. The Appellant in the instant case argues that there is a vital distinction between the situation in this case and the position in *VOM*. In the latter case, the UT still had to carry out the re-determination. The functions of the UT had not all been discharged, and thus the decision was incomplete. In the instant case, the appeal before the UT is complete. The matter has left the UT and once more lies before the FtT. When the FtT has made its redetermination there will arise a right of further appeal to the UT (if permission is granted), but there is no current appeal, and a renewed appeal to the UT may never happen. In that sense there has been "a decision of the UT which is finally dispositive of an appeal from the FtT" to quote the language of paragraph 34 in *VOM*. Any second appeal to the UT will be exactly that: a further appeal.

28. Moreover, the practical implications and difficulties which concerned the UT in *VOM* are materially different from those arising here. It may not often arise that parties will seek to appeal the UT at the same time as the case has been remitted to the FtT. And it will be rare that parties are agreed that there has been an error of law in Country Guidance, as here. Precisely because the judgment gives Country Guidance, such an error (if it be so) may be replicated across many other cases. Delay in addressing such an error may be very costly.

29. We agree with that analysis. In older legal language, the UT is *functus officio* in relation to the appeal which it heard. It has completely finished its task under Section 12 of the 2007 Act. Nor can it be said to be an excluded decision within the terms of Article 3(m) of the 2009 Order, because the UT's decision is final on that appeal and cannot be described as procedural, ancillary or preliminary in relation to the appeal. Hence a right of appeal to this court has arisen in the instant case.

30. There are powerful practical reasons for distinguishing the instant case from the position in *VOM*. Unless the parties can seek to challenge a legal ruling in circumstances such as this, the FtT will have to proceed to re-hear the case without the legal point being tested. Thereafter, the party critical of the legal ruling in the UT will then have to seek permission to appeal a second time to the UT. If they get permission, they will be faced with arguing the same legal issue a second time before the UT. Assuming the UT adopts a view of the law consistent with the view taken previously, the losing party (or conceivably, as in this case, both parties) will only at that point have the opportunity to seek permission to appeal to the Court of Appeal. The law should permit such a pointless and wasteful legal gavotte only if strictly compelled to do so by the statute. In our view, there is no such compulsion.

31. Further, Mr Blundell's submission for the Secretary of State in the present case unavoidably involves the proposition that countless appeals to the Court of Appeal in cases where the UT have decided to allow an appeal and remit the case to the FtT have been premature and entertained without jurisdiction in this court. This implication of the submission for the Secretary of State in this case may be compared and contrasted with the observation of the UT in *VOM* at paragraph 30 in relation to the similar implications of the argument for the individual in the different context which they had to address. In both cases, it is implausible that Parliament intended such results.

32. In our view there is no conflict between our approach and that of the UT in *VOM*. The context in which the issues of application of section 13 of the 2007 Act and Article 3(m) of the 2009 Order are raised before us is very different from that in

which they were invoked before that Tribunal. Where the UT declines to remit, they retain the appeal. Until the UT re-makes the decision on the appeal, they have not finished their task under section 12 of the 2007 Act and so have not made their "decision" for the purposes of section 13. Once they have done so, the right of appeal to this court under section 13 arises at that stage.

33. These considerations are particularly important in the context of a Country Guidance case. If there is an error in such a case, it is liable to proliferate rapidly as other courts and tribunals follow the guidance. It is plainly desirable that any error of law by the UT in such a case should be capable of being put right by this court at the earliest opportunity after the UT have completed their task under section 12 of the 2007 Act.

34. The way in which the UT express the position in paragraph 22(g) of *VOM* is not entirely felicitous, and indeed it was principally that sub-paragraph upon which Mr Blundell fastened for the purposes of his submissions on jurisdiction. The sub-paragraph is ambiguous because it begins by referring to the entirety of possible steps, stages and outcomes under section 12; states that some of them are intermediate in nature; and then says "this analysis applies to" three stages, which on one view cover the entirety of possible steps under section 12 (the subject of the first sentence) and on another view are intended to refer only to some of those possible steps and to identify them as the steps which are "intermediate in nature" (the subject of the second sentence). There is some awkwardness whichever way one reads this, since what is described in sub-paragraph (iii) is arguably a mixture of an intermediate step (the UT retaining the case with a view to remaking the decision in the future) and a final step (the UT allows the appeal and remits the case to the FtT). On the other hand, one could read sub-paragraph (iii) as referring to two final steps: the UT retains the case *and* remakes the decision and the UT allows the appeal and remits the case to the FtT. We think it is best read in this way, and this seems to correspond with the specific identification by the UT of the steps in sub-paragraphs (i) and (ii) as intermediate steps when at paragraph 30 it criticises the submission by Mr Khubber for the individual in that case. However, if paragraph 22(g) in *VOM* is not to be read in this way, we consider that as framed it represents an inaccurate statement of the law which we cannot endorse.

35. For these reasons we are firmly of the view that we have jurisdiction to hear this appeal.

The Substantive Appeal

36. We return to the substantive point in the case. The parties are agreed as to the error below. The UT gave a clear general analysis of the law on Article 15(c) of the Qualifications Directive in paragraphs 83 to 86, and neither party has any criticism of that analysis. However, the Appellant argues that the UT erred in paragraph 170, in concluding as follows:

> "170. In the absence of an expired or current Iraqi passport, a person can only be returned to Baghdad using a laissez-passer. According to Dr Fatah, either a CSID or INC or a photocopy of a previous Iraqi passport and a police report noting that it had been lost or stolen is required in order to obtain a laissez-passer. If a person does not have one of these documents then

> they cannot obtain a laissez-passer and therefore cannot be returned. This has a significant bearing on what we have just said. If the position is that the Secretary of State can feasibly remove an Iraqi national, then she will be expected to tell the tribunal whether and if so what documentation has led the Iraqi authorities to issue the national with the passport or laissez-passer (or signal their intention to do so). The Tribunal will need to know, in particular, whether the person concerned has a CSID. It is only where return is feasible but the individual concerned does not have a CSID that the consequences of not having one come into play."

37. That finding was the basis of Sections B and C of the formal guidance given by the UT at the end of their judgment, a part of paragraph 204. The critical passages read:

> "7. In the light of the Court of Appeal's judgment in HF (Iraq) and Others v Secretary of State for the Home Department [2013] EWCA Civ 1276, an international protection claim made by P cannot succeed by reference to any alleged risk of harm arising from an absence of Iraqi identification documentation, if the Tribunal finds that P's return is not currently feasible, given what is known about the state of P's documentation.
>
> **C. Position on Documentation Where Return is Feasible**
>
> 8. **It will only be where the Tribunal is satisfied that the return of P to Iraq is feasible** [emphasis added] that the issue of alleged risk of harm arising from an absence of Iraqi identification documentation will require judicial determination."

38. In reaching this part of their conclusions, the UT equated the CSID simply to a return document. On that basis, they applied the approach outlined by Elias LJ in *HF (Iraq) v Secretary of State for the Home Department* [2013] EWCA Civ 1276; [2014] 1 WLR 1329. In that case, the point at issue was whether an Iraqi national returned to Iraq without a passport or *laissez-passer* would be detained at Baghdad airport and subjected to Article 3 ill-treatment. However, the risk rose from the absence of those documents, without which the Appellant could not be returned at all. In that context, the Court concluded that the question was redundant. Elias LJ expressed his conclusion as follows:

> "98. … [Counsel for the Secretary of State, Mr Eadie]'s contention is that, properly analysed, the practice of not returning those without the appropriate documents is not a voluntary policy of the Secretary of State at all. The lack of documentation creates an impediment to return which the Secretary of State cannot circumvent. Iraq will not receive anyone from the UK without the relevant travel document. If an unsuccessful applicant for asylum refuses to co-operate to obtain the laissez passer document, he is in precisely the same

> situation as any other failed asylum seeker whom the Secretary of State is unable to return for one reason or another. The assurance of the Secretary of State that she would not return someone to Iraq without the relevant documents is of no special significance; it simply reflects realities. …
>
> 99. Mr Eadie submits that these appellants are precisely in the situation of any other failed asylum seekers who would not be at risk in their own state but cannot for technical reasons be returned home. The existence of technical obstacles does not entitle them to humanitarian protection. …
>
> 100. Mr Eadie says that this is not like the *J1* case [2013] EWCA Civ 279 or the sur place cases where, if returned, the appellants would potentially face ill-treatment meeting Article 3 standards. They can only be returned with the necessary documentation, and if and when the impediment caused by lack of the relevant documentation is overcome, they will be safe on return.
>
> 101. In my judgment, this analysis is correct. I accept, as Mr Fordham submits, that it would be necessary for the court to consider whether the appellants would be at risk on return if their return were feasible, but I do not accept that the Tribunal has to ask itself the hypothetical question of what would happen on return if that is simply not possible for one reason or another. …"

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

40. As the Appellant reminds us, decision-makers must take decisions on entitlement to protection within a reasonable period of time, and must not decline to address a material element of a claim such as this: see *AG (Somalia) v Secretary of State for the Home Department* [2006] EWCA Civ 1342 at [29]; *HH (Somalia) v Secretary of State for the Home Department* [2010] EWCA Civ 426 at [63] and *JI v Secretary of State for the Home Department* [2013] EWCA Civ 279, [42]-[54], in addition to Council Directives 2004/83/EC and 2005/85/EC. The Secretary of State agrees with this analysis. Hence, it will be wrong indefinitely to postpone the enquiry.

41. Since the parties are agreed as to the error of law in this case, and what needs to be done to correct it, there is no point in remitting the case to the UT. The correction to the country guidance can be made by this court. Following submissions as to the best procedure to adopt, the parties are agreed that the safest course is to append to this

judgment a complete revised Country Guidance, with the amended text highlighted. By this means, the revisions will be evident, but practitioners will have ready access to the Guidance in one document, avoiding the inconvenience and risk of confusion which might otherwise arise. The amended country guidance appears as the Annex to this judgment. Paragraph 170 of the UT's judgment should be read in the light of and consistently with this amended guidance.

42. To that limited extent, this Appeal succeeds, by consent, and for those reasons.

ANNEX

The guidance we give is as follows:

A. INDISCRIMINATE VIOLENCE IN IRAQ: ARTICLE 15(C) OF THE QUALIFICATION DIRECTIVE

1. *There is at present a state of internal armed conflict in certain parts of Iraq, involving government security forces, militias of various kinds, and the Islamist group known as ISIL. The intensity of this armed conflict in the so-called "contested areas", comprising the governorates of Anbar, Diyala, Kirkuk, (aka Ta'min), Ninewah and Salah Al-din, is such that, as a general matter, there are substantial grounds for believing that any civilian returned there, solely on account of his or her presence there, faces a real risk of being subjected to indiscriminate violence amounting to serious harm within the scope of Article 15(c) of the Qualification Directive.*

2. *The degree of armed conflict in certain parts of the "Baghdad Belts" (the urban environs around Baghdad City) is also of the intensity described in paragraph 1 above, thereby giving rise to a generalised Article 15(c) risk. The parts of the Baghdad Belts concerned are those forming the border between the Baghdad Governorate and the contested areas described in paragraph 1.*

3. *The degree of armed conflict in the remainder of Iraq (including Baghdad City) is not such as to give rise to indiscriminate violence amounting to such serious harm to civilians, irrespective of their individual characteristics, so as to engage Article 15(c).*

4. *In accordance with the principles set out in Elgafaji (C-465/07) and QD (Iraq) v Secretary of State for the Home Department [2009] EWCA Civ 620, decision-makers in Iraqi cases should assess the individual characteristics of the person claiming humanitarian protection, in order to ascertain whether those characteristics are such as to put that person at real risk of Article 15(c) harm.*

B. DOCUMENTATION AND FEASIBILITY OF RETURN (EXCLUDING IKR)

5. Return of former residents of the Iraqi Kurdish Region (IKR) will be to the IKR and all other Iraqis will be to Baghdad. The Iraqi authorities will allow an Iraqi national (P) in the United Kingdom to enter Iraq only if P is in possession of a current or expired Iraqi passport relating to P, or a laissez passer.

6. No Iraqi national will be returnable to Baghdad if not in possession of one of these documents.

7. In the light of the Court of Appeal's judgment in HF (Iraq) and Others v Secretary of State for the Home Department [2013] EWCA Civ 1276, an international protection claim made by P cannot succeed by reference to any alleged risk of harm arising from an absence of a current or expired Iraqi passport or a laissez passer, if the Tribunal finds that P's return is not currently feasible on account of a lack of any of those documents.

8. Where P is returned to Iraq on a laissez passer or expired passport, P will be at no risk of serious harm at the point of return by reason of not having a current passport.

C. The CSID

9. Regardless of the feasibility of P's return, it will be necessary to decide whether P has a CSID, or will be able to obtain one, reasonably soon after arrival in Iraq. A CSID is generally required in order for an Iraqi to access financial assistance from the authorities; employment; education; housing; and medical treatment. If P shows there are no family or other members likely to be able to provide means of support, P is in general likely to face a real risk of destitution, amounting to serious harm, if, by the time any funds provided to P by the Secretary of State or her agents to assist P's return have been exhausted, it is reasonably likely that P will still have no CSID.

10. Where return is feasible but P does not have a CSID, P should as a general matter be able to obtain one from the Civil Status Affairs Office for P's home Governorate, using an Iraqi passport (whether current or expired), if P has one. If P does not have such a passport, P's ability to obtain a CSID may depend on whether P knows the page and volume number of the book holding P's information (and that of P's family). P's ability to persuade the officials that P is the person named on the relevant page is likely to depend on whether P has family members or other individuals who are prepared to vouch for P.

11. P's ability to obtain a CSID is likely to be severely hampered if P is unable to go to the Civil Status Affairs Office of P's Governorate because it is in an area where Article 15(c) serious harm is occurring. As a result of the violence, alternative CSA Offices for Mosul, Anbar and Saluhaddin have been established in Baghdad and Kerbala. The evidence does not demonstrate that the "Central Archive", which exists in Baghdad, is in practice able to provide CSIDs to those in need of them. There is, however, a National Status Court in Baghdad, to which P could apply for formal recognition of identity. The precise operation of this court is, however, unclear.

D. INTERNAL RELOCATION WITHIN IRAQ (OTHER THAN THE IKR)

14. As a general matter, it will not be unreasonable or unduly harsh for a person from a contested area to relocate to Baghdad City or (subject to paragraph 2 above) the Baghdad Belts.

15. In assessing whether it would be unreasonable/unduly harsh for P to relocate to Baghdad, the following factors are, however, likely to be relevant:

(a) whether P has a CSID or will be able to obtain one (see Part C above);

(b) whether P can speak Arabic (those who cannot are less likely to find employment);

(c) whether P has family members or friends in Baghdad able to accommodate him;

(d) whether P is a lone female (women face greater difficulties than men in finding employment);

(e) whether P can find a sponsor to access a hotel room or rent accommodation;

(f) whether P is from a minority community;

(g) whether there is support available for P bearing in mind there is some evidence that returned failed asylum seekers are provided with the support generally given to IDPs.

16. There is not a real risk of an ordinary civilian travelling from Baghdad airport to the southern governorates, suffering serious harm en route to such governorates so as engage Article 15(c).

E. IRAQI KURDISH REGION

17. The Respondent will only return P to the IKR if P originates from the IKR and P's identity has been 'pre-cleared' with the IKR authorities. The authorities in the IKR do not require P to have an expired or current passport, or laissez passer.

18. The IKR is virtually violence free. There is no Article 15(c) risk to an ordinary civilian in the IKR.

19. A Kurd (K) who does not originate from the IKR can obtain entry for 10 days as a visitor and then renew this entry permission for a further 10 days. If K finds employment, K can remain for longer, although K will need to register with the authorities and provide details of the employer. There is no evidence that the IKR authorities pro-actively remove Kurds from the IKR whose permits have come to an end.

20. Whether K, if returned to Baghdad, can reasonably be expected to avoid any potential undue harshness in that city by travelling to the IKR, will be fact sensitive; and is likely to involve an assessment of (a) the practicality of travel from Baghdad to the IKR (such as to Irbil by air); (b) the likelihood of K's securing employment in the IKR; and (c) the availability of assistance from family and friends in the IKR.

21. As a general matter, a non-Kurd who is at real risk in a home area in Iraq is unlikely to be able to relocate to the IKR.

F. EXISTING COUNTRY GUIDANCE DECISIONS

22. This decision replaces all existing country guidance on Iraq