IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-000249
First-tier Tribunal No:
PA/51963/2020
IA/01643/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 21 May 2023

Before

UPPER TRIBUNAL JUDGE REEDS
DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

TA
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M. Schwenk, Counsel instructed on behalf of the appellant.
For the Respondent : Ms Z. Young, Senior Presenting Officer

Heard at Phoenix House (Bradford) on 17 May 2023

Order Regarding Anonymity

Anonymity is granted because the facts of the appeal involve a protection claim. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and the members of her family are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant and members of her family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. Pursuant to section 12 (2) (b) (ii) of the Tribunals, Courts and Enforcement Act 2007, this is the remaking of the decision of Judge of the First-tier Tribunal Lodato promulgated on the 24 June 2021, following the decision dated 12 January 2023

of the Upper Tribunal setting aside the decision of the FtT having found a material error of law in that decision.

The background:

2. The appellant is a citizen of Iraq of Kurdish ethnicity from the IKR. The basis of her claim is set out in the decision letter and summarised in the decision of the FtTJ. The appellant and her husband married in 2009 and the appellant and her family are of short stature. The appellant and her family had to move around the IKR a lot as they were discriminated against by society and often made fun of due to their short stature. In 2012 the appellant was contacted by 5 men who sent her a threatening letter. Following this incident the men harassed the appellant on 8 separate occasions. One day, the men went to the appellant's house while she was cooking and pushed her resulting in her being burned on her foot. As a result the appellant and her family decided they should leave Iraq.

3. The appellant left Iraq with her husband and children and travelled from that country to Turkey, Greece and then on to Germany where they stayed for 3 years after claiming asylum. Upon receiving a refusal of asylum in Germany the appellant and her family travelled to France where they stayed for 10 months. The appellant and her 2 daughters, M and H, were separated from her husband and son and travelled to the UK arriving on 7 March 2019 and claimed asylum upon arrival. The appellant gave birth to her youngest child, A, shortly after arrival. In October 2019 the appellant's husband arrived in the UK with their son.

4. Since arriving in the UK the appellant and her family have been under the care of the x hospital for their physical health conditions.

5. The appellant is not in receipt of her Iraqi passport or Civil Status Identity Documentation ('CSID') card as they were taken by the German authorities.

6. The respondent refused the appellant's claim in a decision letter dated 9 October 2020. The FtTJ summarised the respondent 's case between paragraphs 34 – 39 of his decision.

Decision of the FtTJ:

7. The appeal came before the FtTJ on 21 June 2021. In a decision promulgated on 24 June 2021 the FtTJ dismissed the appeal on asylum grounds and on human rights grounds.

8. The FtTJ summarised the principal elements of the appellant's claim at paragraph 1 of his decision as follows. The appellant sought refugee status on the principal ground that she had a well-founded fear of persecution due to her membership of a particular social group, namely those of short stature. She further appealed on the basis that she and her family members would face very significant obstacles to integration in Iraq both because they could not access the required identity documents to reach the IKR, and for medical reasons. The FtTJ recorded that it was not argued that her medical condition, or the condition of any of her family members, would expose them to a real risk of conditions contrary to Article 3 of the ECHR on health grounds in accordance with the test set out in AM (Zimbabwe) v SSHD [2020] 2 W.L.R 1152, but that the appellant continued to rely upon health and medical reasons as part of the broad range of circumstances that amounted to very significant obstacles under the Article 8 private life claim which was advanced on her behalf.

9. The FtTJ set out his factual findings and assessment of the evidence at paragraphs [40]-[52]. At paragraph 41 the FtTJ summarised the 3 central matters to be resolved in the appeal. Firstly, whether the appellant had established that there was a reasonable likelihood that she would suffer persecution on account of her short stature upon return to Iraq. The FtTJ recorded that an important dimension of this aspect of the appeal was whether the factual account provided of the extremely persistent levels of abuse and violence suffered before the family departed could be regarded as credible. Secondly, whether, irrespective of the credibility of the factual claims underpinning the appeal, the family has any realistic prospect of safely returning to their home area without the identification documents held by the German authorities. It was argued there were several practical impediments which meant that there was simply no way in which they could secure replacement documents upon arrival in Baghdad as involuntary returnees. The last issue was whether there were very significant obstacles to prevent the appellant and her family successfully reintegrating into society on return given the pervasive discrimination they would face and the lack of support and accessible health conditions for the family, including the children.

10. When dealing with the first issue the FtTJ considered the evidence before him. For the reasons set out between paragraphs [42] – [48], the FtTJ reached the conclusion that the appellant had not established a well-founded risk that she or her family were reasonably likely to suffer persecution or serious harm on return to their home area in Iraq. In his assessment of the evidence, the FtTJ identified a number of inconsistencies in the factual account given set out at paragraphs [43 – 47], and he referred to having the "greatest difficulty accepting at face value" the appellant's evidence of what took place in Iraq before the family departed. The FtTJ had regard to the expert evidence before him but found that the expert did not identify a risk of persecution solely on the grounds of being a person of short stature although he did recognise that this was a group that was discriminated against and marginalised. In his analysis of the evidence, the FtTJ considered the background evidence but reached the conclusion that on the evidence there was no evidential foundation to conclude that the appellant and the family would be at risk of persecution on account of their "immutable characteristics". The FtTJ found that it was reasonably likely that the family had experienced derogatory remarks in public, but that it "did not come close to the threshold of persecution". The FtTJ referred to his factual assessment of the evidence and that the appellant and her husband had not given credible evidence about the most serious episodes that they had described. The FtTJ therefore found that the appellant had not established a well-founded risk that she or her family were reasonably likely to suffer persecution or serious harm on return to their home area in Iraq (at paragraph [48]).

11. The FtTJ considered the issue of documentation and return at paragraph [50]. He referred to the "agreed fact" that the German authorities continued to hold the CSID card and passport of her and her husband, and thus found that it was reasonably likely that they could secure the return of these documents either directly or via the respondent 's officials. The FtTJ found that it was not a case where the requisite documents had been lost and that a "process of correspondence or bilateral arrangements in the UK and Germany is reasonably likely to facilitate the return of these essential documents to enable the appellant to effectively return to her home area in Iraq". The FtTJ concluded he had no reason to think that the authorities would frustrate such a process and that the country guidance was clear that travel from Baghdad to the IKR could be achieved if in possession of a CSID card and that the appellant's family would not find themselves stranded in Baghdad without the documents.

12. Finally at paragraphs [51]-[52] the FtTJ addressed the third issue advanced on behalf of the appellant based on Article 8 grounds. It was argued that it would not be in the best interests of the children to be returned to the IKR with their parents as they would all then face unjustifiably harsh consequences and very significant obstacles to integration. The FtTJ considered the expert report and the medical evidence that had been disclosed in relation to the family and for the reasons set out in those paragraphs, the FtTJ concluded that he was satisfied on the balance of possibilities that there was a combination of factors identified, which did not turn on positive credibility findings in respect of the appellant's claim, which met the high threshold of very significant obstacles. He therefore allowed the appeal under paragraph 276ADE (1)(vi) of the Immigration Rules and thus found that return to Iraq would result in a breach of Article 8 of the ECHR.

13. The appellant sought permission to appeal on 2 July 2021 relying on 4 grounds and sought to challenge paragraph 50 of the FtTJ's decision as to whether the appellant would return to Iraq with or without a CSID and therefore whether they would need to re-document upon return (the second issue).

14. The grounds of challenge submitted that the FtTJ had erred in consideration of the appeal by:

(i) failing to take account of material matters;

(ii) failing to assess matters as at the date of hearing;

(iii) reaching conclusions without evidential foundation; and

(iv) inverting the standard of proof.

15. Permission to appeal was refused by a FtTJ . It was noted that the grounds challenged only the FtTJ's treatment of the issue of whether the appellant would be able to obtain a CSID or an INID from the Iraqi authorities. The grounds did not challenge any of the FtTJ's findings of fact in relation to the substance of the appellant's protection claim. As the FtTJ had found in favour of the appellant under Article 8, the issue of return to Iraq "fell away", and the reasoning and findings of the FtTJ in connection with the travel documentation for the return of the appellant to Iraq had become irrelevant.

16. The appellant renewed her grounds of appeal dated 2 July 2021. It was submitted on behalf of the appellant, that the approach taken in the refusal of permission to appeal appeared to take the view that the issues surrounding the ability of the appellant to re-document were irrelevant given that the appellant's appeal succeeded on Article 8 grounds. However, it was submitted that this disclosed a misunderstanding of the significance of the CSID to an individual's return to Iraq and that the CSID was not simply a return document. It is a document, the absence of which, gives rise to a protection claim in its own right. The grounds cited the decision of the Court of Appeal in AA (Iraq) v Secretary of State for the Home Department [2017] EWCA Civ 944 held at §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."

17. The grounds also relied upon paragraph 40 of that decision to emphasise that, as a material element of an individual's claim to an entitlement to remain, absence of a CSID is a point which must be dealt with on the basis of the hypothetical return at the date of decision: "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."

18. It was therefore submitted that consideration of the CSID point was not, therefore, irrelevant. Rather, it was a separate and distinct head of the Appellant's claim which she was entitled to have considered in accordance with the extant country guidance and in light of the other evidence in the case. As a distinct limb of the appellant's protection claim, it was no answer to it to suggest that consideration could wait, given that the Appellant's appeal has succeeded under Article 8. In summary it was submitted that the grounds of appeal advanced must be determined by the Tribunal, and that the treatment of the CSID issue by the FtTJ was arguably flawed.

19. Permission to appeal was granted by UTJ Plimmer on 29 November 2021 stating:

> " As the renewal grounds contend, the FtT has arguably erred in law in its approach to the appellant's ability to re document in order obviate a prospective risk of serious harm in Iraq. In addition, for the reasons succinctly outlined in the renewal grounds this arguable error remains relevant to the appellant's protection claim, notwithstanding the FTT having allowed her appeal on Article 8 grounds."

Error of law hearing:

20. At the hearing before the Upper Tribunal, Mr Schwenk of Counsel appeared on behalf of the appellant and Ms Young, Senior Presenting Officer appeared on behalf of the respondent . It was explained by the advocates that it was agreed that the decision of the FtTJ involved the making of an error on a point of law for the reasons set out in the original grounds provided and as summarised in the renewed grounds. Ms Young referred to the rule 24 response dated 9 February 2022 which had been filed on behalf of the respondent where it had been accepted that the FtTJ had materially erred in law by failing to take adequate account of material matters as set out in the appellant's first ground of appeal, and that he erred by misapplying the relevant standard of proof as set out in the third ground of appeal. It is therefore accepted by the respondent that the errors were material to the outcome for the reasons set out in the appellant's renewed grounds.

21. Thus it was conceded that the decision should be set aside but that the findings at paragraphs [42]-[49] in respect of the appellant's credibility regarding the core of a protection claim should be preserved. Those findings were not the subject of challenge and were not vitiated by legal error. Nor did the respondent seek to challenge the decision by the FtTJ to allow the appeal on Article 8

grounds. It was further submitted that the appeal should be remade by the Upper Tribunal rather than a remittal to the FtT.

22. We reproduce below the decision on error of law:

"Decision on error of law:

30. Given that the parties are in agreement that the decision of the FtTJ erred in law for the reasons set out in the original grounds, it is not necessary for us to set out in any detail why that concession was properly made. We have set out a summary of the grounds and the renewed grounds earlier in this decision. The grounds advanced on behalf of the appellant seek to challenge paragraph 50 of the FtTJ's decision where he assessed whether the appellant would return to Iraq with or without a CSID and therefore whether she would need to re-document upon return. A factual question to be resolved by the FtTJ in this matter, as often arises at the present time in protection claims originating from Iraq, was the location of the appellant's identity documents, including her CSID. As the parties agree, it was common ground that the appellant was not in possession of her CSID as the German authorities held it.

31. In his assessment of the issue of return, there was evidence which related to the attempts made to secure the document by both the appellant's solicitors and the respondent. In essence, we agree that in his assessment the FtTJ erred in law by failing to have regard to that material evidence on this issue. Furthermore, it is also accepted by the respondent that the FtTJ reached his conclusions at paragraph 50 without undertaking an analysis of the relevant evidence as to the unanswered correspondence by the authorities in Germany or the efforts made by the respondent to obtain the CSID. Thirdly it is accepted by the respondent as ground (iv) set out, that at paragraph 50 the FtTJ inverted the standard of proof and deployed the standard of "reasonable likelihood" against the appellant. As can be seen from paragraph 50, the FtTJ failed to ask the correct question and that the appellant was required to make out a case on the CSID by showing that it was reasonably likely that she cannot obtain her CSID rather than it being reasonably likely that she can obtain her CSID.

32. Whilst the Rule 24 did not address ground (ii), the errors of law identified above, which are agreed by the parties, are sufficient in our view to demonstrate that the FtTJ materially erred in law at paragraph 50 of his decision when considering the issue of return in the context of the necessary documentation.

33. We observe that at paragraphs 93-107 in SMO & KSP (Civil status documentation; Article 15) Iraq CG [2022] UKUT 001100 (IAC) (referred to as "SMO(2)"), the Tribunal considered the significance of documentation, the process of redocumentation, as well as the consequences a lack of documentation would have on the person's ability to function in society. They held that it is necessary for a person to have a CSID or INID in order to live in Iraq without encountering conditions contrary to Article 3 ECHR. They also held that it remains possible for a person to obtain the documentation required to make return to Iraq feasible.

34. We note that the grounds advanced on behalf the appellant do not challenge the factual findings and assessment made of the appellant's refugee claim (protection claim) as set out between paragraphs [42 – 49] of the FtTJ's decision. There is also no challenge by the respondent to the conclusions reached by the FtTJ set out at paragraphs [51 – 52] of his decision whereby he allowed the appeal on Article 8 grounds. They are therefore preserved for the resumed hearing. Thus the only issue to be remade by the Upper Tribunal concerns the issue of documentation.

35. Whilst the rule 24 response had been filed some time ago, neither party provided any further written submissions setting out their respective positions as to the evidence relevant to the remaking of the decision or how or what issues should be determined. Mr Schwenk submitted that the case needed to be re-determined on the issue of documentation and the CSID /INID and that the tribunal had the necessary evidence

and therefore would require submissions from each party to determine that outstanding issue. When asked to clarify an issue raised in correspondence that the appellant wished to continue with her protection claim, Mr Schwenk was not aware of that correspondence but confirmed that the issue to be determined did not relate to the Convention or Refugee grounds of appeal which had already been determined and were not the subject of challenge and thus related to the issue of the CSID and documentation.

36. Ms Young on behalf of the respondent submitted that the remaking of the decision would involve consideration of the up-to-date evidence, that the decision letter was of some age, and it would be necessary to assess the position in light of the country information available as to where the appellant would be returned to given the changes that have been made since the decision letter. In particular she was seeking to rely upon the Country Policy and Information Note- Iraq; internal relocation, documentation and returns dated July 2022 and the most recent CG decision which postdates the FtTJ's decision. Ms Young confirmed that her submission to the tribunal was that the appellant could be returned directly to the IKR in accordance with the respondent 's policy note. She therefore submitted that the evidential position had changed since the original decision.

37. Mr Schwenk submitted that whilst he accepted there was a new policy document, it had no legal effect and that the appeal had previously been premised on the basis that removal would be to Baghdad and that this was the point which had been dealt with by FtTJ. He therefore submitted that the tribunal should not accede to a late change in the respondent's case and should proceed on the basis of a return to Baghdad. In the alternative he submitted that if the tribunal was of the view that the policy document was relevant evidence, as it represented a significant change, the appellant should be given the opportunity to address this by way of evidence which could not be done at this hearing and thus an adjournment should be granted.

38. After having considered their respective submissions, we informed the parties that in our view having set aside the decision of the FtTJ on the issue of documentation, as the parties had agreed, we should remake the decision based on the up to date evidence available as at the date of the Upper Tribunal hearing, which would include the respondent 's CPIN - Iraq: internal relocation, civil documentation returns dated July 2022. In reaching that decision we took into account that since the decision of the FtTJ the evidential background in relation to the issue of documentation had gone through a number of changes as evidenced in the earlier CPIN of June 2020, and the more recent CPIN of 2022 and that there had been new country guidance in SMO (2). However we accepted Mr Schwenk's submission that we should not proceed to remake the decision today without giving the appellant the opportunity to address those evidential matters. We also took into account that there was no interpreter available at the hearing.

39. We therefore agreed with the submissions made by Mr Schwenk and his request for an adjournment and agreed with the advocates the timetable for provision of written submissions and /or further evidence as set out in the directions.

40. For clarity, the findings by the Judge that the appellant does not have a well-founded fear of persecution in Iraq as set out at paragraphs [42]-[49] are preserved. There is no challenge by the respondent to the FtTJ's findings at [51]-[52] and the assessment of Article 8 of the ECHR and they are preserved. The sole question to be considered at the resumed hearing is whether the appellant can obtain her original CSID and documents or a replacement within a reasonable period."

The resumed hearing:

~~23.~~ At the hearing, the appellant was represented by Mr Schwenk of Counsel and the respondent by Ms Young, Senior Presenting Officer. The appellant attended the hearing alongside the

court interpreter who had been requested by the appellant's solicitors. There were no problems identified by either the appellant or the court interpreter concerning the language or interpretation during the hearing.

~~24.~~ A summary of the documents relied upon by the appellant as confirmed by the parties are as follows:

1. The original bundle that was before the FTT.
2. Appellant's supplementary bundle with witness statement, letter to the German authorities dated 15 April 2021, response from German Embassy 7 May 2021, email dated 10 May 2021, screenshot online form completed and submitted as a request for the appellant documentation dated 16 February 22, confirmation of submission of form, email response dated 21 February 2022 and translation.
3. Appellant's reply to the respondent's letter of 16 February dated 8 March 2023.

~~25.~~ The respondent relied upon the material that had been filed before the First-tier Tribunal and in addition provided a written letter dated 16 February 2023 attaching to it a statement from Return logistics.

~~26.~~ At the hearing, the appellant gave oral evidence. In her statement dated 7/2/2023 she said that she had left Iraq with her husband and children and when they left they had Iraqi nationality cards, CSID's and passports. The youngest daughter was born in Germany and had no Iraqi documentation. Her other child was born in the UK and also has no Iraqi documentation.

~~27.~~ As to events in Germany, she stated that on arrival they were arrested, and their documentation was taken from them. Their claim was refused and whilst they had legal representation, nothing further happened, and the German authorities retained the documents although they provided her with copies of her passport and that of her husband but nothing else. She referred to a return to the IKR and that because of her appearance, her and her family members would not have a good life and would not have support on return and whilst the husband had family, there was no life to return to.

~~28.~~ She provided confirmation that she had 2 children born in Iraq and 2 children born outside Iraq; one born in Germany and one in the UK. Neither of the children born outside of Iraq had been registered at the Iraqi embassy.

~~29.~~ In cross-examination the appellant stated she had not been to register their birth because they had no Iraqi documentation to prove their nationality. She confirmed she had registered one child in the UK and the other child was born in Germany and registered there. She confirmed that she had family in Iraq in Halabja.

~~30.~~ No further questions were asked of the appellant by either advocate and they proceeded to provide their submissions on the relevant issues which can be summarised as follows.

<u>The submissions:</u>

~~31.~~ Ms Young relied upon the letter dated 16 February 2023. Dealing with the issue of place of removal she confirmed that it was proposed that the family could be

removed direct to the IKR as supported by the Country Policy and Information Note Iraq: Internal Relocation, Civil Documentation and Returns dated July 2022 (version 13.0)(hereinafter referred to as the "CPIN") at paragraphs 2.6.3 and 3.1.1 and also SMO & KSP (Civil status documentation: Article 15) Iraq CG [UKUT] 00110 (IAC) headnote 7 and 26 (" SMO(2)."Further, she relied upon a statement from Return Logistics dated 4 January 2023 to demonstrate that enforced removals to the IKR have taken place in recent years.

32. It is therefore submitted that the burden of proof is upon the appellant to show that any travel to the local CSA office to be re-documented would amount to a breach of Article 3. She submitted that the statement of the appellant did not address that issue. If returned direct to the IKR, the appellant would not be required to travel to areas outside of the Kurdish Region of Iraq and she could travel to her local CSA office which would be within Sulaymaniyah, and there would be no risk of encountering treatment or conditions which would breach Article 3 of the ECHR. It is submitted that the family would not be at risk travelling to their local CSA office and would be able to obtain relevant documentation within a reasonable timeframe.

33. In answer to the points made on behalf of the appellant, she submitted that the reference made to paragraph 4.6.4 of the CPIN does not say without more that the appellant would have to travel to Baghdad to obtain the relevant documentation for the 2 children, but they could attend the local CSA office.

34. When asked for her response to paragraph 12 of the appellant's written submissions, she acknowledged the factual findings made by FtTJ Lodato who had allowed the appeal and Article 8 grounds but submitted that the findings were not made in respect of the issue of documentation and that the redocumentation process would cause problems.

35. Mr Schwenk relied upon his written reply to the respondent's letter. It submits that the initial position was that the appellant would be returned to Baghdad, but now proposed return to the IKR. The family's Iraqi CSID cards are in the possession of the German authorities and the appellant had made efforts to retrieve the documents but to no avail. It is noted that in the respondent's submissions, it was no longer argued that the documents could be retrieved from the German authorities prior to return.

36. It is submitted that the respondent's position is that the appellant, together with all her family members will be returned to Sulaymaniyah in the IKR and the documents of the appellant, her husband and 2 older children are in the possession of the German authorities and the 2 younger children have never had any Iraqi documentation. He submits that all 6 family members will need to be documented and if documentation cannot be achieved any family member risks a breach of their protected rights. -

37. The appellant's family comprises herself, her husband and 4 children. Two of the children were born in Iraq and their CSID's were issued in Halabja (see paragraph 26 of the FtTJ's decision). One child was born in Germany and the other was born in the UK.

38. It appears that redocumentation for the eldest children will require a journey to Halabja. For the 2 younger children who have never been issued with documentation, the redocumentation process is unclear and it is submitted that

there is, at a minimum, a real risk that redocumentation would require a journey to the General Directorate in Baghdad (see CPIN at paragraph 4.6.4).

39. In addition, the preserved findings of FtTJ found that on return to Iraq the appellant and her family would be treated with hostility and face discrimination because of their short stature and that this would render the process of redocumentation problematic and potentially dangerous.

40. It is submitted that in the event of the appellant and her family being returned to the IKR redocumentation will be complex. Two of her children have never been to Iraq before and the redocumentation process is unclear and may involve the journey to Baghdad. As regards the eldest 2 children it appears that a journey from Sulaymaniyah to Halabja will be required. The appellant, her husband and 3 of her children are of short stature and likely to face ridicule and hostility in Iraq. In the circumstances it is submitted that there is a real risk that at least 1 of the family members will not be able to obtain Iraqi identity documents within a reasonable time and thereby will be at risk of a breach of their protected rights.

41. In his oral submissions, Mr Schwenk submitted in relation to the 2 children born outside Iraq the question was whether there was a reasonable likelihood someone born outside Iraq who had not been registered with the authorities would be able to obtain documentation. He submitted that the answer lacked clarity but there was evidence that there was a real risk that the problems that they will face would lead to an Article 3 breach and the family with a profile such as theirs would not make redocumentation straightforward.

42. He submitted that the country guidance decision in SMO (2) demonstrated the process is bureaucratic even in straightforward cases and thus it is possible that there is a reasonable likelihood that the family would be required to go to Baghdad to obtain documentation in respect of the children who are not registered. He referred to paragraph 4.6.4, and whilst it relates to the system of national certificates, it is an indication of what might happen and that the reference to “special cases” applies requiring travel to Baghdad. Therefore there is a possibility that the children born outside Iraq with no connections would have to register outside of the IKR.

43. He submitted that the US State Department report referred to the position of the failure to register births result in denial of public services such as education, food and health thus it is likely to be exacerbated in a situation where the children were born outside of the country.

44. He also referred to the evidence of Dr Fattah set out in SMO(1) at paragraph 372 where reference is made to the difficulties for unregistered people who were born in camps. Whilst the children here were not born as IDP’s, it demonstrated that the issue was problematic.

45. In conclusion he submitted it was proposed that they would be returned to Sulaymaniyah, but it was likely that they would need a journey to Halabja for the 2 children who would be registered there. As to the 2 children who were born outside the country, the situation was unclear and there was a real risk that they would have to go to Baghdad to the central authorities. They would also need to pass through checkpoints from the airport to Halabja. He submitted that added to this problem they would have to negotiate the bureaucratic process and the difficulties that they would face as acknowledged by FtTJ Lodato and set out at paragraphs 51 and 52 of his decision which referred to difficulties on return as

they will be met with hostility. He submitted that when assessing risk even if there was only one family member out of the 6 who would not be able to obtain documentation within a reasonable time, that would satisfy the test for a breach of Article 3.

Discussion:

~~46.~~ We note that the FtTJ allowed the appeal on Article 8 grounds and the respondent does not seek to challenge that decision thus there is no removal of the appellant or her family members. However both advocates invited the Tribunal to reach a decision on the point they both identified.

~~47.~~ Dealing with the relevant question of whether the appellant, and her family members, can obtain their original CSID's or replacement documents within a reasonable time, our starting point is that there is no dispute that they do not have their original CSID card or any other documentation. As FtTJ Lodato set out, it was an agreed fact that the German authorities continued to hold the CSID's and passports of the appellant and her husband. In the case of the 2 eldest children they do not have their CSID's other than a photocopy and the 2 youngest children have no Iraqi documentation at all as one child was born in Germany and the other was born in the UK.

~~48.~~ It is not in dispute now that the appellant and her family members would not be able to obtain their original documentation from the authorities in Germany. As set out in the correspondence attached in the supplementary bundle, there is positive evidence that the appellant has been unable to obtain those documents from the German authorities. This was the position in the past in 2021 and now. As Mr Schwenk has identified, the respondent in the written submissions does not seek to argue that the appellant and her family members can acquire their original documentation.

~~49.~~ It is also not argued on behalf of the respondent that the appellant and her family members will be able to obtain a replacement CSID from the Iraqi Embassy in light of the position that this would only be possible if the local CSA offices have not transferred to the INID system (see paragraph 60 SMO (2)).

~~50.~~ As to the identified place of removal, the legal and evidential landscape has changed since the FtTJ's decision. There is now an updated country guidance decision of SMO(2) and an updated position taken by the respondent. In SMO (2) the headnote at paragraph 7 states: "return of former residents of the Iraqi Kurdish Region (IKR) will be to the IKR and all other Iraqis will be to Baghdad." At paragraph 26 it states, "there are regular direct flights from the UK to the Iraqi Kurdish Region and returns might be to Baghdad or that region. It is for the respondent to state whether she intends to remove to Baghdad, Erbil or Sulaymaniyah."

~~51.~~ The CPIN of July 2022 at paragraphs 2.6.3 and 3.1.1 states:

"There are asylum seekers and foreign national offenders can now be returned to any airport in federal Iraq and the Iraqi Kurdish Region."

~~52.~~ This is supported by the letter from the Return Logistics dated 4/1/23 setting out a number of enforced removals that have been made to the IKR. It is therefore the position that the appellants can be returned to the IKR and specifically Sulamaniyah.

53. The question remains whether the appellant but also her family members can obtain documentation within a reasonable timeframe. Whilst Ms Young on behalf of the respondent submits that the appellant's family members can travel to their local CSA office ,which is in Sulaymaniyah, that fails to take into account the findings of Judge Lodato that their local CSA office (or at least for 2 of the children) is in Halabja (see paragraph 26 of his decision). The location of Halabja is approximately a distance of 80 km.

54. At best on arrival the only documents that the appellant and her family members would have would be laissez passérs which are documents confiscated on arrival and in any event are not recognised documents for internal travel (see SMO (2) and 2.6.10 of the CPIN). We have taken account of the likely circumstances on arrival for the appellant and her family members. On arrival the appellant and family members will be subject to the security screening process as they are without documentation. Paragraph 2.8.11 of the CPIN refers to the risk of ill-treatment during security screening process and that this must be assessed on a case-by-case basis taking into account any additional facts that may increase the risk. At paragraph 4.10 (the possible consequences of not holding identity documents) states that this increases the risk of other serious protection incidents and rights violations those individuals, especially at checkpoints.

55. On the facts of this particular appeal, there are identifiable additional factors that are likely to increase the risk to the family based on the findings made by FtTJ which are not challenged by the respondent and led to his assessment that there would be very significant obstacles to integration. As set out in his decision this is a family who have their own specific difficulties as persons of short stature. The FtTJ referred to the extensive medical records for the appellant and her children (see paragraph 24) and there were detailed reports relating to the care of one child, M, set out at paragraph 25 and the serious medical condition she suffered from the level of care or treatment required.

56. Whilst the FtTJ was not satisfied that the events described by the appellant and her husband had occurred in Iraq, he did consider that the evidence of the country expert Dr George to be "impressive, impeccably sourced and balanced". The country expert did not identify a risk of persecution solely on the grounds of being a person of short stature, but he did recognise that this was a group who are discriminated against and marginalised. At paragraph 22 of his decision the FtTJ recorded the concern expressed in the expert report that the authorities might regard discrimination against this group as a "traditional practice" and it could not therefore be assumed that there will be any willingness to afford the family protection against abuse. Whilst the FtTJ did not consider that the appellant and family members would be at risk of persecution he did accept that it was reasonably likely that they had experienced derogatory remarks in public (see paragraph 48). At paragraph 51 based on the evidence of Dr George, the FtTJ also accepted that the family would face discrimination, marginalisation and stigmatisation on return and Dr George also referred to verbal harassment (see paragraph 21). At paragraph 52, the FtTJ found that the expert evidence and the objective country information painted a "tolerably clear picture that the appellant and her family would, like others of short stature in Iraq, face the most difficult of circumstances in return" and also identified that they would be met with hostility and discrimination. Thus the FtTJ identified a cumulative number of factors which he found satisfied the high threshold of very significant obstacles and allowed the appeal on Article 8 grounds.

57. Based on that evidence, which is not challenged, we are satisfied that there are additional factors present based on the particular circumstances of this family who have no documentation and importantly have 2 children who were born outside of Iraq. Even if they were able to negotiate the security screening process free of harm, there remains the issue of travel to the local CSA office which is not in Sulaymaniyah as submitted on behalf of the respondent but is in Halabja which is distance of approximately 80 km. This is not a short journey and there is a real likelihood that the family would have to negotiate checkpoints en route with the associated problems (see CPIN 2.811 and 4.10).

58. Whilst we are satisfied that the appellant has family members in Halabja who could attend at the airport, it has not been explained what they could do to obviate any risk during the screening process as they have no documentation to provide to the appellant or her family members and in any event they would not be able to provide any documents relating to the 2 children born outside Iraq. Nor is it suggested how any family members could assist in preventing the type of harassment set out in the country reports.

59. We have considered the difficulties in obtaining documentation for all members of the family and not just the appellant and her husband as they are considered a family group. There are 2 children who have no documentation whatsoever and were born outside of Iraq. Whilst it is not in dispute that they would be entitled to Iraqi citizenship, we accept the submission made by Mr Schwenk that there would be a difficult process for the 2 younger children who have never been issued with any documentation and in this context we have considered paragraph 4.6.4 and the references made to “special cases” that require a person to travel between governorates. The first category identified does not apply on the facts of this appeal, however the second category into which they would fall. would require them to travel to Baghdad and to obtain them from the General Directorate. On our reading of paragraph 4.6.4 there is a real risk that the family may have to travel to Baghdad to obtain the correct documentation for at least 1 of the children before onward travel to the IKR and as recognised in the country guidance decisions this would require the family to pass through with no documentation and even if they were able to negotiate that would have to pass through checkpoints en route where they would likely encounter treatment contrary to Article 3 (see paragraph 2.6.9).

60. Therefore the appellant has discharged the burden of proof that there would be a real risk or reasonable likelihood that they would have to travel outside of the IKR in order to obtain relevant documentation and that there is a real risk of encountering treatment contrary to Article 3 of the ECHR.

Notice of Decision

61. The decision of the FtTJ involved the making of a material error of law; the decision to dismiss the appellant’s asylum claim stands as does the decision to allow the appellant’s appeal on human rights grounds (Article 8).

62. We remake the appeal by allowing the appeal additionally on human rights grounds (Article 3).

Upper Tribunal Judge Reeds

18 May 2023