**Upper Tribunal** **Appeal number: PA/10906/2019 (V)**

**(Immigration and Asylum Chamber)**

**THE IMMIGRATION ACTS**

| **Heard Remotely at Manchester CJC** | **Decision & Reasons Promulgated** |
|---|---|
| **On 9 December 2020** | **On 31 December 2020** |

**Before**

**UPPER TRIBUNAL JUDGE PICKUP**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MA**

**(ANONYMITY ORDER MADE)**

Respondent

**DECISION AND REASONS (V)**

For the Appellant: Mr D Clarke, Senior Presenting Officer

For the Respondent: Ms L Barton of counsel, instructed by Oakmount Law Solicitors

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 reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. Although the Secretary of State has brought this appeal, to avoid confusion, for the purpose of this appeal I have referred below to the parties as they were before the First-tier Tribunal.

2. The appellant, who is a national of Iraq of Kurdish ethnicity and Sunni Muslim religion, with date of birth given as 6.4.89, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 16.12.20 (Judge Herbert), dismissing on all grounds his appeal against the decision of the Secretary of State, dated 29.10.19, to refuse his fresh claim in support of his application for international protection.

*Relevant Background & Chronology*

3. The relevant background can be summarised as follows. The appellant asserts that he arrived clandestinely in the UK in September 2007. He claimed asylum on 21.9.07. The respondent refused the claim on 23.6.08 and his subsequent appeal was dismissed by the First-tier Tribunal on 20.8.08 (Judge Gladstone). He became Appeal Rights Exhausted (ARE) on 7.10.08.

4. Further submissions made in 2008 and again in 2016 were refused. In February 2017 he applied for Leave to Remain in the UK on the basis of his relationship with an EEA national, which was also refused. The appellant then made the further representations on 16.6.17, the refusal of which on 29.10.19 was the subject matter of the appeal to the First-tier Tribunal and the impugned decision of Judge Herbert.

5. The protection claim was based on alleged fear of Article 15(c) indiscriminate violence on return to Tikrit, within the Salah ad Din Governorate, because of the security situation in Iraq. He also feared serious harm or death on the basis that his father and brother were killed in 2007 in an apparent revenge attack for having worked for the Ba'ath Party, a fact accepted by the respondent. He also claimed article 8 private and family life with his EEA national (Czech) partner and children.

*The First-tier Tribunal Decision*

6. Judge Gladstone found the appellant's account of being at risk of persecution not credible. Whilst the killing of the father and brother in revenge attacks for their Ba'ath Party involvement was accepted, the judge, pointing out that he had remained in the same house for some time before leaving, did not accept that he had come to the UK because of this history but the evidence rather suggested his

motive was to study in the UK. His asylum claim was found not credible for the extensive reasons carefully set out in Judge Gladstone's decision.

7. Taking the decision of Judge Gladstone as the *Devaseelan* starting point, Judge Herbert went on to reject the appellant's asylum claim, finding at [15] of the decision that he would not be at risk of persecution on return to Iraq. Neither was it accepted that there was an article 15(c) risk of indiscriminate violence. However, from [24] onwards, the judge found "overwhelming evidence" that the appellant does not have a CSID identity document and had taken all reasonable steps to procure such identification, so that he would be unable to fly from Baghdad to the IKR and there was, therefore, a real risk that he would be subject to detention and possibly unlawful or inhuman treatment if he were to try to negotiate the overland route to his home area.

8. The judge also found that the appellant had lived with his partner since 2014 and she and their two children have permanent residence status in the UK so that it "would not be reasonable to expect the appellant to be separated from his children and removed to Iraq." In consequence, the First-tier Tribunal allowed the appeal on article 8 grounds. Although there was not an EEA application or decision to appeal, the judge also purported to allow the appeal under the EEA Regulations.

*Grounds of Appeal*

9. The Secretary of State sought permission to appeal on grounds that the First-tier Tribunal failed to follow the Country Guidance of SMO, KSP & IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 004100 (IAC), promulgated on 20.12.19, after the First-tier Tribunal appeal hearing on 17.12.19 but before its promulgation on 16.1.20. The grounds also alleged a failure to provide adequate reasons for findings on material matters, including: (a) that the appellant had taken all reasonable steps to procure identity documentation which would allow him to return to Iraq; (b) that it would not be reasonable for him to relocate to Iraq and apply from there for entry clearance; and (c) failed to provide reasoning for allowing the appeal under both the Immigration Rules and the Immigration (EEA) Regulations. Complaint was also made that the judge told the representatives of the two parties to the appeal that he had already made up his mind and for that reason curtailed the Presenting Officer's cross examination of the appellant.

10. On 14.2.20, the First-tier Tribunal granted permission to appeal to the Upper Tribunal, considering it arguable that in the light of SMO the judge had erred in his extremely brief findings and in giving no reasons for allowing the appeal under the EEA Regulations.

11. On 30.4.20 the Upper Tribunal issued directions proposing to determine the error of law issue without a hearing, providing the opportunity for written objection to this course of action and further submissions in respect of the alleged errors of law.

12. In response to those directions, the Secretary of State relied on the grounds seeking permission and made no further submissions. On 20.5.20 the appellant submitted lengthy grounds purporting to oppose the permission to appeal to the Upper Tribunal. It was argued that despite SMO, there was no material error in the decision of the First-tier Tribunal. Neither party objected to the error of law issue being determined without a hearing.

*The Error of Law Decision*

13. On 29.6.20, the Upper Tribunal promulgated Upper Tribunal Judge Coker's error of law decision, made on the papers and without an oral hearing, pursuant to Rule 34. Judge Coker found that the judge ought not to have curtailed either party's involvement in the appeal hearing, and thereby erred in law. Judge Coker also pointed out that Judge Herbert made no reference to the impact Judge Gladstone's adverse credibility findings may or may not have had on the assessment of credibility of the claim to not have access to a CSID and his account of attempts to do so. There was no analysis of the evidence in accordance with the previous credibility findings or in the context of the guidance in SMO that individuals can be expected to know identity information or of the ability to obtain that information. This error was compounded by the curtailment of cross-examination.

14. In relation to article 8 ECHR, Judge Coker found that Judge Herbert failed to undertake a structured analysis of the appellant's circumstances and the relationships he claims to have. No adequate reasoning was provided as to why applying for entry clearance from outside the UK would be unreasonable. Neither was it clear why the appeal was allowed under the EEA Regulations when the appellant is not married to his partner and there was no consideration of Regulation 17. Judge Coker concluded, "*Overall the decision by the judge to allow the appeal on article 8, under the Immigration Rules and under the EEA regulations has not been a structured decision with reasoned findings. The decisions taken by the judge are fraught with errors of law*."

15. Judge Coker also found that in relation to the claim for international protection, "*the judge has failed not only to take account of relevant country guidance but has failed to have adequate regard to any previous findings made; a simple acceptance of (the appellant's) written evidence with no cross examination and no consideration of a previous adverse tribunal decision is inadequate and of such consequence that I set it*

*aside*." Judge Coker retained the decision to be remade in the Upper Tribunal in accordance with directions set out at the conclusion of her decision.

16. In response to those directions, on 20.7.20 the Upper Tribunal received the respondent's skeleton argument. On 6.8.20, the Upper Tribunal received the appellant's further witness statement, dated 5.8.20, and on 24.8.20 the undated and unsigned witness statement of the appellant's partner, Ms SC. A signed copy of this statement, dated 23.11.20, is with the appellant's consolidated bundle lodged with the Upper Tribunal on 30.11.20.

17. There does not appear to have been any compliance by the respondent with the directions of Judge Coker to "*file and serve a supplementary decision, if so advised, taking full account of the evidence relied upon by (the appellant) and his partner in their witness statements as relied upon before the FtT*." However, this is addressed in the respondent's skeleton argument. At [18] of her decision, Judge Coker observed that it was difficult understand on what basis the Secretary of State made her decision finding that the appellant's partner was not settled in the UK, given that she had been granted permanent residence by the date of the refusal decision.

*Challenge to the Error of Law Decision*

18. Notice of the remote hearing for the remaking of the decision was issued to the parties by the Tribunal on 3.11.20. However, very late, only the day before the hearing the appellant's representatives wrote to the Tribunal as a matter of urgency stating, "*As you are aware of the decision of those matters that were heard on paper during the Covid-19 pandemic are held to be illegal, Does the Secretary of State and the Court agree that our client's matter should be regard for the reconsideration. Can the Court please kindly confirm whether a matter tomorrow, as per our client's hearing will go ahead as a full reconsideration, or in conjunction with the current case law on judgements without the client's presence during the Covid-19 period that the matter would be adjourned*."

19. In response, I directed the Tribunal to advise the appellant's representatives that if they wished to pursue this point, I would take it as a preliminary issue at the outset of the appeal hearing and directed the submissions in support to be set out in a skeleton argument. I have not received any such skeleton argument.

20. Although the email message of 8.12.20 is garbled and poorly drafted, the sense was clear. However, the central proposition that all decisions made on paper during the Covid-19 pandemic were held to be illegal, is entirely inaccurate. Notwithstanding the decision of the High Court in R (JCWI) v President UTIAC [2020] EWHC 3103 (Admin), Judges were and remain entitled to decide matters on the papers in the light of Rule 34, the Senior President's Practice Direction, and taking into account the overriding objective to deal with cases fairly and

justly. As noted above the directions proposing the error of law decision should be decided without a hearing invited any objection to that course of action. Whilst the appellant's representatives responded, opposing the respondent's error of law argument, they did not object to the error of law issue to be decided on the papers.

21. I raised this issue with Ms Barton at the outset of the hearing, in response to which she indicated that she did not have instructions to pursue the point. I proceed, therefore, on the basis that there is no challenge to the error of law decision.

*Remaking of the Decision*

22. Judge Coker set aside the decision of the First-tier Tribunal "in its entirety" to be remade in the Upper Tribunal. The matter has now been transferred to me, pursuant to the Principal Resident Judge's Transfer Order dated 29.10.20.
23. In addition to the skeleton arguments and further witness statements of the appellant and his partner referred to above, the Tribunal has received the respondent's bundle, and the appellant's original bundle (AB1) and supplementary bundle (AB2). The other documents referred to in the representative's email of 30.11.20 include the more recent decisions and directions of the Upper Tribunal. I confirm that all of this evidence and these submissions have been carefully considered and taken into account, along with the oral submissions made at the remote hearing, before making any findings or reaching any conclusions. Whether or not specific documents or evidence or submissions are referenced below, all have been considered in the round. Whilst I have necessarily addressed issues sequentially, this is purely for the purpose of presentation in an intelligible form and I confirm that all issues have been considered together before findings were made, notwithstanding any particular order.

24. I also confirm that I have applied the lower standard of proof to the protection claim and borne in mind that in respect of the family and private life claim outside the Rules, it is for the appellant to demonstrate on the balance of probabilities that article 8 is engaged but for the respondent to show that the impugned decision of the Home Office is proportionate.

*Summary of the Appellant's Case*

25. At the outset of the hearing Ms Barton confirmed that the appellant continued to maintain risks on return arising from his family's Ba'ath Party affiliation, his ethnicity and religion, an Article 15 (c) risk of indiscriminate violence, as well as the article 8 and EEA claims.

26. The appellant states that he was born and raised in Tikrit, as a Sunni Muslim of Kurdish ethnicity. He was last in school in 2000 after either two or three years'

study between the ages of 6 and 8, and thereafter stayed at home and was unemployed. His father and brother were killed in Tikrit in either July or August 2007, in an apparent revenge attack for his father's Ba'ath Party involvement. He wasn't sure precisely what his father's role was but said that he wore a military uniform. His mother told him his father worked for Saddam Hussein and had done a lot of bad things, arresting people and involved in a lot of violence. He said that 5-6 months after the fall of the regime, a lot of letters threating his father were thrown into the house. The house was never attacked, and the appellant never threatened or attacked personally. In the month between his father's and brother's deaths and leaving Iraq, he remained living in the family home in Tikrit.

27. He feared return to Iraq for the same reason his father and brother had been killed. Because he feared being killed by terrorists or insurgents in Tikrit, and/or enemies of his father, he was assisted by his paternal uncle and at the expense of his mother in the sum of $10,000 to leave Iraq, travelling via Turkey to the UK. He said he last saw his mother in July 2007; she told him he had to go to Europe and/or to go to school in the UK. His mother went to live with his uncle in Kirkuk. He now maintains that he last had contact with his family in 2014 and that all attempts to re-establish contact have failed.

28. The appellant claimed to have been born on 6.4.91, so that he would have been a minor when arriving in the UK in 2007. The respondent disputed this, based on his appearance of being older, and on a subsequent age assessment which determined he was over the age of 18.

29. When interviewed he said he was told not to bring any documents with him but that he expected some documents, including his ID card, to be sent to him from Iraq which he had telephoned his uncle to ask for. These documents were considered by the respondent and by Judge Gladstone but have not been put before the Upper Tribunal.

30. Having entered the UK clandestinely, the appellant entered into a relationship with a Czech citizen. They now have two children born in the UK, also Czech citizens. Recently, the appellant's partner and their children were granted settled status under the EU Settlement Scheme. He relies on family life with his partner and children.

*Summary of the Respondent's Case*

31. The respondent's skeleton argument maintains the refusal decision and relies on SMO, submitting that the level of indiscriminate violence in the appellant's home area of Tikrit is not such as to engage article 15(c) of the Qualification Directive, so that the appellant could safely return there or, alternatively, relocate to the IKR as a Sunni Kurd.

32. It is submitted that as the appellant has been found not to be a witness of the truth, he cannot be believed when claiming to have lost all contract with his family in Iraq and that he would be unable to obtain a replacement CSID card or other identity document necessary to enable him to be returned to Iraq and make his way to either Tikrit or the IKR. Reliance is made on [391] and [392] of SMO, where the Upper Tribunal held that the number of individuals who do not know and could not ascertain the volume and page reference of the civil register is likely to be quite small, as these details appear on numerous official documents and, given the significance to the individual and the family, most people will know or be able to easily obtain this information.

33. In relation to the human rights article 8 ECHR claim, the respondent now accepts that the appellant's partner and children have now acquired settled status in the EU Settlement Scheme and that he enjoys a genuine and subsisting relationship with his partner and children. However, it is pointed out that the partner and children are not British but Czech citizens and can return there, so there are no insurmountable obstacles to family life continuing outside the UK with an application from Iraq to join them there, if they do not wish to accompany him to Iraq. Whilst the children have settled status, neither meets the 7-year requirement to be a qualifying child under either Appendix FM EX1 or paragraph 117B(6). It follows that the Rules cannot be met as a parent or partner.

34. The respondent asserted that fraudulent identity documents were easily obtainable and pointed out that those the appellant claimed were sent to him from Iraq purported to have been issued in 2002, at which time the appellant would have been 11 years of age, but the photographs were clear of an older person, not those of an 11-year-old. In evidence before me, the appellant said he had no reason to suggest that these documents were anything but genuine but did not know whether they were fraudulent or not. He had submitted them at the First-tier Tribunal appeal hearing in 2008 in the believe they were genuine.

35. Importantly, the respondent also points out that if the appellant was able to obtain replacement identity documents, it would be open to him to use them to support his own application for Leave to Remain under the EU Settlement Scheme from within the UK.

36. Finally, the respondent points out that as the partner's status was obtained under the EU Settlement Scheme, this is not equivalent to exercising Treaty rights in the UK. If he believes he is entitled to settlement under the Immigration (EEA) Regulations, it is open to him to make such an application, which he has not done.

*The 2008 First-tier Tribunal Decision*

37. Whilst judge Gladstone accepted that the appellant's father and brother were killed in revenge for their Ba'ath Party involvement, for the comprehensive

reasons set out from [46] onwards of her decision, Judge Gladstone found the appellant not credible in all other aspects of his claim.

38. The more relevant findings of Judge Gladstone can be briefly summarised as follows. However, reference should be made to the full decision for the detail, which I have carefully read and taken into account in line with the *Devaseelan* principle:

    a. In his various accounts, the appellant was vague about his age and inconsistent about the number of years he attended school. The age assessment concluded that he was over the age of 18, pointing to the fact he was well-developed with a strong beard and stubble, despite first presenting himself as clean-shaven. In the premises, the judge rejected the appellant's claim to be a minor, which false claim undermined his credibility.
    b. The core claim was found not credible; his story was not believed as it contained numerous contradictions, inconsistencies, and discrepancies which he had failed to explain either satisfactorily, or at all.
    c. Whilst the judge considered herself reluctantly bound by the respondent's acceptance that his father and brother had been killed in 2007 in an apparent revenge attack for their work for the Ba'ath Party, there were discrepancies in the various versions of his account so that the judge concluded that whilst they may have been killed, that event did not cause the appellant to leave Iraq. The judge also found that the killing happened some time before he left Iraq. On consideration of the various inconsistent dates the appellant had given for that event, the judge concluded that the deaths were either in late June or early July 2007. The judge noted that when the discrepancies were put to him, he claimed to feel unwell and disorientated.
    d. The judge rejected the appellant's claim to be illiterate, which was a claim the judge concluded was made to try to avoid answering pertinent questions. Nor was it accepted that he is innumerate, and the judge found that his claim not to know dates was false and advanced to avoid answering significant questions, or head-off alleged discrepancies or inconsistencies. He was also found to be evasive in answering questions.
    e. The account of receiving threatening letters was found to be inconsistent and rejected as not credible.
    f. There was no good reason for the appellant to fail to remain consistent and the judge concluded he was unable to maintain a consistent account because it was not true. He was unable to provide a consistent account of the chronology generally, of the claimed receipt of threatening letters, of the immediate aftermath of the killings. At [56] the judge concluded that the killings of his father and brother did not take place shortly before he

left Iraq or that they were the reason for his departure. "Rather there was emphasis on coming to the UK to study."

g. The judge also found at [57] that the appellant's brother had not been deliberately targeted but only killed because he was with his father. The appellant was inconsistent as to whether his brother worked for the Ba'ath Party. "*Thus I find that the appellant, as the son of a former Ba'athist, is not at any real risk of being specifically targeted, particularly as there were no direct threats to him in the past, and therefore the appellant is not in need of international protection*."

h. At [58] the judge repeated that she did not find the appellant to be credible and did not accept his story, "other than having to accept that his father and brother were shot at some stage. I find that there was no Geneva Convention reason for the appellant to leave Iraq, and he will suffer no serious problems on return."

39. Pursuant to Devaseelan (Second Appeals - ECHR - Extra-territorial Effect) Sri Lanka [2002] UKAIT 00702, those findings and reasons are the starting point for my consideration. I found the decision of Judge Gladstone careful and well-reasoned. In her submissions, Ms Barton submitted that Devaseelan was not a straight-jacket and that this Tribunal needed to make an overall assessment of the facts. She argued that it was not reasonable that what she described as a "13-year-old decision" should stand and the evidence be reconsidered. However, no specific error in that decision was identified, and Ms Barton has not advanced any specific reason to depart from any of those findings. In the hearing before me, as Mr Clarke pointed out in his submissions, neither the appellant in his new witness statement nor Ms Barton specifically addressed any of the adverse findings of Judge Gladstone. Nevertheless, I have given careful consideration to the evidence as a whole, including the more recent evidence since that decision was promulgated, and made an overall assessment of the appellant's credibility. Whilst the core claims were not abandoned, it is clear that in submissions to me the emphasis was now being placed on article 15(c), risk on return and relocation, and the feasibility of return without identity documentation. However, given the failure to address those findings, and in the light of my own findings, I can find no basis on which to depart from them. Given the serious concerns in relation to the appellant's more recent written and oral evidence, set out below, I find even greater reason to conclude that, apart from being bound by the respondent's concession as the killing of his father and brother, the appellant's core account remains unreliable and incredible.

40. An interpreter attended to assist the appellant to give evidence in Kurdish Sorani. However, he insisted on answering questions in English saying he didn't need the interpreter. She was kept on hand and it transpired that although his English was reasonable, there were a few questions for which he needed

translation assistance. With Ms Barton's consent, the interpreter was released on conclusion of the appellant's oral evidence.

41. In evidence, I found the appellant a poor and unreliable witness in his own cause. He was frequently argumentative or evasive in his answers to questions, deliberately failing to provide a straight answer to straight questions asked of him. I concluded that he was deliberately untruthful and evasive.

42. In his own evidence, the appellant relied on his witness statements of 12.12.19 and 5.8.20. That of 12.12.19 was prepared for the First-tier Tribunal appeal hearing in December 2019 and purported to replace the earlier witness statement from March 2019 (AB1p48). There was some questioning of the appellant about paragraph 5 of the earliest of these three statements. Curiously, this had been deleted in its entirety from the December 2019 statement. However, as originally drafted and signed by him, the appellant purported in that paragraph to correct an assertion that he had resigned from the army. He maintained in paragraph 5 that he left the army without consent so that return to Iraq would cause him problems and punishment for being an absconder and may even be seen as a collaborator. This is peculiar, given that he came to the UK, in my view falsely, claiming to be a minor, a claim which he did not actively pursue before me. In evidence, he denied ever asserting that he had been in the army but was either unable or unwilling to explain why he had signed a statement with that corrective paragraph in it suggesting that he had left the army and would be at risk on return for that reason. I consider this aspect of the appellant's case undermining of his credibility. I have considered the possibility that the statement was incorrectly drafted by the appellant's current legal representatives based on a statement for a different client, but as he signed the statement and as no evidence has been adduced from the representatives to admit of a 'clerical' error, I must assume that the statement as originally drafted was based on the appellant's explicit instructions and, therefore, signed by him. The revised statement did not appear until several months later, just before the First-tier Tribunal appeal hearing before Judge Herbert.

43. In evidence before me, the appellant maintained that he had entirely told the truth in his evidence to the Tribunal in 2008. When asked if he had relied at that hearing on Iraqi identity documents, including an ID card and an Iraqi National Identity Certificate, to demonstrate how old he was, he didn't directly answer that question, stating instead that he didn't know if the documents were genuine or not. He said he had asked for them and his mother had sent them. It was suggested that if they are genuine, they would enable him to return to Iraq. He repeated that he didn't know if they were genuine or not. However, he could not explain why his mother would send fraudulent documents from Iraq if she could send him the genuine articles. Ms Barton intervened to complain about the line of questioning when there was no evidence that the documents were fraudulent.

However, it was in fact the appellant and not Mr Clarke who raised the question as to whether they were fraudulent.

44. It was pointed out to the appellant that in interview, as noted at [17] of her decision, he claimed his uncle not his mother sent the documents. Varying his account again, he then said that they sent him the documents together. Asked again why they would send fraudulent documents, he repeated he didn't know if they were genuine or false, as he didn't have that power. He said he didn't have the identity documents and believed that the Home Office had them. However, he had never asked for them back. I pointed out to the representatives, that Judge Gladstone noted in her decision that the originals together with translations had been handed in to the Tribunal in 2008 and were retained on file. In the circumstances, they were not held by the Home Office. The appellant admitted that he had not made any attempt to obtain them for the purpose of this hearing, or indeed when purportedly asking the Red Cross to help locate his family in Iraq, a request that on the evidence was only made as late as 2019. Neither had any request been made of the appellant's previous representatives to see if they had retained a copy of the identity documents on the case file. Neither had he requested their return to provide to the Iraqi consulate when purportedly seeking their assistance for identity documentation. When pressed on the matter, he said he feared that he might be arrested and detained by the embassy if he produced fraudulent identity documents to them but could not explain why he thought they might be fraudulent. He denied Mr Clarke's suggestion that he didn't produce the documents to the Iraqi consulate because he was intent on frustrating his removal to Iraq. Asked if the documents were genuine during re-examination by Ms Barton, he said he didn't know but if he had known they were not genuine he certainly wouldn't have provided them to the Tribunal.

45. Similarly, he was questioned about what details he had given to the Red Cross. He was entirely vague in answer to these questions and unable to satisfactorily explain why he did not make contact with the Red Cross before 2019, when he claimed to have lost contact with his family in 2014. When pressed, he suggested that it was because he didn't have support at that time. However, he evidently had had the benefit of legal representation from the Immigration Advisory Service in 2008. In response, he claimed to have contacted the Red Cross "a couple of times" before 2019, without success, but was unable to produce any supporting evidence of such earlier contact. He admitted that he did not provide them the telephone number of his uncle in Iraq, stating that he lost contact and that number was switched off in 2014.

46. In oral evidence the appellant maintained that he lost contact with his family in 2014. However, it was pointed out that in 2008 he said he had already lost contact with his mother by that date and told the Tribunal he did not regain contact with her. This put him in some difficulties, which he was unable to satisfactorily

explain as he maintained he had contact by telephone with his uncle throughout from when he left Iraq to 2014. He did not explain why, therefore, he did not also have contact with his mother at least until 2014. When questioned about what other paternal or maternal family he had in Iraq, the appellant was again evasive and apparently reluctant to answer directly, maintaining that he didn't know much about either side of the family because he was not interested. He was also vague about what details of his family he had given to the Red Cross. He denied deliberately attempting to mislead the Tribunal and stated later that he could not remember dates of birth as he didn't even know his uncle's family having only met them once, but I am satisfied that was exactly what the appellant was doing in respect of this issue and much of his evidence, attempting to mislead the Tribunal.

47. I concluded that the appellant was being deliberately evasive and dishonest about the identity documents and why he had no interest in seeking their return. It is clear that he no longer wished to rely on these documents which had originally been produced to confirm he was a minor on entering the UK. I am satisfied that that age claim was false and that he has not sought the return of these documents either because he believes that they are not genuine and knew or believed that fact when they were submitted to the First-tier Tribunal, or because he fears they might assist his return to Iraq, which he clearly does not want to happen. I am satisfied that if he provided any information to the Red Cross about his family, he was not been truthful or frank about those details and did not provide them with all that he knows, because he does not genuinely seek the assistance of the Red Cross to locate his family. I am also satisfied on the evidence that he has no genuine interest in obtaining replacement identity documents from the Iraqi consulate because he has no wish to return to Iraq. His attendance there was effectively a self-serving exercise designed to fail. In summary, I am satisfied that the appellant was evasive, deliberately vague, inconsistent, and untruthful in his oral evidence. All of this seriously undermines his credibility.

48. In the premises, I find that little reliance can be placed on any factual assertion by the appellant, nor the support for his claims about contact with family and attempts to document himself provided by his partner's witness statement. He was found not credible by Judge Gladstone and, even though the appeal was allowed, Judge Herbert also rejected his claim to be at risk of persecution or ill-treatment on return to Iraq. Whilst it was not disputed that the appellant's father and brother had been killed in 2007 in an apparent revenge attack for having worked for the Ba'ath Party, Judge Gladstone relied on the country background information that relatives of former Ba'ath party members are not at any real risk of being targeted themselves, which remains the background information. It was also pointed out that he did not consider it necessary to flee Iraq immediately and remained living in the same house after the claimed dates of the killings,

with the judge finding that the deaths took place earlier than the appellant had claimed. Having considered the evidence for myself, I can find no reason to depart from the findings of Judge Gladstone and adopt them, rejecting all aspects of the appellant's factual claim apart from the respondent's concession as to the death of his father and brother. In the premises, I reject his claim to be at any real risk of persecution or serious harm on any ground on return to Tikrit. Similarly, I do not accept that there is any article 15(c) risk on return to Tikrit.

49. Whilst there has been correspondence with the Red Cross and the Iraqi Consulate in Manchester, which I accept, I find that the appellant has been deliberately evasive about the information provided to those bodies and that he failed to provide all the information he could have done to help locate his family. He has not sought the ID documentation he relied on in 2008, perhaps because he believes it to be false. However, I am also satisfied that the appellant has not lost touch with his family in Iraq and that he has invented this assertion in an attempt to frustrate his removal to Iraq. For the same reason, I do not accept he has been truthful in his contact with either the Red Cross or the Iraqi Consulate.

50. I am driven to the clear conclusion that the appellant has not done all he could to obtain his Iraqi documentation. Further, I am satisfied that he does have effective access to his identity documents. I reach that conclusion, taking account of the fact he has previously been found not credible, and my own adverse assessment of the appellant's credibility, the country background information set out in the bundles, and the country guidance of SMO. I entirely reject his claim to not know the details of his CSID or that he would not in any event be able to be provided with those details by his family members in Iraq, so that he will be able to obtain a replacement CSID to render return to Iraq feasible. I have considered this further, as set out below.

*Return to Tikrit*

51. In relation to return to Tikrit, within the Salah al Din Governorate, this was formerly but is no longer a 'contested area'. The respondent's case is that given the change in the country security situation, the level of indiscriminate violence does not meet the Article 15(c) threshold anywhere in Iraq and that return to Tikrit is now possible. Applying the Country Guidance of SMO, in general terms "*the intensity of that conflict is not such that, as a general matter, there are substantial grounds for believing that any civilian returned to Iraq, solely on account of his presence there, faces a real risk of being subjected to indiscriminate violence amounting to serious harm within the scope of Article 15(c) QD*." Only a small area of Salah al-Din which does not include Tikrit is an exception to the general conclusion. However,

> *"3. The situation in the Formerly Contested Areas (the governorates of Anbar, Diyala, Kirkuk, Ninewah and Salah Al-Din) is complex, encompassing ethnic, political and humanitarian issues which differ by region. Whether the return of an individual to such an*

*area would be contrary to Article 15(c) requires a fact-sensitive, "sliding scale" assessment to which the following matters are relevant.*

*"4. Those with an actual or perceived association with ISIL are likely to be at enhanced risk throughout Iraq. In those areas in which ISIL retains an active presence, those who have a current personal association with local or national government or the security apparatus are likely to be at enhanced risk.*

*"5. The impact of any of the personal characteristics listed immediately below must be carefully assessed against the situation in the area to which return is contemplated, with particular reference to the extent of ongoing ISIL activity and the behaviour of the security actors in control of that area. Within the framework of such an analysis, the other personal characteristics which are capable of being relevant, individually and cumulatively, to the sliding scale analysis required by Article 15(c) are as follows:*

- *Opposition to or criticism of the GOI, the KRG or local security actors;*
- *Membership of a national, ethnic or religious group which is either in the minority in the area in question, or not in de facto control of that area;*
- *LGBTI individuals, those not conforming to Islamic mores and wealthy or Westernised individuals;*
- *Humanitarian or medical staff and those associated with Western organisations or security forces;*
- *Women and children without genuine family support; and*
- *Individuals with disabilities.*

*"6. The living conditions in Iraq as a whole, including the Formerly Contested Areas, are unlikely to give rise to a breach of Article 3 ECHR or (therefore) to necessitate subsidiary protection under Article 15(b) QD. Where it is asserted that return to a particular part of Iraq would give rise to such a breach, however, it is to be recalled that the minimum level of severity required is relative, according to the personal circumstances of the individual concerned. Any such circumstances require individualised assessment in the context of the conditions of the area in question."*

52. In the light of my findings, and applying a sliding-scale assessment, I have considered whether the appellant has any personal characteristics capable of being relevant to the Article 15(c) risk. He is the son of a former Ba'ath Party member or official. However, the country background information suggests that family members of former Ba'ath Party members are not at risk of being targeted. Judge Gladstone concluded that the appellant's brother was only killed because he was with his father, not because of any role in the Ba'ath Party, about which issue the appellant was vague. He was able to remain at home for a considerable period after the attack and was never personally threatened. The account of receiving threatening letters was rejected as being inconsistent and not credible. I take into account his claim not to speak Arabic and that he is a Sunni Kurd.

However, the area is Sunni dominated and whilst Arabs are the predominant ethnic group, many Kurds also live there. The appellant has no former or current political profile or interest. He does not have any former or current association with the security apparatus, or with ISIL, and was relatively young, although not a minor, when he left Iraq. In the premises, I am not satisfied that these factors individually or cumulatively present any real risk of being targeted on return.

53. It follows from the above that, in theory, there is no article 15(c) or Convention or humanitarian protection reason why the appellant cannot return to his hometown of Tikrit. The next question is whether return to Iraq and Tikrit is feasible, which turns on the availability of identity documentation. Applying the Country Guidance, the appellant would be returned to Baghdad and would have to make his way to Tikrit from there, some two hours drive north.

*Documentation*

54. Applying SMO, before return to Iraq can be considered feasible, the appellant will need at least either a passport, expired passprt or Laissez Passer. With one of those documents, he will be at no risk of serious harm at the point of return. Even if return is not feasible at the present time, he cannot succeed on that basis in his protection claim.

55. However, to travel onwards from Baghdad, a CSID or the new INID will be required. Although it was not raised before me, I understand the respondent's position to be as set out in the CPIN of June 2020 that at the present time obtaining a CSID from the Iraqi embassy in the UK is highly unlikely. Despite, in my view, his deliberately designed to fail attempt to re-certify himself through the Iraqi Consulate, I am satisfied that in the light of my credibility findings and the importance this document has for Iraqi's it is more than reasonably likely that the appellant left Iraq with his CSID and has retained it. At the very least, he either has access to it or the information on which it is based, including the page and volume of his family registration details.

56. In assessing this issue, I note that at [391] of SMO, the Upper Tribunal stated,

> *"We consider the number of individuals who do not know and could not ascertain their volume and page reference would be quite small, however. It is impossible to overstate the importance of an individual's volume and page reference in the civil register. These details appear on numerous official documents, including an Iraqi passport, wedding certificate and birth certificate, as well as the CSID. It was suggested in a report from the British Embassy in Baghdad, quoted at 6.1.9 of the Internal Relocation CPIN of February 2019, that "[a]ll Iraqi nationals will know or be able to easily obtain this information". We find the former assertion entirely unsurprising. The volume and page reference in the civil register is a piece of information which is of significance to the individual and their family from the moment of their birth. It is entered on various documents and is ever present in that person's life."*

57. The Upper Tribunal accepted that there are some in Iraq who are undocumented, but that is not this appellant's case. At [392] the Tribunal added:

> *"There will of course be those who can plausibly claim not to know these details. Those who left Iraq at a particularly young age, those who are mentally unwell and those who have issues with literacy or numeracy may all be able to make such a claim plausibly but we consider that it will be very much the exception that an individual would be unaware of a matter so fundamental to their own identity and that of their family. The letter from the Embassy also suggested that most Iraqis would be able to obtain this information easily. Again, that assertion is unsurprising when viewed in its proper context."*

58. There is no plausible reason why the appellant would not know these details. His claim to be illiterate and innumerate has been soundly rejected. Neither does he have any memory problems nor is he unwell. Applying the Country Guidance in the light of my findings on credibility, I reject the appellant's claim not to have his CSID available to him.

59. In the alternative, I am satisfied that it will be open to the appellant to either seek the return of the Identity documents he relied on in 2008 or obtain the assistance of his family to redocument himself, if not already in possession of his documentation. On my findings that the appellant remains in contact with his family in Iraq and either already has access to identity documents or information or can be provided by his family with sufficient identity information, he will be able to obtain a CSID before leaving the UK by having it sent to him if he does not already have it. I am also satisfied that he will know his book and page number, and that this can, if necessary, be provided to him by his family. In light of my findings, I do not accept that a CSID document is not available to the appellant in one way or another. In the premises, return is feasible.

60. Given his minority religion and ethnicity and the absence of family there, I do not consider relocation to Baghdad realistic for the appellant. Further, it is not necessary to consider relocation to the IKR, but on the basis of SMO, I am satisfied in the alternative that as a Kurd the appellant would gain entry there. He could not be returned there directly, as he does not come from the IKR. However, with a valid CISD or INID, he can make the journey overland from Baghdad without risk of serious harm or ill-treatment. He can also fly to Erbil or Sulaymaniah. However, he does not have family there to assist him. However, he has an uncle in Kirkuk, which is not far from the IKR and given that his family was able to fund his travel to the UK, I am satisfied that financial assistance will be available to him so that he will not need to access a critical shelter or IDP camp. He is single, unencumbered by family responsibilities, fit and healthy, and able to work. With his CSID he has every prospect of being able to seek employment to provide for himself. In the premises, relocation to the IKR is a viable alternative.

*Article 8 Private and Family Life*

61. In considering private and family life within and outside the Rules, I have taken account of all of the information now available to the Tribunal as to the

circumstances of the appellant and his family. It is accepted that the appellant is in a genuine and subsisting relationship with his Czech partner and their two young children, all three of whom have acquired settled status under the EU Settlement Scheme.

62. In addition to the appellant's oral evidence, his partner gave brief oral evidence relying on her witness statement of 23.11.20. Asked why the appellant could not go to live with his wife and children in the Czech Republic, the appellant relied on the absence of identity documentation, that his partner has a business in the UK, and that his children only speak English. He denied working illegally in the UK but admitted occasionally helping out his wife in her hairdressing salon. In the light of my findings as to the appellant's overall credibility, I do not accept his claim not to have worked illegally in the UK. However, that is not a significant factor in the article 8 consideration.

63. The partner's statement asserts that they met in August 2013 and have been together for over two years. Which is peculiar since she also states that they started to live together in 2014, which is 6 years ago. The documentation available confirms that she is registered as self-employed and she told the Tribunal that she rents a hair salon in Bolton. She obtained permanent residence status in April 2018, and now has settled status under the EU Settlement Scheme. She stated that she could not go to live in Iraq because of the instability and danger. The respondent accepts it would not be reasonable to expect the partner or children, now 2 and 5 years old, to relocate with the appellant to Iraq. She said they could not go to the Czech Republic because of absence of his identity documentation and because they are settled in the UK. She claimed it would be hard for the family to adapt to life there and she was used now to life in the UK. She confirmed in evidence that when she met the appellant she was fully aware of his immigration status but denied making any contingency plans should he fail in his protection and human rights claims. I am not satisfied that the fact that the partner works as a self-employed hairdresser in premises she rents is sufficient reason to render continuing family life outside the UK an insurmountable obstacle, or unreasonable. She has family support in the Czech Republic, speaks the language, and remains in regular contact with parents, siblings and other family members, all of whom will be able to assist the family's integration, should she choose to continue family life with the appellant there.

64. Balanced against the difficulties with the appellant's credibility set out above, I reject the partner's claims as to the appellant's lack of contact with his family in Iraq and attempts to redocument himself within the UK. She stated that when attending the Czech embassy to obtain passports for herself and her children, she was told that valid ID would be needed for the appellant before the children could be given a passport. In the light of my findings, I am satisfied that such identity information is or will be available, so that the children will be able to

obtain Czech passports and the appellant will be able to apply for entry as the partner and father of Cech citizens. In the premises, I find it has not been shown that the family could not continue family life in the Czech Republic. The partner admitted in evidence that the children understand some Czech and that they have a good relationship with her wider family in the Czech Republic who sometimes speak to the children in Czech.

65. It was not contended by Ms Barton that the appellant could meet the requirements of the Immigration Rules for leave to remain on the basis of either his relationship with his partner or as a father. On my findings set out above, neither can the appellant demonstrate very significant obstacles to his own integration in Iraq pursuant to paragraph 276ADE. That he cannot meet the requirements of the Rules is highly relevant to the article 8 proportionality balancing exercise outside the Rules.

66. It is also open to the appellant to return to Iraq and make application for entry clearance from there as a parent and partner. This is not a Chikwamba v SSHD [2008] UKHL 40 situation as it is far from clear whether the appellant will be able to meet the various requirements for entry clearance.

67. It would also appear that given his partner's settled status, the appellant may be able to apply as a partner under the EU Settlement Scheme. However, this was not raised in the arguments before me and I am unable to address it further within this decision.

68. Applying the Razgar stepped approach, the crucial issue is the proportionality balancing exercise between on the one hand the public interest in removing the appellant as an illegal entrant and on the other the de facto family life that has been established during his illegal presence with his Czech partner and their two children. I accept the family circumstances are as outlined above, with genuine and subsisting relationships.

69. Pursuant to section 117B of the 2002 Act, little weight falls to be accorded to family life with his Czech partner, as his immigration status was illegal, a fact she well knew before deciding to enter into a relationship with him. He has no entitlement to remain in the UK. Neither is any weight to be accorded to his private life, given that was developed whilst he was illegally present and his status was precarious.

70. Article 8 is not a shortcut to compliance with the Rules and there is not entitled to continue family life in the UK just because that is their desire. Although they have settled status under the EU Settlement Scheme, the partner and children are not British, and the children are not qualifying children under either EX1 or s117B of the 2002 Act. It was not argued that 'settled status' under the EU Settlement Scheme has the same meaning as 'settled' in Appendix FM.

71. Whilst the best interests of the children are to be taken into account under Section 55 of the Borders, Citizenship and Immigration Act 2009 and are a primary consideration, they are not the only consideration. Clearly, the best interests are to have the appellant influence in their lives as their father. They are not to be blamed for their father's illegal entrance to the UK. However, I am not satisfied that their best interests are necessarily to remain in the UK. The children are very young, the eldest only recently commenced schooling. I am satisfied that their primary focus is on their parents and they can have but limited private or family life outside the immediate family unit. They have no wider family or associates in the UK but are young enough to relocate without difficulty, will have greater access to their mother's extensive family in the Czech Republic, with whom they are familiar, and have some basic understand of Czech words. With their parents' support, integration is more than feasible. It follows that the appellant has not demonstrated that there would be insurmountable obstacles to continuing family life outside the UK.

72. In all the circumstances, taking everything into account, I am satisfied that the respondent's decision was proportionate to the family and private life of the appellant and his family members, including partner and children. There are routes available to them to continue family life outside the UK or for him to apply for entry clearance on immigration grounds. However, even if family life is interrupted or interfered with by the separation, perhaps temporary, of the appellant from his partner and children, I remain satisfied that on the facts of this case there are not compelling circumstances which, exceptionally, would render the decision unjustifiably harsh. It follows that I am driven to the conclusion that the decision was entirely proportionate to the article 8 ECHR rights.

*EEA Regulations*

73. I am not satisfied that there is any valid appeal in relation to EEA Regulations. Ms Barton accepted that there was no application the refusal of which was appealable to the First-tier Tribunal. It remains open to the appellant to make such application. That fact is also relevant to the article 8 proportionality balancing exercise considered above. In any event, whilst some limited information has been provided as to her self-employment and tax registration, settled status under the EU Settlement Scheme is not equivalent to exercising Treaty rights in the UK, as it gives no consideration to whether Treaty rights were being exercised. There would have to be a specific EEA application, which has not been made.

*Conclusion*

74. In the circumstances and for the reasons set out above, the appeal cannot succeed on any grounds.

**Decision**

The appeal of the appellant is dismissed on all grounds.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 9 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: 9 December 2020