R (on the application of H) v The Secretary of State for the Home Department (application of AA (Iraq CG) IJR [2017] UKUT 00119 (IAC)

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

F ield House,

Breams Buildings

London

EC4A 1WR

Heard at Field House: 6 January 2017

Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

H

Applicant

And

TEH SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Mr D Jones, Counsel, instructed by Sutovic Hartigan Solicitors, on behalf of the applicant.

Mr N Chapman, Counsel, instructed by the Government Legal Department, on behalf of the respondent.

JUDGMENT

(9 February 2017)

A proper reading of the Upper Tribunal's decision in AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC) reveals the importance of making findings of fact regarding P's circumstances, in order properly to apply the country guidance in that case. A finding that P cannot currently be returned, owing to a lack of particular travel documentation, will not be determinative of P's claim to international protection if P faces a real risk of serious harm, otherwise than (solely) by reason of P's lack of such documentation.

JUDGE PETER LANE:

Introduction

1. The applicant, a citizen of Iraq who seeks international protection, challenges the respondent's decision of 10 March 2016 to refuse to accept the applicant's submissions as a fresh claim, pursuant

to paragraph 353 of the Immigration Rules. Permission was granted on the papers on 29 July 2016 by Upper Tribunal Judge McGeachy. Following the grant, the respondent produced, on 16 November 2016, a further decision letter in respect of the applicant, which the respondent describes as supplementary to, and which is to be read together with, the decision letter of 10 March.

Immigration history

2. The immigration history of the applicant is essentially as follows. He says he was born in 1992 in Mosul. He entered the United Kingdom illegally in 2008, when he was aged 16. He sought asylum shortly after entry. On 10 November 2008, the respondent refused the applicant's asylum claim but granted him discretionary leave to remain until 28 February 2010 (that is to say, until the applicant reached the age of 17½ years).

3. On 24 February 2010, the applicant made an application for further leave to remain. Following the respondent's refusal of that application, the applicant appealed to the First-tier Tribunal. On 17 June 2010, the First-tier Tribunal dismissed his appeal. The applicant became appeal rights exhausted in respect of the refusal of May 2010, when the Upper Tribunal refused permission to appeal.

4. On 26 March 2014, the applicant made further submissions to the respondent. She refused to treat them as a fresh claim and judicial review proceedings were commenced by the applicant. On 2 October 2015, the respondent agreed to reconsider the applicant's submissions. On 10 March 2016, however, the respondent refused to treat the applicant's further submissions (including those made on 15 October 2015) as a fresh claim. That refusal gave rise to the present proceedings.

5. Immigration Judge A D Baker's determination, dismissing the applicant's appeal, records that the applicant boarded a lorry in his home village in Iraq about seven days before his arrival in the United Kingdom. The applicant remained in the lorry, being allowed out of it only at night. The applicant's case was that he never had his own national passport and used no documents to enter the United Kingdom clandestinely, leaving his national identity card in Iraq.

6. The applicant's claimed age was accepted by the respondent, who found that he had told the truth about this matter. Neither the respondent nor the judge, however, accepted the applicant's account of the events that caused him to leave Iraq. The applicant said that he had heard his father had been shot and that the applicant had difficulties with a terrorist group. The applicant refused to join that group, as a result of which he was beaten. He was later threatened with death if he did not join the group. Family members arranged for the applicant to leave Iraq in the lorry.

7. So far as international protection was concerned, the judge concluded as follows:-

" 31. I find that this appellant has told an untruthful account which has been caught out in cross-examination. I find that this is a fictitious account of his claimed history.

32. I find that this appellant is a fit young man who when 18 years in August will be able to relocate in Iraq either by living in Baghdad if transported there on return or make his way from Baghdad to Mosul to rejoin his uncle and mother and extended family. I find that he has given one true account of the circumstances that prompted him allegedly to enter the United Kingdom ".

The country guidance in AA (Iraq)

8. Of key significance in the present proceedings is the country guidance case of the Upper Tribunal in AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC). AA was heard on 18 and 19 May 2015 and the decision was promulgated on 30 October 2015. The Tribunal found that a state of internal armed

conflict, such as to engage Article 15(c) of the Qualification Directive, existed in certain parts of Iraq. It is common ground that these include the present applicant's home area. It is also common ground that, for the purposes of these proceedings, such a state of internal armed conflict continues in that home area and that, as a result, the applicant cannot return to his home in Iraq.

9. The remaining parts of the country guidance in AA concern documentation and feasibility of return; the position of documentation where return is feasible; internal relocation within Iraq; and the possibility of return to the Iraqi Kurdish region (IKR).

10. The country guidance on these matters is as follows:-

" **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 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 that the issue of alleged risk of harm arising from an absence of Iraqi identification documentation will require judicial determination.

9. Having a Civil Status Identity Document (CSID) is one of the ways in which it is possible for an Iraqi national in the United Kingdom to obtain a passport or a laissez passer. Where the Secretary of State proposes to remove P by means of a passport or laissez passer, she will be expected to demonstrate to the Tribunal what, if any, identification documentation led the Iraqi authorities to issue P with the passport or laissez passer (or to signal their intention to do so).

10. 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 or other current form of Iraqi identification document.

11. Where P's return to Iraq is found by the Tribunal to be feasible, it will generally 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.

12. 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.

13. 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 IRAQI KURDISH REGION)

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. ”

The letter of 10 March 2016

11. The respondent’s decision of 10 March 2016 noted that the applicant’s submissions were to the effect that the applicant feared returning to Mosul as a Sunni Kurd in a majority Arab area and that he had had no contact with his family since he left Iraq. The case of AA indicated that the applicant could not return to his home area, given the internal armed conflict there. The submissions further contended that the applicant’s profile included his Kurdish ethnicity and the nature of the violence in Iraq, which was now said to be ethnically and religiously based.

12. The respondent further noted that the applicant’s case was that he would be without a CSID, and so would find it difficult to find employment or housing, as well as access to rations and support. The applicant had developed a private life in the United Kingdom, which meant that his removal would violate Article 8 of the ECHR.

13. After setting out extensive passages from the submissions made on behalf of the applicant, the letter expressly noted that it had “previously been accepted” that the applicant was:-

“an Iraqi national of Kurdish ethnicity from Mosul in Ninewa Governorate and at the current time the Home Office assesses the ‘contested areas’ of Iraq to include the Governorates of ... Ninewa. Therefore, it is considered that you would be unable to return to Mosul City due to the current country situation and consideration is given as to whether there are particular factors relevant to your individual and personal circumstances in regards the issue of internally relocating within Iraq”.

14. It is necessary to pause here and observe the respondent’s acknowledgement of the importance of ascertaining the applicant’s “individual and personal circumstances” in deciding whether internal relocation would be reasonable, since Mr Jones, on behalf of the applicant, submits that the applicant’s claim requires a fact-sensitive examination, which the respondent has failed to provide.

15. The letter continued by précising and, in places, quoting, what the Tribunal in AA had to say by way of country guidance regarding the possibility of relocating to Baghdad City. The letter then quoted from paragraph 31 of Judge A D Baker’s determination, noting that it was not accepted by the judge that the applicant would be at risk in Iraq over and above any other citizen and that the applicant was not of adverse interest to anyone at the time he left the country. The respondent considered that the applicant had provided no “significant or conclusive evidence” to demonstrate that the applicant’s family members no longer lived in Iraq. The Tribunal in AA had found that there was support from organisations for internally displaced persons “and it is believed you would have access to this support”.

16. The letter therefore found that it was “possible for you to relocate to Baghdad City as a person who is a Kurd and a Sunni Muslim. You are a young and healthy male and have remained in the United Kingdom for eight years now and it is considered that you have demonstrated that you are capable of being independent and resourceful and your ability to find employment is not in doubt. Therefore it is not considered to be unreasonable or unduly harsh to expect you to relocate in Iraq, to Baghdad City”.

17. The letter then set out the country guidance findings in AA relating to a person’s ability to obtain a CSID or an Iraqi nationality card and the relevance of, in particular, having a CSID (or not).

18. The letter continued as follows:-

“ While the UT in **AA Iraq** did not make findings on how someone from a contested area who is returned to Iraq would be able to reacquire a CSID, persons from Mosul city in Ninewah governorate, as well as Anbar and Salah al Din governorates will in general be able to reacquire a CSID from Baghdad or Najaf, providing they are returned on a valid or expired passport. If they are returned on a laissez passer and do not have a CSID, their ability to reacquire a CSID will depend on whether they can prove their identity to officials by, for example, knowing their (sic) the page and volume number of the book holding their information (and that of their family) and their ability to persuade officials that they are the person named on the relevant page is likely to depend on whether the person as (sic) family members or other individuals who are prepared to vouch for them.

Firstly, it is accepted that those persons from the ‘contested areas’ of Iraq, such as yourself from Mosul in Ninewa governate would be unable to return to their place of origin due to the security situation and it is generally not reasonable to expect a person from there to reacquire documents through a proxy due to the circumstances of armed conflict in such ‘contested areas’. In your initial screening interview dated 25 March 2008, you admitted to being assisted in leaving in (sic) Iraq by your uncle and entered the UK on 20 February 2008 in a lorry, but you had no identity documentation because you had never been issued with an Iraqi passport, however you stated that your own National Identity Card was ‘ in Iraq ’ (Q: 6.1 – 9.2 refer). As outlined above, in your statement you have claimed that you have not had any recent contact with your family in Iraq despite attempts to do so. However, the onus is on you to demonstrate why you could not get the appropriate identity documentation to enter Baghdad, that is, an Iraqi passport (current or expired); a laissez-passer, a Civil Status ID (CSID) and Nationality Certificate and you have not shown that you are unable to obtain the necessary documentation by attending the consular section of the Iraqi Embassy in the UK. You should also note that a lack of travel documents may be a technical obstacle to return, but is not a reason itself to grant protection. As outlined above in **AA Iraq** , it was found a Civil Status Affairs Office (CSA) for Mosul has been established in Baghdad and you have not demonstrated that it is not feasible for you to be returned to Baghdad City. ”

19. The applicant had, as part of his submissions, provided the respondent with a report from Dr Alan George, a recognised expert on Iraq, which “highlights the issue of ongoing sectarian violence in Iraq, the feasibility of internal relocation and risk on return to someone with [the applicant’s] profile”. Dr George was of the view that the applicant would be at risk in central and southern Iraq because of his Kurdish ethnicity and Sunni Muslim religio-political identity, as well as being at risk of being kidnapped as someone perceived to be wealthy. Dr George considered that the applicant, despite being Kurdish, would not be able to reside permanently in the IKR.

20. The respondent’s letter, however, said that Dr George’s opinions added nothing to the applicant’s case. This was because the applicant was “not of any adverse interest to anyone at the time you left the country and in regards your individual characteristics and personal circumstances it has been

found that it is possible for you to return to Iraq and relocate to Baghdad City and as a young male who is a Kurd and a Sunni Muslim. It was found there are no particular factors that would place you at additional risk than any other civilian in Iraq ...". This meant that "Whilst the full contents of the report from Dr George have been considered it is not believed that the report adds any further supporting weight to your claims".

21. Pausing again, Mr Jones submits that the letter wrongly treats the applicant's position as a Kurd and a Sunni Muslim, who is being returned to Baghdad, as positive features whereas, in fact, both place him in a problematic minority position in that city.

22. The letter of 10 March concluded its analysis of the submissions in terms of paragraph 353 as follows:-

" • Your claims have been considered in line with the relevant and applicable caselaw (sic) **AA Iraq** .

• It is known you are a Kurdish male from Mosul in Ninewa governate and you are independent and resourceful.

• It is possible for you to relocate to Baghdad City as a person who is a Kurd and a Sunni Muslim, and it is not considered to be unreasonable or unduly harsh to expect you to do so. You would have community support, general support as an IDP and as a failed asylum seeker and can seek employment.

• The onus is on you to demonstrate why you could not get the appropriate identity documentation to enter Baghdad, that is, an Iraqi passport (current or expired); a laissez-passer; a Civil Status ID (CSID) and Nationality Certificate and you have not shown that you are unable to obtain the necessary documentation by attending the consular section of the Iraqi Embassy in the UK.

• The report from Dr George adds no supporting weight to your claims when considered in line with **AA Iraq** and your personal circumstances.

• To return you to Iraq would not contravene Article 15(c) of the Qualification Directive.

• It is not believed you have demonstrated that upon return to Iraq there is a real risk you would face ill-treatment; inhumane or degrading treatment or persecution that would breach Articles 2 and 3 of the ECHR.

Therefore, these submissions do not amount to a fresh claim. "

23. The letter considered the applicant's private and family life submissions, by reference to Article 8 and the Immigration Rules regarding family and private life. The respondent concluded that the applicant did not qualify under the Rules and that there were no exceptional circumstances, such as to make it necessary to grant him leave by reference to Article 8.

The letter of 10 November 2016

24. The respondent's letter of 10 November 2016 is headed "FURTHER SUBMISSIONS DECISION FURTHER EXPLANATORY LETTER". The respondent stated that "This letter is supplementary to and should be read together with" the letter of 10 March 2016. She stated that the letter of 10 November "does not represent a new decision. It is intended to provide further clarification as to the reasons for my earlier decision. This is set out below".

25. It is necessary to set out in full the last part of this decision letter:-

“ 6. I provide further clarification of my conclusions and reasoning as regards each of these factors below.

(a) Whether you have a CSID or will be able to obtain one

7. At paragraphs 152-153 of **AA** , the Upper Tribunal concluded that it will ordinarily be reasonable and not unduly harsh to expect an individual who has, or is able to obtain, a CSID to return to Baghdad City.

8. The onus is on you to demonstrate to the requisite standard that you do not hold a CSID and would be unable to obtain one on return to Iraq.

9. You have provided no evidence that you do not presently have a CSID. In the absence of any such evidence, no immigration judge could legitimately conclude that you do not have a CSID.

10. Furthermore you have not indicated whether you presently hold a passport or laissez passer but if you do not it is not presently feasible for you to return to Iraq. In those circumstances you are not at risk on return by reason of the absence of documentation, for the reasons explained by the Upper Tribunal in paragraph 170 of **AA** .

11. In addition you have failed to provide any evidence to demonstrate that you have taken all reasonable steps to obtain a passport (or alternatively a laissez passer) from the Iraqi embassy in London, in the absence of which you would not be entitled to international protection (**HM & others** [2013] EWCA Civ 1276).

12. Alternatively, if you do hold a passport or laissez passer, the Secretary of State and Tribunal would require to know which documentation was provided to the Iraqi authorities in order to obtain it (**AA** at paragraph 170). Without this information there is no real prospect that an immigration judge would conclude that you had overcome the burden to show that you do not hold a CSID.

13. In all of the circumstances, there is no real prospect that an immigration judge would conclude that it would be unreasonable or unjustifiably harsh for you to internally relocate to Baghdad City.

(b) Whether you can speak Arabic

14. It is not suggested in your further submissions or letter before claim or grounds of claim that you do not speak Arabic. In any event you have failed to provide any evidence to demonstrate that you are unable to speak Arabic and an immigration judge could not legitimately conclude on the evidence that you do not speak Arabic. There is no basis on which to conclude that you could not obtain employment in Baghdad City.

(c) Whether you have family members or friends in Baghdad able to accommodate you

15. It is accepted that, notwithstanding the fact that your core claim was previously found to be a dishonest invention, it cannot be said that there is no prospect that an immigration judge would accept your account that you are not in contact with family members in Iraq.

(d) Whether you are a lone female (women face greater difficulties than men in finding employment)

16. You are not a lone female but a healthy young male.

(e) Whether you can find a sponsor to access a hostel room or rent accommodation

17. As you would be returned to Baghdad City, there is no need for you to find a sponsor in order to find accommodation. In any event, there is no evidence upon which an immigration judge could conclude that you would be unable to rent accommodation.

(f) Whether you are from a minority community

18. You are a Sunni Muslim of Kurdish ethnicity. It is not considered that you would belong to a minority community in Baghdad City in the sense explained by the Upper Tribunal in **AA** , when it stated that 'Those from minority communities are less likely to be able to access community support than those from the Sunni and Shi'a communities'. In any event it is clear that there is a substantial number of Sunni Muslims of Kurdish ethnicity in Baghdad City, even if Shi'a Muslims represent the religious majority. As previously explained, there is no real prospect that an immigration judge would choose to depart from the Country Guidance set down in **AA** on the basis of the evidence of Dr George (which pre-dated it). Furthermore there is no evidence that you are anything other than a healthy young man of working age well able to provide for yourself in Baghdad City.

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

19. If you were to return voluntarily to Iraq, you would be eligible for financial support through the Voluntary Assisted Return and Reintegration Programme. Support may also be available to you from Iraqi and international agencies upon your return. In any event, there is no reasonable prospect that an immigration judge would conclude to the requisite standard that you would be unable to support yourself if you were returned to Baghdad City.

Conclusion on internal relocation

20. Taking all of these factors into account, I concluded in my earlier decision that 'You are a young and healthy male and have remained in the United Kingdom for 8 years now and it is considered that you have demonstrated that you are capable of being independent and resourceful and your ability to find employment is not in doubt. Therefore, it is not considered to be unreasonable or unduly harsh to expect you to relocate in Iraq, to Baghdad City.'

21. There is no realistic prospect that an immigration judge would conclude otherwise.

Updated Country Information and Guidance

22. In August 2016 the Home Office published updated guidance as to the security and humanitarian situation in Iraq. This guidance is publically available on the official Government website at https://www.gov.uk/government/publications/iraq-country-information-and-guidance.

23. You have not sought to make further submissions based on the contents of that Country Information and Guidance, or the other evidence referred to therein. For the avoidance of doubt, the updated guidance is not of assistance to your claim and is not considered herein. "

Discussion

26. As is well-known, the standard of review in a judicial review concerning the application of paragraph 353 of the Immigration Rules is Wednesbury , with the application of the requisite anxious scrutiny. Approaching matters in this way, I find that the respondent's decisions of 10 March and 10 November 2016 fall to be quashed. In essence, the respondent has failed to take proper account of the case of AA .

27. Before giving my reasons for this conclusion, it is necessary to consider what relationship the decision of 10 November 2016 bears on the decision of 10 March. The issue of supplementary decision letters in the context of immigration judicial review has recently been subjected to close examination by the Court of Appeal in Caroopen v Secretary of State for the Home Department & Anor [2016] EWCA Civ 1307. Applying the analysis of Underhill LJ, the letter of 10 November reveals itself, almost entirely, as a "further reasons" type of supplementary letter (as described in paragraph 30 of the judgment). The letter of 10 November is, I consider, predominantly an attempt to engage and apply the country guidance in AA to a far greater extent than was discernible in the earlier decision.

28. What, though, of paragraphs 22 and 23 of the 10 November letter? Here, the respondent, of her own volition, made reference to updated country material published by the Home Office in August 2016. Although paragraph 23 claims that this material was "not considered", it plainly was considered by the respondent; otherwise, she could not have formed the view that the "updated guidance is not of assistance" to the applicant's claim. To this extent, the letter of 10 November in my view fall to be treated as a "new material" case, the third of Underhill LJ's four categories (paragraph 32 of the judgment). As the Judge observed at paragraph 4, although the "categories are clear enough conceptually … they can often be blurred in practice". So, what we have here is a hybrid.

29. Mr Jones makes the point that, since the respondent chose to introduce the August 2016 Home Office guidance, the applicant should be entitled to pray in aid provisions of that guidance that show the maintaining by the respondent of her position not to treat the applicant's submissions as a fresh claim is legally flawed. In this regard, Mr Jones points in particular to paragraphs 3.1.1 to 3.1.5 of the guidance, which note that Sunnis may be at real risk of persecution or serious harm from the Shia militia in Baghdad unless they have tribal, family or political links which mean they would not be at risk and so can relocate to that city. Furthermore, although the paragraph 353 and section 94 certificate tests are conceptually different, it is noteworthy that paragraph 3.1.5 of the guidance states that, if refused, "a claim is unlikely to be certifiable as 'clearly unfounded' under section 94" of the 2002 Act.

30. At paragraph 2.2.6 of the guidance, we find that Sunni internally displaced persons who generally lack support networks and economic means, are more vulnerable to suspicion and abuse and so "decision-makers need to consider each case on its merits". At paragraph 2.3.4, decision-makers are told that they "must explore whether there are circumstances – such as family, tribal or political links – in which a person can obtain protection".

31. Mr Jones quite properly draws attention to paragraph 2.4.2, where it is said that Sunnis number at least in the hundreds of thousands in Baghdad. Nevertheless, paragraph 2.4.3 records that a Sunni "may be required to find a sponsor to enter the city, although this requirement is subject to change based on the changing security situation".

32. I find that the inclusion of paragraphs 22 and 23 in the letter of 10 November 2016 permits the applicant, in the context of the present proceedings, to point to the passages in the August 2016 guidance, to which I have just made reference. The fact that the respondent did not engage with those paragraphs, in the context of the applicant's claim, underscores the respondent's general failing, in both of the decision letters, to consider with the requisite anxious scrutiny the particular circumstances of the applicant, by reference to the findings in AA .

33. The fact that the situation in Iraq, as identified in AA, raises complex, often intertwining, issues of potential risk is clearly demonstrated in the decision of the Upper Tribunal to remit the case of the

individual known as AA to the First-tier Tribunal, in order for findings to be made, which would enable the First-tier Tribunal to have a comprehensive picture of AA's circumstances. This was necessary to determine the reasonableness of AA's proposed internal relocation. This aspect of AA was, I find, overlooked by the respondent in the present case.

34. The factual lacuna which troubled the Upper Tribunal in AA was the lack of any finding regarding the ability of AA to speak Arabic. In the present case, as Mr Chapman fairly acknowledges, it is simply not correct to assert, as the respondent did, that the applicant had provided "no evidence" to show he was unable to speak Arabic. At page B7 of the bundle we find the applicant's screening interview record, following his claim for asylum. In answer to the question "What are ALL the languages/ dialects that you speak?" (original capitalisation), the appellant replied "Kurdish, Badini". There is nothing in the determination of Judge A D Baker to suggest that the applicant, in fact, also knows Arabic. Thus, the respondent failed to apply anxious scrutiny to this significant issue.

35. I agree with Mr Jones that the respondent's decision-making displays a failure, in effect, to step back from the adverse credibility findings of the immigration judge, in her determination (which have become of little or no relevance in the years that have elapsed since their determination) and ask what a hypothetical judge, hearing the applicant's appeal in 2016, would make of a claim brought by someone who left Mosul as child, whose home area is in a state of internal armed conflict (with all that might entail for his ability to contact family members) and who, if returned to Baghdad, would be going there as a Kurd and a Sunni, both of which place him in the position of being in a minority in that city. I should mention here that, although the respondent's decision engaged with the possibility of the applicant being able to relocate to the IKR, neither side regarded this issue as relevant. The background evidence indicates that onward travel from Baghdad to that zone is highly problematic.

36. I turn to the issue of documentation. As can be seen, the respondent's position on this moved 180 ° between the two letters. In the first, the respondent's stance was that the applicant had failed to take any steps to show that he would not be able to secure travel documentation to facilitate his return to Iraq. By the time of the second letter, a further reading of the Tribunal's decision in AA led the respondent to contend that the applicant had failed to demonstrate it was feasible for him to return to Iraq. Given, therefore, that return was not presently feasible, the respondent relied upon the finding at paragraph 7 of the country guidance in AA , that an international protection claim cannot succeed by reference to any alleged risk of harm arising from an absence of Iraqi identification documentation, if the Tribunal finds that a person's return is not currently feasible, given what is known about the state of a person's documentation.

37. In support of this aspect of the respondent's case, Mr Chapman refers to the judgment of the Court of Appeal in MA (Ethiopia) v Secretary of State for the Home Departmen t [2009] EWCA Civ 289. There, a claim based upon the denial by the Ethiopian authorities of a person's Ethiopian nationality foundered upon the applicant's failure to take reasonable steps (such as applying to the Ethiopian Embassy in London) to secure her documented return as such a national.

38. But, as Mr Jones counters in reply, the difference between MA and the present case is that in AA the Upper Tribunal undertook, as part of its country guidance, a detailed forensic examination of the evidence concerning the availability of relevant documentation, both in the United Kingdom and Iraq. A judicial fact-finder, accordingly, would not necessarily be acting speculatively or otherwise contrary to the judgment in MA , if he or she were to examine the likelihood of the applicant being able to obtain relevant documentation, through the lens of the country guidance in AA .

39. Mr Jones points out that permission to appeal to the Court of Appeal was granted by that court in 2016 in relation to the Upper Tribunal's country guidance finding at paragraph 7, based as it was on the judgment in HF (Iraq) & Ors v Secretary of State for the Home Department [2013] EWCA Civ 1276. The legal position, at the present time, is however plain: unless or until overturned on appeal or replaced by other country guidance, the guidance in AA remains binding on the hypothetical First-tier Tribunal Judge.

40. There is a further, discrete reason why the respondent's reliance on the "documentation" issue is misconceived. Having explained the importance, in its view, of HF (Iraq) , the Tribunal in AA said:-

" 169. On one reading of HF (Iraq) - particularly the highlighted passage in paragraph 101 - the impossibility of return could be said to make it unnecessary to hypothesise any risk to an appellant in the country of proposed return, whether or not stemming from a lack of documentation or similar problem. We do not, however, consider that the Court can be taken to have intended such a reading. There may be cases where it will be evident that the person concerned would be at real risk of persecution or serious harm irrespective of lack of documentation. Were Nazi persecution of the Jews occurring today, it would clearly subvert the purpose of the Convention to deny refugee status on the basis that, regardless of what might happen to appellants on return because they are Jewish, they cannot in practice be returned (whether because of documentation or mere refusal to admit Jews to Nazi Germany). For this reason, we consider that the judgment in HF (Iraq) does not preclude a claim to international protection from succeeding, insofar as the asserted risk of harm is not (or not solely) based on factors (such as lack of documentation) that currently render a person's actual return unfeasible.

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. "

41. Two points emerge. First, a person who is found to be returnable (because he or she has or will be able to obtain a passport or laissez-passer) may, nevertheless, face difficulties if he or she cannot obtain a CSID, following return. Secondly (and crucially), a person whose return is not currently feasible may, nevertheless, still succeed in a claim to international protection, if and insofar as the claim is based on a real risk of harm, which arises otherwise than by not having the requisite documentation.

42. The significance of this second point emerges clearly from the Upper Tribunal's application to the appellant AA of its country guidance:-

" 206. However, the Respondent has confirmed that the Appellant would be returned to Baghdad city. There is no evidence that the Appellant has access to a current or expired Iraqi passport, or a laissez-passer, and we conclude that he does not. In all the circumstances we find that he will not be returnable until he is able to supply sufficient documentation to the Iraqi Embassy in London to

enable it to provide him with a passport or a laissez passer. This will only occur if he can provide a copy of a CSID or Nationality Certificate. His return is, therefore, not currently feasible.

207. Given that the appellant's return is not currently feasible it could be said that it is unnecessary to hypothesise any risk to him upon his return to Iraq. However, as identified in paragraphs 169 and 170 above, there may be cases where it will be evident that the person concerned would be at real risk of persecution or serious harm irrespective of the lack of documentation and that an applicant should not be precluded for pursuing a claim to international protection in circumstances where the asserted risk of harm is not (or not solely) based on factors (such as lack of documentation) that currently render a person's actual return unfeasible. ”

43. As a result, AA does not support the respondent’s approach in the present case to the issue of documentation. The respondent’s failure to consider the way in which the Upper Tribunal applied its country guidance to the individual concerned has led the respondent into error. She has failed to apply the requisite anxious scrutiny. A risk analysis by reference to all the factors set out in AA needs to be undertaken. As I have already found, the respondent’s decision letters are deficient in this regard.

Decision

44. For these reasons, the decisions of 10 March and 10 November 2016 fall to be quashed. In the circumstances, it is not necessary to dwell upon the Article 8 issue. Whilst there is force in Mr Jones’s contention that the deficiencies in the respondent’s decision making affected her consideration of whether there might be “very significant obstacles to integration into” Iraq, that issue will need to be considered afresh, by reference to the then current position.

45. I shall hear the parties on the issue of costs, unless this can be agreed.~~~~ 0 ~~~~