Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: LP/00028/2020
[PA/50128/2019]

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 2 June and 20 August 2021	**On 15 November 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

SA (IRAQ)
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr D Bazini and Mr C Holmes, both of Counsel, instructed by Parker, Rhodes Hickmott Solicitors
For the Respondent:	Mr T Lindsay, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is an Iraqi national who was born on 9 January 1982. He appeals, with permission granted by me, against First-tier Tribunal Judge Kelly's decision to dismiss his appeal against the respondent's refusal of his application for international protection.

A. BACKGROUND

2. The appellant entered the United Kingdom unlawfully in January 2017 and claimed asylum. He stated that he was originally from Kirkuk but that he had subsequently relocated to Ranya, which is within the Independent Kurdish Region ("IKR"). He had transferred his civil registration there when he married his wife. The appellant based his claim for asylum on his actual or imputed political opinion. He stated that he was a Kurd and a supporter of the Gorran Change Movement. He had a factory where he made UPVC and aluminium windows and he had shown his support for the party by hanging banners outside his shop. He had spoken out against the Patriotic Union for Kurdistan and the Kurdish Democratic Party during a television interview in 2015 and he thought that he had been placed under surveillance as a result. In 2016, he objected to a mosque being built next to his premises and the Imam began to speak out against him, stating that he was a non-believer. Matters were said by the appellant to have spiralled out of control at this point. The appellant's premises caught fire and he went to the police to claim that he had been the victim of arson. The appellant was arrested the next day, however, and held for a week because a complaint had been made against him. The following year, he hear the Imam speaking disparagingly about him, in response to which he stole 150 books (including copies of the Qu'ran) from the mosque and set fire to them. His friend told him that he was wanted by the police and he fled the country.

3. The respondent did not believe the appellant's account and did not accept that he would be at risk on return to Iraq. She did not consider that his return would place her in breach of her international obligations. I will return at a later stage in this decision to the reasons given in support of the latter conclusion.

B. THE PROCEEDINGS BELOW

4. The appellant appealed to the First-tier Tribunal ("FtT"). The appeal was heard by Judge Kelly ("the judge"), sitting at Bradford on 19 March 2020. The appellant was represented by Mr Holmes, the respondent by a Presenting Officer.

5. The judge accepted that the core events described by the appellant were reasonably likely to be true. He accepted, therefore, that he had broadcast an interview on the GCM's channel and that there had been a fire at the appellant's commercial premises. He also accepted that the appellant had been arrested and released on bail and that he had then stolen and destroyed a number of books from the mosque. The judge did not accept the conclusions which the appellant himself had drawn from those facts, however.

6. The judge considered there to be no risk to the appellant from his activities on behalf of the GCM. He specifically rejected the appellant's claim that he would be 'vanished' as a result of those activities. The judge also noted that the appellant had not claimed to have been ill-treated by the police when he was

arrested, and concluded that there was nothing to show that his punishment for stealing and burning books from the mosque would be disproportionate.

7. The judge then turned to the appellant's claim that he would be in difficulty upon return to Iraq because he did not have a Civil Status Identity Card ("CSID"). He resolved that argument against the appellant in the antepenultimate paragraph of his decision. Given the focus of this appeal to the Upper Tribunal, it is necessary to reproduce that paragraph in full:

> [40] The third limb of the appellant's claim is that he would be at risk of destitution on return due to his lack of a CSID together with the obstacles in the way of him obtaining a replacement. This claim is largely based on what I consider to be the false premise of the appellant being required to return to his place of birth (Kirkuk), which is sill arguably a contested area, in order to obtain a replacement CSID. However, the appellant made it very clear in his Asylum interview that he not only relocated to Ranya upon his return to Iraq in 2005 (…) but that his CSID details are now registered at the relevant office in Ranya rather than Kirkuk (…) Mr Holmes' submission in this regard were also based upon the appellant being returned to Iraq via Baghdad airport, with what he argued were the resultant insuperable obstacles to him thereafter travelling to and obtaining a replacement CSID from the office in Kirkuk. In this Mr Holmes assumed that the appellant would not voluntarily return to Iraq and would accordingly be forcibly returned via Baghdad airport. However, given that the appellant is by his own admission a registered resident of the IKR and thus able to return voluntarily via Erbil, and difficulties arising from his forcible return via Baghdad airport would be entirely of his own making. I am accordingly unwilling to assess the risk on return by reference to problems that the appellant could so easily avoid. It is moreover his case that the IKR authorities are in possession of his original CSID, and there is no obvious reason why they should not return it to him once he has surrendered to them for prosecution under the due process of law for his admitted crimes.

C. THE APPEAL TO THE UPPER TRIBUNAL

8. Permission to appeal was refused by the First-tier Tribunal. The application was renewed to the Upper Tribunal. There were two grounds. The first related to the judge's findings of fact, the second to the correctness of his approach in [40], as above. I granted permission to appeal on only the second ground, holding that the judge had been entitled to reach his primary findings of fact for the reasons he had given. The second ground raised a point which I summarised in the grant of permission as follows:

> Where an individual would be at risk if forcibly returned to a part of his country of nationality, is it a valid answer to a protection claim that he might nevertheless avoid any such risk by returning voluntarily to another part of that country, even where he does not wish to do so?

9. I subsequently directed that the parties should file and serve skeleton arguments in advance of the remote hearing. I noted that the point was potentially of wider importance.

10. At the first hearing before me, on 2 June 2021, the respondent had not complied with that direction but there was a skeleton argument from Mr Holmes of counsel, who at that stage represented the appellant by himself. Both advocates urged me to hear argument despite the respondent's failure to comply with directions and I did so. I reserved my decision at the end of that hearing.

11. I sought to prepare a decision shortly after the first hearing but I considered, on reflection, that I had not been addressed on a number of matters which were potentially of significance to my decision. On 22 June 2021, therefore, I issued further directions in which I indicated to the parties that I would benefit from additional argument on the following matters:

    (i) The word 'removal' in each of the three grounds of appeal available to the appellant in s84(1) of the Nationality, Immigration and Asylum Act 2002;

    (ii) The amendments made to the 2002 Act by the Immigration Act 2014 when considering the authorities cited thus far by both parties;

    (iii) The intention of the respondent, as expressed in the 'Next Steps' section of the letter of refusal;

    (iv) MA (Somalia) v SSHD [2009] EWCA Civ 4; [2009] Imm AR 413 and J1 v SSHD [2013] EWCA Civ 279;

    (v) The relevant provisions of the Qualification Directive; and

    (vi) The authorities of the CJEU and the ECtHR, including AAM v Sweden (Application no. 68519/10) and DNM v Sweden (Application no. 28379/11).

12. The appellant then filed a further skeleton argument. The respondent also filed a skeleton argument addressing these points. Mr Bazini was instructed to lead Mr Holmes and a helpful bundle of authorities was prepared. The hearing reconvened before me on 20 August 2021. It was agreed between the advocates that the fairest course, given the scope of the argument and in light of Mr Bazini's absence from the first hearing, was to start afresh. I heard submissions from Mr Bazini and Mr Lindsay and I express my gratitude at the outset for the quality of their written and oral advocacy.

13. Mr Bazini submitted that Article 3 ECHR was not to be considered in a vacuum. It was to be considered within the specific statutory framework provided by Part 5 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The 2002 Act required the Tribunal to consider the consequences of *involuntary* return or *expulsion*. That was clear from the domestic authorities and from the

decisions of the ECtHR mentioned in the directions of 22 June 2021. There was no dispute – indeed it was clear from the findings of the FtT – that the appellant would be at risk of conditions breaching Article 3 ECHR in the event that he was involuntarily removed to Baghdad. The respondent made a fundamental error when she attempted to introduce the idea of the appellant returning voluntarily to the IKR and the undertaking which Mr Lindsay purported to give in his skeleton argument was a 'non-starter', which was contrary to AA (Iraq) v SSHD [2017] EWCA Civ 944; [2017] Imm AR 1440. There was no dispute that there was only one place (Baghdad) to which enforced removal could take place and the Tribunal was required to undertake its assessment of risk on the basis of the envisaged route of return: HH (Somalia) & Ors v SSHD [2010] EWCA Civ 426; [2010] Imm AR 563. The question of voluntary return simply did not arise.

14. The respondent sought to rely on what had been said by the Court of Appeal in Gardi v SSHD [2002] EWCA Civ 750; [2002] 1 WLR 2755 but such reliance was impermissible in light of the fact that the case was decided without jurisdiction, as confirmed in Gardi v SSHD (No 2) [2002] EWCA Civ 1560; [2002] 1 WLR 3282. In any event, the reasoning in Gardi v SSHD was flawed, as had been confirmed in subsequent cases. It was immaterial that the respondent sought to give an undertaking as enforced, imminent removal was necessarily the focus of an appeal. The appellant could only be removed to Baghdad. He would be at risk there, and he would be at risk *en route* from Baghdad to the IKR. What had been said at [38]-[39] of AA (Iraq) v SSHD was directly on point, in that the Civil Status Identity Document ("CSID") is not simply a document which facilitates return; it is instead an essential document for life in Iraq. It was simply not open to the respondent as a matter of law to attempt to defeat the appellant's Article 3 ECHR claim by reference to an undertaking that he would not be removed without a CSID. In the event that he had no CSID, he would be at risk on return to Baghdad and his appeal fell to be allowed. If a CSID was obtained at a later point, the respondent could consider revoking his status.

15. The respondent was not correct, Mr Bazini submitted, in asserting that this was an 'impediment to return' case of the type considered in HH (Somalia) v SSHD. The absence of a CSID was not merely a technical obstacle; it was a risk factor in itself. The appellant's submissions as to the undertaking were supported by Court of Appeal authority including MA (Somalia) v SSHD [2009] EWCA Civ 4; [2009] Imm AR 413, J1 v SSHD [2013] EWCA Civ 279 and CL (Vietnam) v SSHD [2008] EWCA Civ 1551; [2009] Imm AR 403. To rely on such an undertaking would be to delegate the judicial function of deciding the Article 3 ECHR claim to the respondent.

16. The respondent had never specified that the appellant would be removed to the IKR. It was removal to Iraq which had been in contemplation, and that could only mean return to Baghdad. There was an important distinction between enforced removal and voluntary return and only the former was to be considered in an appeal. Mr Bazini recognised that the concern which underlay the respondent's stance was that the appellant should not benefit from his

reluctance to return voluntarily to the IKR but the fact remained that the Tribunal's enquiry was framed by statute. It was to be recalled that the decisions in cases such as J1 v SSHD and indeed Danian v SSHD [2000] Imm AR 96 were often reached with little enthusiasm. Ultimately, it would be a matter for the respondent to consider what action to take in light of a decision to allow the appeal on the proper basis and there were a range of policies which she might seek to apply in a case such as this.

17. Mr Lindsay began his otherwise helpful submissions by stating that he was content to assume without conceding that the question posed by the 2002 Act was whether the *enforced* removal of the appellant would be contrary to either Convention. He submitted that the areas of real disagreement were (i) whether the respondent had made a clear proposal not to remove the appellant via Baghdad and (ii) whether she was entitled to make that specific proposal. The respondent wished to make it clear that removal would only be to Baghdad if the appellant had a CSID and would otherwise be via the IKR. There was a clear line of authority recognising the validity and importance of such undertakings. The concern of the senior courts was to avoid a situation in which an applicant was placed in limbo but that was not the case here as he could return safely of his own volition.

18. Mr Lindsay took me to the salient parts of the refusal letter. He accepted that the letter was to be read alongside the statements made publicly by the respondent in the Country Information and Policy Note of June 2020. All things considered, the respondent's clear intention was not to return to Baghdad without a CSID or to return to the IKR. So much was clear from [65] of the letter and from the respondent's review of her decision before the FtT.

19. Mr Lindsay submitted that Gardi v SSHD still represented the law despite the fact that the Court of Appeal had no jurisdiction. It had been cited with approval (and in full knowledge of the subsequent events) by the majority (Jackson and Treacy LJJ) in J1 v SSHD. Insofar as Elias LJ had disagreed, he was in the minority. CL (Vietnam), upon which Mr Bazini had relied was nothing to the point as the appellant could leave voluntarily and in safety. The only unsafe route of return (via Baghdad) was currently ruled out. Applying what had been said at [55] of J1 v SSHD, the Tribunal should attach weight to the undertaking given about the route of return. There was no authority directly on point but reference might properly be made to what was said by the Court of Appeal in R v SSHD *ex parte* Robinson [1998] QB 929, as cited at [30] of Gardi v SSHD; it was reasonable and safe for the appellant to go and stay in the safe haven which the IKR represented. The judge was correct, therefore, to approach the matter on that basis and the undertaking was in any event determinative.

20. In response, Mr Bazini submitted that there had never been any proposal to remove the appellant to the IKR. The only undertaking was to refrain from removing the appellant without a CSID and that was an undertaking which sought to cut down the appellant's legal protection. The respondent's

submissions were fanciful and she was not able to avoid her international obligations by saying that she would only remove at some indeterminate point in the future. To do so was to act contrary to the authorities. Neither *ex parte* Robinson nor Gardi v SSHD were of any real assistance to the respondent.

21. I reserved my decision.

D. STATUTORY FRAMEWORK

22. Part 5 of the 2002 Act makes provision for appeals in respect of protection and human rights claims. By s82(1), a person ("P") may appeal to the Tribunal where the respondent has decided to refuse a protection claim or a human rights claim, or where she has decided to revoke P's protection status. The grounds of appeal available against those decisions are specified in s84. The refusal of a protection claim such as the appellant's must be brought on one or more of the grounds specified in s84(1), which are as follows:

    (a) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention;

    (b) that removal of the appellant from the United Kingdom would breach the United Kingdom's obligations in relation to persons eligible for a grant of humanitarian protection;

    (c) that removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 (public authority not to act contrary to Human Rights Convention).

E. ANALYSIS

(i) The meaning of 'removal' in s84 of the 2002 Act

23. It was submitted on behalf of the appellant before me that the grounds of appeal in section 84(1) of the 2002 Act are concerned with the consequences of *enforced* removal from the United Kingdom. Mr Lindsay did not seek to advance a contrary submission. He was correct not to do so, for the following reason.

24. In AA & LK (Zimbabwe) v SSHD [2006] EWCA Civ 401; [2007] 1 WLR 3134, the Court of Appeal considered two appeals from the Asylum and Immigration Tribunal, one of which concerned the country guidance decision in AA (Involuntary Returns to Zimbabwe) CG [2005] UKAIT 144. The judgment of the court runs to 109 paragraphs and it is unnecessary to rehearse it. What is material for present purposes is that the court considered the meaning of the word 'removal' in s84(1)(g) of the 2002 Act as it then stood. It provided for there to be a ground of appeal to the AIT on this basis:

> (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under

> section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights.

25. It was submitted by counsel for AA that 'removal must mean enforced removal', whereas the Secretary of State submitted that 'removal' also contemplated voluntary return. At [91], the court concluded that such an argument was 'only apt to confuse' and that 'removal … means enforced removal pursuant to directions issued by the Secretary of State.'

26. The only difference of substance between the ground of appeal then available in s84(1)(g) and those which are now available in s84(1) is the removal of the words 'in consequence of the immigration decision'. I cannot see how the removal of those words should make any material difference to the meaning of the word 'removal' in this context, and Mr Lindsay did not seek to suggest that AA & LK (Zimbabwe) v SSHD was not determinative of that question. In considering the grounds of appeal in s84(1), therefore, it is clear that a court or Tribunal is concerned with the consequences of enforced removal by the Secretary of State and not with the possibility of voluntary return.

(ii) The UK's obligations under the Refugee Convention and the ECHR

27. As the title of the AIT's decision in AA (Zimbabwe) suggests, an issue arose in those country guidance cases about the risk to involuntary returnees. It was submitted that those who were returned involuntarily to Zimbabwe were at risk of ill-treatment on account of the fact that they were readily identifiable as failed asylum seekers. It was thought that no such risk arose in the event that the individuals concerned departed voluntarily, since they would retain their own travel documents and would be dealt with upon arrival by ordinary immigration staff, rather than Zimbabwe's Central Intelligence Organisation ("CIO"). One of the submissions made by the Secretary of State in this connection was described by the court as 'very simple'. In reliance on the definition of a refugee in Article 1A(2) of the Refugee Convention, it was submitted that 'someone who can voluntarily return in safety is not outside the country of his nationality owing to a well-founded fear of persecution; he is outside it simply because he chooses not to return to it.' Such a person could not succeed on Refugee Convention grounds because he was not a refugee and was not owed the obligation of non-refoulement in Article 33(1) of that convention, the Secretary of State submitted.

28. The court agreed with the Secretary of State's submission, holding at [99] that 'a person who can voluntarily return in safety to the country of his nationality is not a refugee, notwithstanding that on a forced return he would be at risk'. That was precisely because such a person is not outside his country of origin owing to a well-founded fear of persecution and a safe voluntary returnee is therefore outside the Convention definition of a refugee.

29. In relation to Article 3 ECHR, however, the Secretary of State did not seek to submit in AA & LK (Zimbabwe) v SSHD that the possibility of safe voluntary

return disqualified an individual from the protection of Article 3 ECHR: [107] refers. The court regarded her position as producing an unsatisfactory state of affairs but it allowed the Secretary of State's appeal in AA on other grounds and remitted it to the AIT: [108].

30. On remission, the AIT did not consider whether the possibility of safe voluntary return disqualified an individual from the protection of Article 3 ECHR, since it decided that a failed asylum seeker returned involuntarily to Zimbabwe did not face a real risk of being subjected to persecution or serious ill treatment on that account alone: AA (Risk for involuntary returnees) Zimbabwe CG [2006] UKAIT 00061.

31. As far as I have been able to discern, the issue was not considered again until 2013, when it arose in HF (Iraq) & Ors v SSHD [2013] EWCA Civ 1276; [2014] 1 WLR 1329. These were also appeals against country guidance decisions and I need not mention the full range of issues considered by the Court of Appeal. One issue centred on the fact that the Iraqi authorities would only issue travel documentation to an Iraqi national if that person positively co-operated in the documentation process. It was submitted by the appellants that they would not co-operate, and that the Upper Tribunal had erred in failing to consider whether they would be at risk on return due to the resulting absence of travel documents.

32. Elias LJ's conclusion on that point was that, since the Secretary of State would not return failed asylum seekers to Iraq if they did not have the necessary documentation, the Upper Tribunal was not required to ask itself the hypothetical question of whether a failed asylum seeker who was returned without the necessary documentation would be at a real risk of ill-treatment: [101] and [105]. Maurice Kay and Fulford LJJ agreed. They also agreed with what Elias LJ said *obiter* at [102]-[104]. The first of those observations was that it should not readily be assumed that an asylum seeker would not co-operate with a lawful process of documentation: [102]. I should reproduce the second *dictum* in full:

> [103] Second, [counsel for the SSHD] contends that as a general proposition an asylum claim ought not to succeed where the risk on return arises only because of the refusal by the asylum seeker to co-operate. He should not be able to secure the benefit of humanitarian protection where he could be returned safely and is at risk of serious ill-treatment solely because of his own conduct—a fortiori where, as with the refusal to co-operate, that conduct is criminal—and where he can up to the very moment of return eliminate the risk by co-operation.
>
> [104] I accept that submission. The claim for humanitarian relief in such circumstances is wholly unprincipled and subverts the true purpose of asylum law. Whether in those circumstances the claimants could properly be sent back to Iraq (assuming that Iraq would take an undocumented person) is no doubt problematic; but even if that would infringe their human rights, it does not follow in my view that they should then be

> entitled to claim humanitarian status with all the benefits which that confers.

33. Whilst I respectfully agree with the concerns expressed, I am not able to reconcile those obiter observations with the binding decision of the Court of Appeal in AA (Zimbabwe) v SSHD. If – as the court held in AA (Zimbabwe) – the available ground of appeal concerns the enforced removal of the appellant, that is the focus of the statutory task prescribed by Parliament. As unattractive as the appellant's position is, I cannot see that his ability to return voluntarily to the IKR in safety is any answer to the analysis required by the 2002 Act.

34. On this point also, therefore, I consider Mr Bazini to be correct. In order to succeed on the ground specified in s84(1)(c) of the 2002 Act, an individual must demonstrate only that his enforced removal would be unlawful under section 6 of the Human Rights Act 1998. The additional definitional hurdle in the way of an appellant who relies on the Refugee Convention ground of appeal is not present for an appellant who relies on the ECHR. In order to succeed on Article 3 ECHR grounds, he must only establish that his enforced removal would be unlawful under s6 because he would be subjected to torture or to inhuman or degrading treatment or punishment. In my judgment, it is immaterial to that question that the individual concerned might effect a safe voluntary return; any such consideration falls outside the scope of the enquiry prescribed by Parliament.

(iii) The destination of enforced removal as the focus of the appeal

35. At the time that AA & LK (Zimbabwe) v SSHD and most of the other authorities before me were decided, the legislative framework required the Tribunal to consider an appeal against an "immigration decision". In respect of various types of immigration decision (broadly speaking, those which contemplated the removal of an individual from the UK), regulation 5(1)(b) of the Immigration (Notices) Regulations 2003 required, *inter alia*, that the immigration decision should state the countries or territories to which it was proposed to remove the person. Subject to any undertaking or clarification provided by the Secretary of State at the hearing of the appeal, therefore, the focus of the Tribunal's enquiry was to be on the specific countries or territories specified in that notice.

36. The amendments made to the 2002 Act by the Immigration Act 2014 might properly be thought to have detracted somewhat from the focus I have described above. The decisions against which appeals are brought are never required by the amended Notices Regulations to contain a statement of the countries or territories to which it is proposed to remove the individual. The decision which generates the right of appeal is the refusal of the claim and never the concrete proposal to remove an individual to a stated place.

37. Notwithstanding those statutory changes, it remains necessary for the respondent to be able to state with clarity the countries or territories to which she intends to remove an individual in the event that their protection claim is

refused. Whilst an individual might be able to establish that he is a refugee without reference to the prospect of removal, it is only by considering the consequences of removal that the Tribunal can ascertain whether that act would place the United Kingdom in breach of her Convention obligations. In many cases, there will be no doubt as to the route or method of return. In others, there may well be ambiguity which should be resolved, insofar as it is possible to do so, in advance of the hearing before the Tribunal. As Sir John Dyson JSC said when delivering the judgment of the Supreme Court in MS (Palestine) v SSHD [2010] UKSC 25; [2010] 1 WLR 1639 the specified location provides the focus for the issues which arise on the appeal and, without it, an appeal on asylum or human rights grounds is made in the abstract: [37] refers.

(iv) The destination of enforced removal in Iraqi protection appeals

38. The respondent's Country Policy and Information Note *Iraq: Internal relocation, civil documentation and returns*, version 11, June 2020 records at [4.2] that 'all enforced returns are to Baghdad and that only those willing to return voluntarily can travel directly to the KRI'. That reflects the position which I understand to have obtained for some time, whereby the authorities in the IKR are unwilling to accept involuntary returns. Mr Lindsay confirmed in his skeleton argument that the authorities of the IKR were recorded in the February 2019 version of the same CPIN to have adopted this position in respect of involuntary returns.

39. Mr Lindsay submits that it would nevertheless be permissible for the respondent to indicate that she intends either to remove an appellant only to the IKR or that she would seek to remove either to Baghdad or to the IKR, depending on whether either course is considered to be safe. He made an attractive submission that the current impossibility of removing an individual to the IKR involuntarily should be disregarded because it amounts to what has variously been described as an impediment to return, a technical obstacle or an administrative difficulty. I was attracted to this argument for some time, not least because of the line of authority which analysed Article 8(3) of the Qualification Directive and held that technical obstacles such as an absence of travel documentation should be disregarded in an appeal of this nature. Such matters depend, as the Supreme Court explained at [32] of MS (Palestine) v SSHD on practical and operational issues which are often only capable of being addressed shortly before removal is due to take place. In that case, for example, it was envisaged that the respondent would need to engage in detailed dialogue with the Palestinian authorities in order to investigate possible methods of redocumentation: [33] refers. There is every reason for excluding such matters from consideration in a protection appeal.

40. In the Iraqi context, however, there is no technical obstacle and there is no doubt over the current route of enforced return. The only route by which the respondent could enforce the removal of an individual to Iraq is via Baghdad International Airport ("BIAP"), since the IKR authorities would refuse to accept an involuntary return. It is that route of return on which the Tribunal must

focus, for the reason given by the Court of Appeal in HH (Somalia) v SSHD, at [58]:

> we consider that, in any case in which it can be shown either directly or by implication what route and method of return is envisaged, the AIT is required by law to consider and determine any challenge to the safety of that route or method.

41. Mr Lindsay submits that the respondent may nevertheless give undertakings so as to change or refine the Tribunal's focus in a statutory appeal. I will return at a later stage in this decision to the specific undertakings which are said to have been given in this appeal, as it is preferable at this stage to consider the general position. Mr Lindsay submits, firstly, that an undertaking might be given that the respondent will not remove an Iraqi national to Baghdad until they have a CSID or INID. He submits, secondly, that the respondent might undertake not to remove an asylum seeker to BIAP and only to the IKR.

42. It is common ground that undertakings given by the Secretary of State may be taken into account in an appeal of this nature. Such undertakings are statements of her intention which 'may form part of the evidence which tribunals or courts take into account when assessing the question of risk on return: J1 v SSHD [2013] EWCA Civ 279, at [45], per Jackson LJ. The undertaking given in that case was that the Secretary of State would not remove J1 until such time as there was in Ethiopia a system by which the Ethiopian government's assurance not to breach J1's human rights could be monitored effectively. Having undertaken a detailed review of the authorities on such undertakings, Jackson LJ summarised the relevant principles at [55]:

> i) In cases where the claimant seeks asylum or a right to remain in the UK on human rights grounds, the court or tribunal must determine that claim on the basis of current evidence.
>
> ii) Where the claim is based upon dangers confronting the claimant in their home state, that determination involves an assessment of what will happen, or what there is a real risk of happening, in the future.
>
> iii) In determining the claim the court or tribunal will take into account any undertaking or assurance given by the Secretary of State, in so far as it is relevant to the issues under consideration.
>
> iv) Such an assurance or undertaking cannot cut down the legal protection to which the claimant is entitled.
>
> v) If the route or method of return is unknown, the court or tribunal may in appropriate cases leave this matter for later decision by the Secretary of State. If the Secretary of State fails to address the matter properly, the claimant's remedy is by way of making a fresh claim or bringing judicial review proceedings.

> vi) The court or tribunal cannot, however, delegate to the Secretary of State the resolution of any material element of the legal claim which the claimant has brought before that court or tribunal for determination.

43. Jackson LJ went on to find that the undertaking given by the respondent in that case fell foul of the fourth and sixth principles above. At the time of the hearing before the Special Immigration Appeals Commission, there was a risk that the appellant's treatment at the hands of the Ethiopian authorities would be in breach of Article 3 ECHR due to the absence of effective monitoring. SIAC's acceptance of the respondent's undertaking had the effect of cutting down the legal protection to which the appellant was entitled and impermissibly delegating the decision on his Article 3 ECHR claim to the respondent. Elias and Treacy LJJ agreed in the result and the appellant's appeal was allowed.

44. As Mr Bazini submits, J1 v SSHD provides a clear basis for rejecting the respondent's submission that she can undertake not to remove an individual to Baghdad until such time as they have a CSID. Where it is clear that the absence of that document would give rise to a breach of Article 3 ECHR upon return, the acceptance of such an undertaking would cut down the legal protection to which he is entitled and would delegate a material element of the legal claim which falls for determination by the Tribunal. The position in that regard is materially identical to that which obtained in J1 v SSHD. It is also materially identical to two of the cases cited by Jackson LJ in reaching the conclusions I have set out above. The impermissible undertaking in CL (Vietnam) v SSHD was that the respondent would not remove the appellant (a minor) until such time as there were adequate reception facilities. And the impermissible undertaking in MS (Ivory Coast) v SSHD was that the respondent would not seek to remove the appellant until the outcome of proceedings in the Family Court was known. These were not merely matters which went to the process of removal; they were critical elements of the human rights claims brought by those appellants, just as the absence of a CSID is in the Iraqi context. The Tribunal cannot, therefore, accept an undertaking that the respondent will not remove to Baghdad until such time as an asylum seeker has a CSID. That is clear from the authorities I have cited, just as it is clear from AA (Iraq) v SSHD.

45. J1 v SSHD is significant in the present context not only because it contains, with respect, the clearest possible summary of the law in relation to undertakings given in protection and human rights appeals. What is also significant is the fact that the court considered in some detail what was said in Azad Gardi v SSHD, which was a case much like the present. In Gardi, it was accepted on all sides that the appellant would be at risk if he was returned to the part of Iraq which was at that time controlled by Saddam Hussein's Ba'ath Party. But the respondent gave an undertaking, the terms of which are recorded at [17] of Keene LJ's judgment, that nobody would be removed to Baghdad and that arrangements were being explored for returning failed asylum seekers of Kurdish origin to the northern part of Iraq in a manner which complied with the UK's international obligations. Keene LJ, with whom Sir Martin Nourse and

Ward LJ agreed, held that the decision under appeal had to be read in light of the Secretary of State's undertaking: [34]. In light of that undertaking, the court held that the appellant could not have a fear that he would be returned to a part of Iraq in which he would be persecuted.

46. In the event that Gardi v SSHD was binding upon me, it would be determinative of this issue. But the point is not so straightforward. Gardi was an appeal from an adjudicator sitting in Scotland and the Court of Appeal had no jurisdiction to hear the appeal, as was subsequently accepted in Gardi v SSHD (No 2): [2002] EWCA Civ 1560. Jackson and Elias LJJ both noted that point in their judgments in J1 v SSHD. Jackson LJ nevertheless proceeded on the basis that the technical flaw did not affect Keene LJ's reasoning and was not relevant 'for present purposes': [47]. Jackson LJ then analysed the reasoning in Gardi v SSHD against the other cases I have already mentioned, including CL (Vietnam) v SSHD and MS (Ivory Coast) v SSHD.

47. Elias LJ adopted a different approach at [104]-[111]. He drew a distinction between cases in which the route of return was unknown and those in which the Secretary of State sought to rely on an undertaking. Drawing on what had been said in HH (Somalia) v SSHD, he also concluded that the analysis in Gardi v SSHD could no longer be sustained in light of subsequent jurisprudence: [107]. It failed, Elias LJ said at [107] and [110], to respect the principle that an applicant for asylum was entitled to have his status properly considered and it was

> … not now legitimate to deny an applicant leave to remain in this country, if only for a limited period, on the grounds that an undertaking of the Secretary of State will ensure that his or her safety is not put at risk.

48. At [111], Elias LJ said that the decision in Gardi had no precedent value for the reasons explained in Gardi (No 2) but that, even if it had, he would have declined to follow it in light of later authority.

49. Treacy LJ agreed that the appeal should be allowed but he said nothing about the differing treatment of Gardi v SSHD by Jackson and Elias LJJ. As a matter of precedent, therefore, I am not bound by Gardi (which was decided without jurisdiction) or by what was said about it by Elias or Jackson LJJ. Faced with that rather unusual situation, I have decided to follow the approach adopted by Elias LJ, with which I agree. Like Elias LJ, I do not consider that the approach in Gardi can survive subsequent authority, and HH (Somalia) v SSHD in particular. The only available route for enforced returns to Iraq is via Baghdad. That has been the case for some time and it is not clear that the respondent is even exploring the possibility of negotiating with the authorities in the IKR about accepting enforced removal to the airports in Erbil and Sulaymaniyah. To rely on such an undertaking would have the effect of cutting down the legal protection to which an applicant is entitled because his enforced removal to Iraq – by the only route presently available – would be unlawful under section 6 of the Human Rights Act 1998 as being in breach of Article 3 ECHR.

50. In anticipation of Mr Bazini's submissions on this point, Mr Lindsay drew attention to the concerns which were said by Elias LJ to underpin his conclusion that it would be 'wrong for the court to allow the Secretary of State to determine any element of the asylum claim'. The three reasons were as follows:

> *First*, it involves an unlawful delegation of the judicial function allowing the executive to determine matters falling within the jurisdiction of the courts. *Second*, it means that the case will be determined not on the basis of the evidence before the court but on speculation as to what the facts are likely to be at some time in the future. *Third*, it leaves the asylum seeker in an unacceptable state of limbo pending the future clarification of his status. He is technically illegally in the country and yet he is unable to return to his home state until further steps have been taken sufficient to guarantee his safety. If he is entitled to refugee status or protection from removal on human rights grounds, even if only on the basis that he should be given leave to remain for limited duration, he ought to be given that status or protection from removal at least for the period when his safety is potentially compromised.

51. Mr Lindsay submitted that the third of these concerns did not apply in a case such as the present because such a person need not be in a state of limbo; he can return voluntarily to the IKR. That might be so, but the first two concerns would apply in the event that a court or tribunal dismissed an asylum seeker's appeal on the basis that he might safely be returned to the IKR at some indeterminate point in the future.

52. In the circumstances, I conclude that the proper focus in an appeal of this nature must be on the only route of return which is known to exist for failed Iraqi asylum seekers who refuse to go voluntarily to the IKR: Baghdad International Airport. It would be an error, on the state of the jurisprudence as it presently stands, to rely on an undertaking by the Secretary of State that she will seek to remove to the IKR when it becomes possible to do so.

(v) The appellant's case

53. The judge of the FtT fell into legal error in this appeal in placing reliance on the appellant's ability to return voluntarily to the IKR. As I have explained at [26] above, the fact that the appellant could return voluntarily was irrelevant to the judge's appellate task, as defined by Part 5 of the 2002 Act.

54. Mr Lindsay submitted that the appellant would not be at risk in Baghdad because he would not be removed there without a CSID or other form of acceptable identity document. That argument was not put to the FtT but it is bad in any event, for the reasons I have given at [44] above.

55. Mr Lindsay submitted in the alternative that the appellant might be returned directly to the IKR. I agree with Mr Bazini that this submission is not clearly apparent on the face of either the letter of refusal or the review which was undertaken on 18 December 2019. The proposal in the letter was that the

appellant would be removed or returned to Iraq. At [64], the respondent noted that there were direct flights to the IKR 'and therefore no need to travel back through Baghdad' but there was never any suggestion from the respondent that she would seek to enforce the appellant's return to Erbil or Sulaymaniyah notwithstanding the stance of the IKR authorities. Even if, contrary to my primary conclusions above, the Tribunal was entitled to rely on an undertaking that removal would only be to the IKR, I can discern no such undertaking in the material which was before the FtT.

56. Nor, with respect to Mr Lindsay, is it actually possible to discern any such undertaking from his skeleton argument before the Upper Tribunal. The point first arose in his oral submissions. There is reference at [20] to the appellant not being removed to Baghdad 'unless in possession of a CSID or equivalent documentation'. That submission is repeated at [44]. At [30], there is a suggestion that the refusal letter 'concerned return directly to the IKR' but, as I have explained above, it would be quite wrong to read into the refusal letter any suggestion that the respondent planned at some point to arrange for the appellant's enforced removal to the IKR. I agree with Mr Bazini, therefore, that this is not a case in which there has ever been an undertaking comparable to that which was given in Gardi v SSHD. Even if such an undertaking was capable of bearing the significance which it was thought to bear in 2002, therefore, I do not consider that any such undertaking is before me.

57. In the circumstances, I conclude that the FtT erred in relying on the possibility of the appellant returning voluntarily to the IKR and that the only permissible conclusion available on the facts of this case is that the appellant's removal would be unlawful under section 6 of the Human Rights Act 1998 as being in breach of Article 3 ECHR.

58. I reach that conclusion with no enthusiasm for two reasons. Firstly, because the appellant can avoid the risk which obtains in Baghdad by choosing to go voluntarily to the IKR. Secondly, because the only reason that he does not wish to do so is because he is – in the words of the FtT – a fugitive from justice who burned several books including the Qu'ran. For the reasons I have given, however, I do not consider that either of those points bears on the appellant's entitlement to a declaration that his enforced removal by the only available route would be a breach of Article 3.

59. I add this observation, which reflects the closing submissions made by Mr Bazini. The appellant is not a refugee and the decision I have reached affords him no comparable status. He is simply entitled not to be removed to Baghdad because to do so would be in breach of Article 3 ECHR. What leave the respondent should grant to a person in that position – who is perfectly able to return to a safe part of his country but refuses to do so – is a matter for her. It might well be thought that such a person is undeserving of any leave to remain, regardless of the outcome of such an appeal.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. I set aside that decision and remake the decision on the appeal by allowing it on human rights grounds.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 October 2021