



**Upper Tribunal
(Immigration and Asylum Chamber)
AA/06175/2009 (V)**

Appeal number:

THE IMMIGRATION ACTS

**Heard Remotely at Manchester
CJC
On the 1 November 2022**

**Decision & Reasons
Promulgated
On the 14 November 2022**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

AA

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DIECTIONS FOLLOWING CASE MANAGEMENT REVIEW

For the appellant: Mr D Bazini of Counsel, leading Mr C Cole of Parker Rhodes Hickmotts Solicitors

For the Respondent: Mr A McVeety, Senior Presenting Officer

1. For the reasons summarised below, the appeal is allowed on article 3 ECHR grounds only and dismissed on all other grounds.

Appeal Chronology

2. The full chronology is set out in the case papers and in both my error of law decision promulgated 15.12.20 and the directions I issued on 9.3.21 following a Case Management Review(CMR). The more relevant history may be summarised as followed.
3. The appellant, who is an Iraqi national of Kurdish ethnicity with date of birth given as 3.9.91, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 10.5.18, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 18.6.09, to refuse his claim for international protection.
4. The appellant entered the UK in 2009, at the age of 17, and applied for international protection. That application was refused by the respondent on 18.6.09 and a decision was also made to remove him from the UK, pursuant to s10 of the 1999 Act.
5. In all, there have been three previous First-tier Tribunal decisions, each dismissing the appeal: Judge Batiste (7.9.09), Judge Wynne (1.4.11), and Judge Kelly (10.5.18).
6. Following appeals to the Court of Appeal, this matter was remitted to the Upper Tribunal for reconsideration of the article 15(c) issue, which resulted in the issue of Country Guidance in May 2015 in AA (Article 15(c)) Iraq CG [2012] UKUT 00409 (IAC). However, this was subsequently successfully appealed to the Court of Appeal in AA (Article 15(c)) Iraq v SSHD [2017] EWCA Civ 944, which amended the Country Guidance and remitted the matter to the First-tier Tribunal for further fact finding. The outstanding factual issues then comprised: the appellant's claimed inability to speak Arabic; the whereabouts of his family members; his ability to enter and remain in the IKR as an alternative to Baghdad; and the situation in Iraq for the appellant's family. The Upper Tribunal directed the First-tier Tribunal to apply the relevant Country Guidance.
7. Deciding the remitted appeal in May 2018, Judge Kelly agreed with the respondent's submission that there was sufficient evidence to justify departure from the then Country Guidance of AA and to conclude that Kirkuk was no longer a 'contested area'. It followed, therefore, there would be no article 15(c) risk for the appellant returning to his hometown of Dubis, within the Kirkuk Governorate.
8. Although permission to appeal Judge Kelly's decision was refused by both the First-tier Tribunal and the Upper Tribunal, a CART judicial review application ultimately resulted in the quashing of the Upper Tribunal's decision refusing permission and the subsequent grant of permission by the Upper Tribunal on 28.11.19.

9. Unfortunately, the Covid-19 Pandemic then intervened, so that the matter was not able to be heard until it was listed before me for an error of law hearing remotely by video on 4.12.20. For the reasons set out in my decision promulgated 15.12.20, annexed hereto, I found a material error of law in Judge Kelly's decision and set it aside to be remade in the Upper Tribunal, subject to the limitations in scope set out in the accompanying directions.
10. The matter then came back before me for a Case Management Review on 8.3.21, following which I issued revised directions for the appeal to be remade in the Upper Tribunal by remote video hearing.
11. The appeal next came back before me for a face-to-face hearing in Manchester on 1.11.22. The appellant was in attendance with the assistance of an interpreter.

Documentation

12. The Upper Tribunal has received an electronic copy of the 'Appellant's Upper Tribunal Bundle', comprising 385 pages, sent to the Upper Tribunal on 26.10.22. This includes subjective and objective material, including country background information and copies of relevant case law.
13. Before making any findings of fact and reaching a decision on this appeal, I confirm that I have carefully considered and fully taken into account all evidence, submission, and other materials put before the Tribunal for this appeal hearing, particularly those passages highlighted and drawn to my attention and listed in the 'Key Passage Index'. However, it is not necessary for me to list, recite, summarise, or address each and every piece of evidence within this decision as the parties' representatives have the documentation and were present for the oral evidence and submissions.

The Scope of the Appeal

14. My previous directions preserved those findings of fact of Judge Wynne which accepted that until he left Iraq to come to the UK at the end of 2008, the appellant formerly lived in the family home in Dubis, within the Kirkuk Governorate. His father died in 2006. However, he has a cousin who is a lorry driver and who continues to live in Kirkuk. It was this same cousin who arranged for the appellant to leave Iraq. I proceed on that basis.
15. I also preserved Judge Kelly's acceptance that as the appellant had barely spoken any Arabic since arriving in the UK in 2009, "it is likely, therefore, that he would initially only be able to communicate in Arabic at a fairly basic level until such time as his subconsciously retained knowledge was fully restored to the forefront of his memory. It would thus be apparent that Arabic is very much his second language, and

others may thus quickly conclude (as is in fact the case) that he was of Kurdish ethnicity and/or had spent many years in the West.”

16. My directions from 2020 and 2021 limited the scope of the issues for the appeal hearing as follows:
 - a. Any article 15(c) risk of indiscriminate violence on return to Kirkuk and the appellant’s hometown of Dubis;
 - b. Alternatively, relocation to either Baghdad or the IKR;
 - c. Whether the appellant has lost contact with family members in Iraq as claimed;
 - d. The feasibility of return and the related issue of access to CSID or other identity or travel documentation enabling the appellant to be returned to Iraq and make his way to either his hometown of Dubis, remaining in Baghdad, or relocation to the IKR.
17. Since the appeal had last been before the First-tier Tribunal in 2018, the Country Guidance of AA was replaced by SMO, KSP & IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 004100 (IAC).
18. However, matters have since moved on. The latest iteration of Country Guidance is SMO & KSP (Civil status documentation; article 15) Iraq CG [2022] UKUT 00110 (IAC), referred to as SMO2 to distinguish it from what is now referred to as SMO1. Even since SMO2 was promulgated on 16.3.22, the situation has changed further. The respondent has now issued revised CPIN: (1) on Internal Relocation, Civil Documentation and Returns (V13.0 July 2022) and (2) on the humanitarian situation in Iraq (V1.0 August 2022). The CPINs and the Country Guidance are helpfully contained within the appellant’s bundle.
19. At the outset of the hearing before me on 1.11.22, Mr McVeety and Mr Bazini explained that they had been able to narrow the outstanding issues even further. Mr Bazini stated that the article 15(c) issue has been resolved by Country Guidance and he did not pursue that aspect of the appeal, accepting that there is now no viable claim in this regard. For his part, Mr McVeety accepted that INID terminals have been installed throughout Iraq, including in the appellant’s home area, and that there are very few places where the old CSID system remains. That has, of course, implications for the ability of the appellant to redocument himself, if necessary.
20. Mr McVeety and Mr Bazini both agreed that realistically the only viable issue remaining is whether the appellant remains in contact with his family and, through them, can have access to the CSID identity document he claims his mother retained when he left Iraq at the age of 17 in 2008. If he can access that identity document, Mr McVeety asserts that return is feasible as he would be able to use the CSID to return to his home area and present himself for redocumentation at an

INID terminal in Dubis. It is not now contended by the respondent that return to Baghdad is or elsewhere is feasible. Whilst returns can be made to any city with an international airport, including the IKR, it is agreed between the parties that the feasibility of return depends entirely on the appellant having access to his CSID.

The Article 15(c) Issue

21. Whilst, as stated above, this is no longer a live issue, it may be helpful to set out the background which gave rise to this appeal having to be remade in the Upper Tribunal.
22. In 2015 the Country Guidance of AA had held that the intensity of the armed conflict in the so-called 'contested areas' including the Governorate of Kirkuk was 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."
23. Judge Kelly concluded in 2018 that whilst the situation was very far from ideal, government and associated forces had taken control from IS and there had been a consequent overall reduction in the level of violence since AA, so that the overall level of violence was not such that a civilian would face a real risk of serious harm solely on account of his presence there. It was on that basis that Judge Kelly departed from the Country Guidance and found it safe for the appellant to return.
24. For the reasons set out in my error of law decision of 15.12.20, I found material error of law in the decision of the First-tier Tribunal in departing from Country Guidance. I pointed out that pursuant to SG (Iraq) v SSHD [2012] EWCA Civ 940, Country Guidance should be followed "unless very strong grounds supported by cogent evidence are adduced" justifying not doing so. It was not clear from the decision that the First-tier Tribunal had applied that relatively high threshold test before departing from Country Guidance.
25. In relation to Kirkuk, SMO1 had held that "whether the return of an individual to such an area would be contrary to Article 15(c) requires a fact-sensitive, 'sliding scale' assessment". Nevertheless, as stated above, Mr Bazini did not contend that conditions in the appellant's home area would be sufficient to meet the threshold of a serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict. It follows that there is no need to resolve that issue in this appeal.

Access to Documentation

26. Having rejected the claim that he had lost contact with his family, Judge Kelly found that the appellant failed to substantiate his claim that

he would be unable to gain access to his CSID prior to or soon after his return to Iraq. The judge also found that in light of his basis Arabic and family support, he would be able to 'get by' in the short-term living in Baghdad and would be able to make his way to his hometown of Dubis, by flying on to Erbil within the IKR and travelling the short overland distance from there. Dubis lies close to the border with the IKR. On that basis, the appeal was dismissed.

27. Given the change in Country Guidance on both Article 15(c) and identity documentation in SMO1, it was clear when I was considering the CMR directions back in 2021 that some further evidence would be required. For that reason, after hearing submissions on the matter, I concluded that it would not be appropriate to preserve Judge Kelly's findings that the appellant had not lost contact with his family in Iraq.
28. Before me at the CMR on 8.3.21, the two representatives agreed to the limitation of issues as set out in my directions, summarised above. At that hearing Mr Cole also agreed that the scope for any oral evidence should be limited to the issue as to whether the appellant has lost contact with family members in Iraq, as claimed. Consequently, I gave leave for the appellant to adduce further oral evidence, limited to that issue. Within the new appeal bundle is the appellant's Supplementary Witness Statement dated 22.10.22 (in fact little different to his earlier statement of 3.4.18).
29. It was and remains the appellant's case that his parents (and following the death of his father, his mother) had retained possession of his CSID; that they subsequently fled to Syria; and his last contact with any member of his family was with his mother in May 2010, calling from a call centre in Syria, who told him that his older brother, H, had gone to Germany. He maintains that he has no idea where his mother or any other family member are now or even if they are still alive.
30. The appellant adopted his statement and was tendered for cross-examination. In answer to Mr McVeety, he maintained that he last spoke with his mother in 2010, when she was in Syria. He confirmed that he has had no contact with any family member since that date. He had more recently, in 2018, contacted the Red Cross for assistance in finding his family but had had no response thus far. He said that he had also forwarded his mobile number to a person going to the area where he believed his mother was but received no call. Since then, he had changed his phone and number several times. He had no family elsewhere.
31. Mr McVeety and Mr Bazini then made brief submissions.
32. Mr McVeety submitted that if I accepted the appellant's evidence he stands to succeed on article 3 ECHR grounds. Even if I found that he was in contact with his family, to dismiss the appeal I would

additionally have to find that his mother was alive, had retained his CSID, and had the ability to send it to him in the UK.

33. In his submissions, Mr Bazini asked me to consider the context of the appellant's departure from Iraq in 2008 at a young age and at a period during numerous armed conflicts. The country background information indicates that more than 100,000 had died and some 3 million were displaced. Over the years relevant to this appeal, Kirkuk has been a major centre of contest between different forces or militia. It was submitted that against that background and with a risk of being drawn into fighting, it is no surprise that the appellant's family arranged for him to leave Iraq. Similarly, it was submitted that it is plausible that his mother fled with her three daughters to Syria and that contact has since been lost. Mr Bazini referred to the poor treatment of Kurds in Syria. Finally, it was submitted that even if the mother was still alive the odds that she had retained the CSID all this time, some 14 years later, must be remote.

34. In relation to identity documentation, the CPIN refers to SMO2 and states:

'2.6.4 In SMO2, the Tribunal held that in order to enter and pass through security checkpoints, a person will require a civil identity document (a CSID or INID).

'As a general matter, it is necessary for an individual to have... [either a Civil Status Identity Card (CSID) or a Iraqi National Identity Card (INID)]...in order to live and travel within Iraq without encountering treatment or conditions which are contrary to Article 3 ECHR. Many checkpoints in the country are manned by Shia militia who are not controlled by the GOI [Government of Iraq] and are unlikely to permit an individual without a CSID or an INID to pass.' (Paragraph 11) 2.6.5 Decision makers must therefore assess whether a person will be returned to Iraq in possession of the necessary civil documentation or could obtain replacement documents in a reasonable timeframe. This can also be done through the Iraqi Embassy in London and/or via family (or proxies) in Iraq with the right supporting evidence. They may be met on arrival by family members who can provide them with either their original documentation or a replacement document (i.e. their family members have obtained a replacement CSID from a CSA office in Iraq).'

2.6.7 The onus is on the person to show why they cannot reasonably obtain necessary documentation.

2.6.8 Those persons whose return is feasible and who would arrive in Iraq or the IKR in possession of a CSID or an INID, or could be provided with an original or replacement document soon or shortly after arrival, would be able to return to their home governorate via the various security checkpoints and are, in general, unlikely to encounter treatment or conditions which are contrary to paragraphs 339C and 339CA(iii) of the Immigration Rules/Article 3 of the ECHR.

2.6.9 However, those who return to Iraq or the KRI without a CSID or INID, cannot obtain one via a family member on arrival and who would be required to travel internally to a CSA office in another area of Iraq or the IKR to obtain one would be at risk of encountering treatment or conditions which are contrary to paragraphs 339C and 339CA(iii) of the Immigration Rules/Article 3 of the ECHR. In these cases, a grant of Humanitarian Protection is therefore appropriate (unless the person is excluded from such protection)."

Findings and Conclusion

35. I found the appellant's evidence clear, consistent and straightforward. Whilst there is no specific other evidence to support his claim of lost contact, there is nothing to contradict it and I remind myself that corroboration is not a requirement. I also accept Mr Bazini's submission that in the context of the prevailing in-country conditions at the date of departure, when his mother fled to Syria and since, the appellant's account is plausible and consistent with the country background information. In the circumstances, I accept the appellant's factual claim on this issue.
36. It follows that I find that the appellant does not have and cannot reasonably obtain access to his CSID, which in turn renders his return to Iraq not feasible at the present time, for the reasons outlined in the current Country Guidance and the respondent's CPINs.
37. I find that the appellant's evidence was sufficient to demonstrate that there are substantial grounds for believing that expulsion from the UK to return to Iraq would violate Article 3 of the ECHR, because of the conditions in which he would have to live without identity documentation to enable access to support, together with his likely treatment as an undocumented Kurd. Return without such documentation would expose him to a real risk of inhumane conditions likely to breach article 3 ECHR. The respondent did not seek to counter that conclusion.
38. As the representatives agreed, the remaining issues fall away, determined in line with the above finding. Whilst the appellant cannot succeed in his claim for international protection on the basis of a lack of identity documentation, I am satisfied that it must succeed on Article 3 ECHR grounds.

NOTICE OF DECISION

39. The appeal is dismissed on both Convention and Humanitarian Protection Grounds.
40. The appeal is allowed on article 3 ECHR grounds.

Signed: DMW Pickup

Upper Tribunal Judge Pickup

Date: 1 November 2022

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

“Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.”

Signed: DMW Pickup

Upper Tribunal Judge Pickup

Date: 1 November 2022



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal number: AA/06175/2009 (V)**

THE IMMIGRATION ACTS

**Heard Remotely at Manchester
CJC
On 4 December 2020**

Sent to parties on

.....

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

**AA
(ANONYMITY ORDER MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellant: Mr D Bazini of counsel, instructed by Parker Rhodes
Hickmotts Solicitors
For the Respondent: Mr A Tan, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I indicated my decision on the error of law issue, reserving my full decision reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is an Iraqi national of Kurdish ethnicity with date of birth given as 3.9.91, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 10.5.18, dismissing on all grounds his appeal against the decision of the Secretary of State, dated 18.6.09, to refuse his claim for international protection.
2. The appellant entered the UK in 2009, at the age of 17, and having been arrested applied for international protection the following day. That application was refused by the respondent on 18.6.09 and a decision was also made to remove him from the UK, pursuant to s10 of the 1999 Act.
3. His appeal to the First-tier Tribunal was dismissed on 7.9.09 (Judge Batiste). On 27.1.10 the Upper Tribunal was ordered to reconsider the appeal and on 23.6.10 set aside the decision of the First-tier Tribunal for it to be remade. Following a further appeal hearing, the appeal was dismissed on 1.4.11 (Judge Wynne). The appellant sought permission to appeal to the Court of Appeal, which was granted. The appeal was subsequently allowed without a hearing and the matter was remitted to the Upper Tribunal for reconsideration in relation to article 15(c) of the Qualification Directive only.
4. The Upper Tribunal panel heard the remitted appeal in May 2015, issuing Country Guidance in AA (Article 15(c)) Iraq CG [2012] UKUT 00409 (IAC). However, this was subsequently successfully appealed to the Court of Appeal in AA (Article 15(c)) Iraq v SSHD [2017] EWCA Civ 944, which amended the Country Guidance and remitted the matter to the First-tier Tribunal for further fact finding.
5. The appeal was heard again by the First-tier Tribunal in April 2018. In the decision promulgated 10.5.18, First-tier Tribunal Judge Kelly dismissed the appeal, finding sufficient cogent evidence to depart from the existing Country Guidance and to conclude there would be no article 15(c) risk for the appellant returning to his home town of Dubis, within the Kirkuk Governorate.
6. Permission to appeal the decision of Judge Kelly to the Upper Tribunal was refused by the First-tier Tribunal on 6.6.18. When the application was renewed to the Upper Tribunal, on 13.8.18 Deputy Upper Tribunal Judge Murray also refused permission. The appellant then sought permission to apply for CART judicial review of that decision, which was granted by the High Court on 28.12.18, on the basis that it was arguable that in considering the permission application the Upper Tribunal departed from its own Guidance Note on departing from Country Guidance and that this raised important points of principle. In the absence of a request for a hearing of the substantive application, on 7.11.19 the Administrative Court quashed the Upper Tribunal's refusal of permission decision.

7. In light of the High Court's decision, on 28.11.19 the Vice President granted permission to appeal to the Upper Tribunal, reminding the parties that the Upper Tribunal's task is that set out in s12 of the 2007 Act.
8. Subsequent directions issued on 7.12.19 anticipated that this matter would be heard by a panel of the Upper Tribunal. However, the Covid-19 Pandemic intervened and the hearing listed for 2.4.20 had to be vacated. On 14.5.20 the Upper Tribunal issued further directions, proposing that the hearing be held remotely, directing any objections to be made in writing, and providing for the lodging of a consolidated bundle. There were no objections to a remote hearing in relation to the error of law issue. In consequence the matter was listed before me for an error of law hearing only on 4.12.20.

Relevant Factual Background

9. It should be remembered that this matter had been remitted by the Upper Tribunal to the First-tier Tribunal for further fact finding, as indicated at [210] of AA, the Country Guidance decision amended by the the Court of Appeal. The outstanding factual disputes included the appellant's claimed inability to speak Arabic; the whereabouts of his family members; his ability to enter and remain in the IKR as an alternative to Baghdad; and the situation in Iraq for the appellant's family. The Upper Tribunal also directed the First-tier Tribunal to apply the relevant Country Guidance.
10. However, at the hearing before Judge Kelly, the respondent argued that the Tribunal should depart from the Country Guidance of AA, in light of what was alleged to be cogent background country information to show that Kirkuk was no longer a 'contested area' and, therefore, that the appellant could return there.
11. As noted by Judge Kelly at [3] of the impugned decision, the preserved findings of Judge Wynne accepted that until he left Iraq to come to the UK at the end of 2008, the appellant formerly lived in the family home in Dubis, within the Kirkuk Governorate. His father died in 2006. However, he has a cousin who is a lorry driver and who continues to live in Kirkuk. It was this same cousin who arranged for the appellant to leave Iraq. Between [9] and [12] of the decision, the judge summarised the appellant's case, which included that his parents had retained possession of his CSID, that they subsequently fled to Syria, and his last contact with any member of his family was with his mother in May 2010, calling from a call centre in Syria, who told him that his older brother, H, had gone to Germany.
12. For the reasons set out between [13] and [15] of the decision, Judge Kelly rejected the claim that the appellant had lost contact with family members in Iraq. At [16] it was accepted that having barely spoken any Arabic since his arrival in the UK in 2009, he would initially only be able

to communicate in Arabic and it would be apparent that Arabic was his second language and that he is of Kurdish ethnicity and/or had spent many years in the West.

13. In relation to Article 15(c) and the situation of internal armed conflict in Kirkuk, Judge Kelly set out the competing arguments between [17] and [21] of the decision, concluding that whilst the current situation in Kirkuk was very far from ideal, government and associated forces had taken control from IS and there had been a consequent overall reduction in the level of violence since the Country Guidance of AA was issued in April 2015, so that the overall level of violence was not such that a civilian would face a real risk of serious harm solely on account of his presence there. In other words, the judge found departure from the Country Guidance to be justified.
14. At [22] and [23] of the decision, the judge concluded, for the reasons set out at [10] to [15] of the decision the appellant failed to substantiate his claim that he would be unable to gain access to his CSID prior to or soon after his return to Iraq. The judge also found that in light of his basis Arabic and family support, he would be able to 'get by' in the short-term living in Baghdad and would be able to make his way to his home town of Dubis, by flying to Erbil within the IKR and travelling the short overland distance from there. Dubis effectively lies on the border with the IKR. In the premises, the appeal was dismissed.

The Error of Law Issue & Grounds

15. The issue as to whether there is a material error of law in the decision of the First-tier Tribunal has now returned to the Upper Tribunal for consideration, complicated by the fact that not only has the country situation moved on but new Country Guidance has been issued in the recent decision of the Upper Tribunal in SMO, KSP & IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 004100 (IAC).
16. In summary, the grounds are, first, that the First-tier Tribunal failed to follow Country Guidance in relation to Article 15(c) and the risk of indiscriminate violence on return to Kirkuk. Subsidiary grounds also argue that the First-tier Tribunal Judge made a number of errors of law at [22] and [23] of the decision in that the findings that the appellant would be able to access his CSID and how he would be able to live in Baghdad and/or go to the IKR are irrational and contrary to the evidence.
17. The Tribunal has received the Home Office's skeleton argument of 4.2.20, and the appellant's skeleton argument of 25.6.20. Very late, lodged only the day before the hearing, the Tribunal has also received the consolidated bundle which I directed in May 2020 to be served within 21 days, together with a number of other documents in an email comprising 9 attachments.

Consideration & Conclusions

18. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.
19. I have carefully considered the decision of the First-tier Tribunal in the light of the submissions and the grounds of application for permission to appeal to the Upper Tribunal.
20. Both representatives agreed that the primary issue in the appeal is whether Judge Kelly was justified in departing from Country Guidance on the basis of the materials placed before the Tribunal. I indicated to both representatives that I would first hear submissions on this primary issue and consider thereafter whether there was any need to pursue the subsidiary grounds. Both relied on their respective skeleton arguments and made further oral submissions.
21. The Country Guidance in force at the time of Judge Kelly's decision was that of AA, referenced above. This held that the intensity of the armed conflict in the so-called 'contested areas' including the Governorate of Kirkuk was 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."
22. Pursuant to *SG (Iraq) v SSHD* [2012] EWCA Civ 940, Country Guidance should be followed "unless very strong grounds supported by cogent evidence are adduced" justifying not doing so. The respondent's case is that there was such cogent evidence so that no risk meeting Article 15(c) arose, the appellant's that there was not such cogent evidence to justify departure.
23. At the First-tier Tribunal hearing, the respondent relied on the CPIN of March 2017, the 'Musings on Iraq' blog from April 2018, and an extract from the Iraq Body Count Database, accessed in April 2018. Mr Tan maintained that this evidence was sufficient to justify the departure from the Country Guidance. He also reminded me that Judge Kelly had the benefit of the respondent's skeleton argument drafted by Mr Addy and that this had referenced SG and the threshold test for departing from Country Guidance. The judge referenced this skeleton argument at [17] of the decision.
24. However, Mr Bazini made the cogent point that at no point did the First-tier Tribunal Judge set out the test for departing from country guidance or specifically address how the country information relied on

met that test. At [8] of the decision the judge noted the respondent's submission that there was 'cogent' background country information. After setting out the competing information and submissions, at [20] of the decision, the judge stated that he had tried to take a 'holistic' approach to the evidence. He concluded, "As a result, I am satisfied that whilst the current situation in the Kirkuk Governorate is very far from ideal and there are gaps in the security arrangements that have led to a significant recent increase in the number of incidents, this increase ought to be viewed within the context of government and associated forces taking control from IS and the consequent overall reduction in the level of violence since the Upper Tribunal gave its guidance in April 2015. I therefore conclude that the overall level of violence has now fallen back to levels similar to those in HM2, which were held not to constitute substantial grounds for believing that a civilian would face a real risk of serious harm solely on account of his presence there." The judge went on to note that the situation in the Hawija area was "an obvious exception to the general proposition."

25. Whilst the judge did not need to make any lengthy self-direction on the law, and whilst I bear in mind that the test was set out in the skeleton argument to which he had regard, I am not satisfied that it can be deduced from the way in which the decision was drafted that the judge applied the relatively high threshold test necessary before departing from Country Guidance. In fact, the way in which the country background information is summarised and assessed between [17] and [21] of the decision rather suggests that there was a fine balancing of factors for and against departing from the Country Guidance, with a 'on the one hand but on the other hand' approach to the country background information.
26. For example, at [18] of the decision the judge set out the statistical information that whilst the number of deaths and casualties had fallen, the number of security incidents had significantly increased. The judge noted that although the area was now under the control of the Iraqi government and its proxies, the area remained a "hotbed of conflict". At [20] of the decision the judge referred to information that the number of daily attacks remained steady in the Kirkuk Governorate in the first half of 2017 but had risen steadily thereafter, with the commentary suggesting the rebirth of the insurgency facilitated by the inadequacy of the Iraqi forces. The judge cited country background information to the effect that there were not enough security forces to be everywhere all the time and it was suggested that the Iraqi government needed to build up local neighbourhood watch groups that could call on the security forces when confronted by IS. "Providing that this and other recommended steps are taken in the near future, there remains hope that the nascent insurgency can be retarded."
27. Similarly, at [21] the judge was satisfied that the "current situation in the Kirkuk Governorate is very far from ideal and there are gaps in the security arrangements that have left to a significant recent

increase in the number of incidents” but set this off against the overall context of government and associated forces taking control from IS with a consequent overall reduction in the level of violence. The judge also appeared to conclude that the overall improvement in the country situation outweighed the local difficulties in the Kirkuk Governorate.

28. As cited by the judge, the picture painted by the country background information was very mixed and, in my view, did not adequately demonstrate “very strong grounds supported by cogent evidence.” Mr Bazini also pointed out that at the time of the First-tier Tribunal appeal hearing the CPIN relied on was already a year out of date. Whilst the judge referred to having tried to take a ‘holistic’ approach I accept Mr Bazini’s submission that when considering Article 15(c) the judge should have taken the more inclusive approach advised in both AA and the more recent SMO and not a balancing out of country background information leaning both ways. The overall country situation was relevant context, as Mr Tan submitted, but the judge had to consider the area to which the appellant would be returning and determine whether it had been demonstrated that there were very strong grounds supported by cogent evidence to justify departing from Country Guidance. Whilst there had been a marked change in Iraq since the defeat of IS, there was information before the judge that the situation in Kirkuk remained volatile with factional fighting in a power struggle having replaced IS. I am not satisfied that the way in which the judge approached the issue can be justified by the reasoning set out in the decision.
29. In the premises, despite the long and convoluted history of this case, I am satisfied that there was material error of law in the making of the decision of the First-tier Tribunal, requiring it to be set aside and remade. It follows that it was not necessary to address the secondary grounds, the merit of which seems to me to be doubtful.
30. Given its history, I am satisfied that this is a matter which ought to be retained in the Upper Tribunal. Neither representative objected to that course of action. I invited submissions as to whether any part of Judge Kelly’s decision could be preserved. Mr Tan invited me to preserve the findings that the appellant had not lost contact with his family, which is relevant to the ability to return with CSID or other identity documentation. I find no reason not to preserve Judge Kelly’s findings as to the appellant’s ability in Arabic, set out at [16] of the decision. However, given the change in Country Guidance on both Article 15(c) and identity documentation in SMO, I am satisfied that it would be difficult to preserve the findings as to family contact when further oral evidence will be necessary in a remaking decision. In relation to Kirkuk, SMO held that “whether the return of an individual to such an area would be contrary to Article 15(c) requires a fact-sensitive, “sliding scale” assessment”. Effectively, the appellant is in a situation similar to those in SMO who had not had the opportunity to address the enhanced risk factors identified in the Country Guidance. I

also bear in mind the limitations of the restriction of issues when this matter was remitted by the Court of Appeal and the Upper Tribunal.

Decision

The appeal of the appellant to the Upper Tribunal is allowed to the extent that the decision of the First-tier Tribunal is set aside to be remade in the Upper Tribunal, subject to the directions set out below.

I make no order for costs.

DIRECTIONS

1. The decision is to be remade in the Upper Tribunal with the issues restricted to the following:
 - a. Any article 15(c) risk of indiscriminate violence on return to Kirkuk and the appellant's home town of Dubis;
 - b. Alternative relocation to either Baghdad or the IKR;
 - c. Whether the appellant has lost contact with family members in Iraq as claimed;
 - d. The feasibility of return and the related issue of access to CSID or other identity or travel documentation enabling the appellant to be returned to Iraq and make his way to either his hometown of Dubis, remaining in Baghdad, or relocation to the IKR.
2. The findings preserved by Judge Wynne as set out above remain preserved;
3. With 21 days of the issue of these directions, the appellant and the respondent must lodge any written submissions as to whether this is an appropriate case for a remote hearing, identifying the nature of the oral and written evidence intended to be adduced, the likely length of hearing, and confirming whether an interpreter in Kurdish Sorani will be required;
4. The Upper Tribunal will then give further directions for the listing of this matter in the Upper Tribunal.

Signed: DMW Pickup

Upper Tribunal Judge Pickup

Date: 4 December 2020

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

“Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.”

Signed: DMW Pickup

Upper Tribunal Judge Pickup

Date: 4 December 2020