Neutral Citation Number: [2021] EWCA Civ 1467

Case Nos: C5/2019/0704
C5/2020/1728

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
Upper Tribunal (immigration and Asylum Chamber)
Deputy Upper Tribunal Judge M A Hall (MA)
Upper Tribunal Judge Kekic (RO)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2021

Before :

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE BAKER
and
LADY JUSTICE ELISABETH LAING

- -

Between :

MA (IRAQ)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
RO (IRAQ)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

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Mr David Jones (instructed by **Sutovic & Hartigan Solicitors**) for the **Appellant** in **RO**
Mr Alastair Henderson (instructed by **Fadiga & Co**) for the **Appellant** in **MA**
Mr Tom Tabori (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates : 6th and 7th July 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.00 a.m. on Monday, 11 October 2021.

Lady Justice Elisabeth Laing DBE :

Introduction

1. These are appeals from the Upper Tribunal (Immigration and Asylum) Chamber ('the UT'), with the permission of Phillips LJ. He gave permission in each case on similar grounds. Both appeals raise questions about the meaning of various country guidance ('CG') determinations of the UT, and the approach which the UT and the First-tier Tribunal (Immigration and Asylum) Chamber ('the FTT') in both these cases took to those determinations. Both Appellants were found to be Iraqi Kurds. The issues are whether and, if so, how they would be able to get the identity documents, possession of which would be necessary in order to avoid a breach of article 3 if they are returned to Iraq.

2. On this appeal, MA was represented by Mr Henderson and RO by Mr Jones. Mr Tabori represented the Secretary of State. I thank counsel for their helpful written and oral submissions. Having reflected on those, however, I have not considered it necessary to refer to them in this judgment (other than allusively). The parties, perhaps understandably, in the light of the terms in which permission to appeal was granted in each case, saw these appeals as raising issues of general importance about returns to Iraq. I do not consider that they do. Although the context of the appeals is returns to Iraq, the issues, as I analyse them, really concern how the UT should approach an appeal on a point of law, as I will explain in due course.

3. Unless I say otherwise, paragraph references in this judgment are to the paragraph numbers in the tribunal determination which I am considering.

4. This judgment is in seven sections:
   i. the relevant country guidance determinations
   ii. the facts
   iii. the law
   iv. the issues
   v. discussion
   vi. procedural issues
   vii. conclusion.

i. The relevant country guidance determinations

5. The parties referred to many passages from the country guidance cases in their written and oral submissions. In the light of my analysis of the issues on these two appeals, I do not consider that it is necessary to refer to those materials as extensively as they did.

(1) AA (Article 15(c) Iraq) CG ('AA')

6. Paragraph 9 of the headnote of *AA (Article 15(c) Iraq) CG* [2015] UKUT 544 (IAC) ('*AA*') (as amended by the Court of Appeal in *AA (Iraq) v Secretary of State for the Home Department* [2017] EWCA (Civ) 944) emphasises that it is necessary to decide whether or not a returnee ('P') has a Civil Status Identity Document ('CSID'), or will be able to obtain one, reasonably soon after arrival in Iraq, because of its relevance to article 3 risk if P has no family support. Paragraph 10 says that 'Where return is feasible but P does not have a [CSID], P should as a general matter be able to obtain one from the Civil

Status Affairs Office ['the CSA Office'] of P's home Governorate, using an Iraqi passport (whether current or expired), if P has one'. If he does not, his 'ability to obtain a CSID may depend on whether P knows the page and volume number of the book holding P's information (and that of P's family). P's ability to persuade officials that P is the person named on the relevant page is likely to depend on whether P has family members or other individuals who are prepared to vouch for P.'

7. Paragraph 11 qualifies this. If the CSA Office in P's home Governorate is in an area subject to article 15(c) serious harm, his ability to get a CSID may be 'severely hampered'. Alternative CSA Offices, including for Mosul, have been established in Baghdad and Kerbala. The evidence did not show that the 'Central Archive' in Baghdad was in practice able to provide CSIDs, though there is a National Status Court in Baghdad to which P could apply for formal recognition of identity. 'The precise operation of this court is, however, unclear'.

8. Paragraph 176 of the determination is headed 'Obtaining a CSID whilst in the UK'. Paragraph 176 noted a consensus between the evidence of the expert in that case and the UNHCR. It said 'In principle, a failed asylum seeker, or indeed any Iraqi citizen abroad, can acquire Iraqi documents through Iraqi embassies and consulates. There is a special authorization granted to these bodies to provide documents for Iraqis abroad on the condition that the beneficiaries should have any available documents in order to prove their nationality.' The UT's summary, in paragraph 177, was that it was 'possible for an Iraqi national living in the United Kingdom to obtain a CSID through the consular section of the Iraqi Embassy in London, if such a person is able to produce a current or expired passport and/or the book and page number for the family registration details'.

(2) AAH (Iraqi Kurds – internal relocation) Iraq CG (20 June 2018) ('AAH')

9. The headnote of *AAH (Iraqi Kurds – internal relocation) Iraq CG* [2018] UKUT 212 (IAC) ('*AAH*') says that it supplements the country guidance in *AA* as amended by the Court of Appeal. Paragraph 1 says that it is still possible for an Iraqi returnee ('P') to get a new CSID, but that whether P will be able to, or to do so within a reasonable time, will depend on 'the individual circumstances'. It then lists the 'factors to be considered'. Those are said to include (i) whether P has 'any other form of documentation or information about the location of his entry on the civil registry'. It lists documents which will be 'of substantial assistance', as with them 'the process should be straightforward'. A laissez passer does not count for this purpose and they are confiscated on arrival in Baghdad. The relevant factors also include (ii) where the relevant civil registry is, and whether, if it is in an area held, or formerly held by ISIL, it still functions; and (ii) whether a male family member can go to the civil registry with P, and because the system is patrilineal, whether that relation is on P's mother's, or father's, side of the family.

10. The headnote also states that there were currently no international flights to the Iraqi Kurdistan Region ('the IKR') and that all returns were to Baghdad. If P was an Iraqi national of Kurdish origin, who had a valid CSID or Iraqi passport, he could travel safely to the IKR. P could not fly from Baghdad to the IKR without a valid passport or CSID. The land journey would be very difficult without a passport or CSID. P would normally be granted entry to the IKR at the border.

11. The expert who had given evidence in *AA*, Dr Fatah, again gave evidence. Paragraph 103 of *AAH* records his evidence that the guidance in *AA* was still accurate, but that he had added two caveats. Those concerned, not the process of getting a CSID from the consulate in the United Kingdom, but the process of getting a CSID in Iraq. In such a case, an applicant would have to 'produce something which can establish the location of his family's details in the civil register' (paragraph 27) and that if some of the documents were missing, it could generally take up to a month to replace them. The 'key piece of information …would be his family's volume and page reference in the civil register. Without that, the individual "is in trouble"' (paragraph 28). He added, 'The only way that a totally undocumented Iraqi could realistically hope to obtain a new CSID would be the attendance at the civil registry of a male family member prepared to vouch for him or her' (ibid).

(3) SMO, KSP & IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (IAC) ('*SMO*')

12. The third section of the headnote of *SMO, KSP & IM (Article 15(c); identity documents) Iraq CG* [2019] UKUT 00400 (IAC) ('*SMO*') is headed 'Civil Status Identity Documentation'. Paragraph 11 explains that the CSID is being replaced with a new biometric Iraqi Nationality Identity Document ('INID'). The UT held that 'As a general matter, it is necessary for an individual to have one of these two documents in order to live and travel within Iraq without encountering treatment or conditions which are contrary to Article 3 ECHR. Many of the checkpoints in the country are manned by Shia militia who are not controlled by GOI [ie the Government of Iraq] and are unlikely to permit an individual without a CSID or an INID to pass. A valid Iraqi passport is not recognised as acceptable proof of identity for internal travel'.

13. The UT held that a laissez passer would not help without a valid CSID or INID. A laissez passer was confiscated when a person arrived in Iraq. There was not enough evidence that returnees were issued with a 'certification letter' at Baghdad Airport, or that it would be recognised as proof of identity inside Iraq (headnote, paragraph 12). In paragraph 14, the UT held that once a person was in Iraq, he would be expected to go to his local CSA Office to get a replacement document. All such offices were open, but the extent to which their records were intact was not clear. It would depend on how intense fighting in the local area had been.

14. A person who was not from Baghdad was not likely to be able to get a replacement document there, and 'certainly not within a reasonable time' (headnote, paragraph 15). The introduction of the INID system had reduced the likelihood of using a proxy to get a replacement document, because the CSA Offices which were issuing INIDs required holders to attend in person to enrol their biometrics (including fingerprints and iris scans). Such offices were unlikely to issue replacement CSIDs, either in person, or to a proxy.

15. In paragraph 13 of the headnote the UT referred to the phased replacement of CSIDs with INIDs in Iraq. Despite that, the UT said that replacement CSIDs were still available from Iraqi consular facilities. Whether a person could get a replacement CSID when he was in the United Kingdom 'depends on the documents available, and critically, the availability of the volume and page reference of the entry in the Family Book in Iraq, which system continues to underpin the Civil Status Identity process. Given the importance of that

information, most Iraqi citizens will recall it. That information may also be obtained from family members, although it is necessary to consider whether such relatives are on the father's or the mother's side because the registration system is patrilineal.'

16. The findings on which paragraph 13 of the headnote is based are in paragraphs 383 and 389 of the determination. In paragraph 383, the UT made clear that it had not been asked to revisit the extant country guidance about how a person could get a replacement CSID from the United Kingdom. In paragraph 383, the UT cross-referred to paragraphs 173-177 of *AA* and to paragraph 26 of *AAH* and said 'An Iraqi national in the UK would be able to apply for a CSID in the way explained in *AA*… and if one was successfully obtained, we find that it would be acceptable evidence of the individual's identity throughout Iraq'. In paragraph 389, the UT said that, subject to the introduction of the INID and gradual phasing out of the old forms of identification, the position about the CSID 'remains as it was before'.

17. In paragraph 390, the UT referred to paragraph 28 of *AAH*. It said, 'In the event that some of the documents are missing, it might nevertheless be possible to obtain a replacement CSID and the key piece of information which is required is the family's volume and page reference in the civil register'.

18. The appellants in *SMO* appealed against the determination of the UT. Permission to appeal was granted by Dingemans and Nugee LJJ after an oral hearing. It was granted on a narrow basis, that is, whether the UT should have found, in paragraph 425 of the determination and paragraph 13 of the headnote, that 'Given the importance of the information, most Iraqi citizens will recall it' (that is, the information I describe in the previous paragraph of this judgment). The appeal was then compromised on the basis of a consent order. The Secretary of State has provided the Court with a copy of the order. The case was remitted to the UT for it to reconsider that narrow question. We understand that the issues which the UT will examine are now wider than the narrow question on which this Court remitted the case to the UT.

ii. The facts

(1) RO

19. RO is an Iraqi Kurd. He claimed to be from Mosul, but he was found to be from the IKR. RO entered the United Kingdom illegally, hidden in a lorry, in November 2009.

The procedural history

20. RO claimed asylum on the basis that he was afraid he would be the target of terrorist groups because he had worked as a policeman or as a member of the Iraqi National Guard ('the ING') in Iraq. The Secretary of State refused his claim in 2009. RO's appeal failed on 17 March 2010. The FTT did not believe his account.

21. RO was convicted of rape on 21 December 2011. He was sentenced to ten years' imprisonment. He pleaded not guilty, despite what the sentencing judge described as 'overwhelming evidence'. There were 'seriously aggravating features' in his conduct. The sentencing judge had called for his deportation (determination of the FTT promulgated on 9 October 2018). The FTT described its concerns about the risk of violence and predatory behaviour which he continued to pose (ibid, paragraph 41.e)-j)).

22. RO made a further protection claim in 2012. The Secretary of State refused that claim and made a deportation order on 24 September 2015. RO was detained under immigration powers on 18 May 2016, having served the custodial part of his sentence. He was interviewed for an emergency travel document in May 2016. On 29 September 2017 he was interviewed by the Iraqi authorities, who accepted that he was an Iraqi. They agreed to issue a laissez passer on 6 October 2017.

23. The Secretary of State tried to remove RO to Iraq. RO made further representations. His representatives applied for judicial review and secured a stay of his removal. Permission to apply for judicial review having been granted, the Secretary of State conceded the claim for judicial review and agreed to make a further decision.

24. On 3 April 2018 the Secretary of State again refused RO's claim, but accepted that the further representations were a 'fresh claim' and that they generated a further right of appeal. The Secretary of State relied, among other things, on paragraph 2.43 of the Country Policy Information Note ('CPIN') from September 2017 which suggested that the possession of a laissez passer was a route to getting a CSID.

25. The FTT dismissed RO's further appeal in a determination promulgated on 10 October 2018. In paragraph 12, the FTT referred to the Secretary of State's submission that international flights to Erbil and Sulaymaniyah had been reinstated. The FTT had been referred to *AAH* (paragraph 19), but said nothing more about it. It referred in paragraph 25.j) to the CPIN 'Iraq: Internal relocation, civil documentation and returns'. It is probable that this is a reference to the CPIN published in September 2018. Paragraph 4.2.1 of that CPIN says that there 'are international flights to Erbil International Airport and Sulaymaniyah International Airport'.

26. In paragraph 31, the FTT listed eight significant discrepancies in, or problems with, RO's various accounts of his history. RO could have provided supporting evidence: he claimed to have been in contact in 2017 and 2018 with a nephew in the United Kingdom, the son of his sister, Shilin. The nephew, who had come to the United Kingdom more recently than RO, could shed light on the family circumstances in Iraq. The FTT found that RO had withheld a 'comprehensive account' of his immediate family until the date of the hearing, and that RO's father was not dead.

27. The FTT could find no evidence to enable it to depart from the findings made in the 2010 appeal (paragraph 33). It adopted seven of those findings: RO had not shown that he was living in Mosul before he came to the United Kingdom, he was from the IKR, he was not a police officer or member of the ING, he was not kidnapped in Iraq, no terrorist group in Iraq was interested in him, and he could seek protection from the Iraqi police. RO had himself described the standard of his Arabic as 'good' which was an important skill for the purposes of relocation.

28. In paragraph 37, the FTT accepted that RO had a laissez passer and had been recognised as an Iraqi national. The FTT was 'satisfied in light of the recent background evidence', he could be returned to Baghdad, Erbil or Sulaymaniyah. That reference to background evidence is likely to be a reference to the September 2018 CPIN (see paragraph 25, above).

29. In paragraphs 37 and 38 the FTT said:

> *'37 ….[RO] claims not to have an Iraqi passport or nationality identity card and to have no means of obtaining one. I do not believe him because he has not shown that his family is no longer in Iraq (on his own account he had 3 close male relatives in Iraq when he left): because he has a relative in the UK who had have more knowledge of his family in Iraq than him and because he has been found to be from the [IKR]. In my view [RO] has not provided reliable evidence to show he could not within a reasonable time obtain a new Iraqi passport or new CSID.*
>
> *38. [RO] has not in my view shown he cannot safely return to the [IKR] or that he could not reasonably obtain the CSID he would need to access public services. He has not shown that he would be at serious risk of harm in Baghdad or on return to the IKR. I am not satisfied that he would be at serious risk of persecution, serious harm or breach of fundamental rights as a Sunni returning to the country.'*

30. The FTT did not accept that RO was severely mentally ill, accepting only that he had been recently treated for mild or moderate depression. I have already referred, in 21, above, to the FTT's findings about the risk RO posed. The FTT concluded that the public interest in deportation was not outweighed.

31. RO asked for permission to appeal to the UT. Two of his grounds of appeal are relevant. He argued that the FTT had failed to make findings on material issues (RO's contact with his family in Iraq). He also argued that even if, which he did not accept, the findings about his family were sustainable, the FTT had failed to explain how RO could get identity documents in Iraq, and had failed to take into account paragraph 2.7.4 of the Secretary of State's 2018 CPIN, to which the Home Office Presenting Officer ('the HOPO') had referred in her closing submissions, which said that former residents of the IKR who did not return there voluntarily were returned to Baghdad. The FTT should therefore have considered how RO could get a CSID in Baghdad. It was not clear from the relevant country guidance cases that RO would be able to get a CSID by proxy if he could not travel to the IKR.

32. The UT gave permission to appeal. RO was represented at the hearing by Ms Sabic of counsel, and the Secretary of State by Mr Clarke, a Senior Home Office Presenting Officer.

33. In its determination promulgated on 15 January 2019, the UT recorded that RO relied on two arguments. First the FTT should have made findings about what family support would be available to him in Iraq (paragraph 6). Second, the FTT had failed to follow country guidance. The UT recorded that 'It was accepted that by the date of the hearing before the [FTT] the position as to international flights to the IKR had altered from the position at the time [*AAH*] had been promulgated. If RO refused to return voluntarily to the IKR, he would be removed to Baghdad. RO maintained that he was from Mosul and would refuse to go to the IKR. It had not been shown that RO would be able to get any documents if he were returned to Iraq. If that ground were upheld, the issue of relocation to Baghdad would have to be considered' (paragraph 6). The UT also recorded Ms Sabic's argument in reply that it was crucial to decide where RO would be returned to. He could only be returned to a safe area voluntarily. The FTT could not depart from country guidance about flights and returns; only the UT could do that.

34. The UT also recorded the Secretary of State's submissions about the adverse credibility findings made by the FTT. The FTT's finding that RO had family in Iraq who would help him was 'clearly made and sustainable'. The test was whether RO would be at risk in his home area. RO's willingness to obstruct his removal to a safe area could not be relevant to the assessment; otherwise all appellants would be encouraged to 'follow that tactic'.

35. In paragraph 12, the UT said it was satisfied that the FTT had made 'adequate and sustainable findings'. The FTT rejected RO's account of losing touch with his family and/or that they had left Iraq. It was open to the FTT to hold that RO 'would be able to turn to them for assistance in finding identity documents if he did not already have them'.

36. The UT considered 'the issue of return' in paragraph 13. The FTT had found that RO was from the IKR. The FTT found 'that it would be safe for her [sic] to return there. The evidence before [the FTT] were [sic] that there were international flights to that area and so [the FTT] was entitled to find that he could be returned there. I have had regard to the submission about voluntary returns, but as Mr Mills submitted, the test is whether he would be safe in his home area. I also find merit in his submission that if appellants were permitted to refuse to return to safe areas in favour of possibly unsafe areas, then that would make a mockery of the asylum system'.

37. The UT's view was that the FTT had considered RO's claim for protection, but had found that it was not made out (paragraph 14). The UT's conclusion was that the FTT did not make any errors of law. The FTT's decision to dismiss the appeal therefore stood.

38. RO applied to the UT for permission to appeal to this Court. RO contended that the UT's decision was 'flawed in law' and 'perverse'. In sum, RO argued that the FTT had erred in law by not referring to, or applying, the relevant country guidance (*BA*, *AAH* or *AA*), and that the UT had not put that right. The error was material, because RO was a Kurd from the IKR who would be returned to Baghdad. He had no documents. He would be returned on a laissez passer, which, the relevant country guidance showed, would not allow onward travel in Iraq, or help with re-documentation. The FTT's findings could not support an inference that RO's family were in Baghdad. His circumstances meant that he would be at article 3 risk in Baghdad. The country guidance showed that travel from Baghdad without documents created an article 3 risk. RO would not get documents in Baghdad. RO would only be able to get a CSID in the IKR but could not travel there without incurring an article 3 risk. A finding that A's risk only had to be assessed by reference to circumstances in the IKR was irrational.

39. The UT refused permission. It referred to the finding that 'it would be safe for him to return to the IKR given the resumption of flights'. It considered that 'the issues raised were adequately dealt with' in its determination.

40. RO applied for permission to appeal to this Court on 27 March 2019. His application was stayed behind *SF (Iraq) v Secretary of State for the Home Department* (C5/2018/1963). *SF* was eventually settled; the parties agreed that the case should be remitted to the UT.

41. The grounds of appeal for the application for permission to appeal to this Court were, as I think Mr Jones accepted in his oral submissions, somewhat vague. Ground 2 was that the

FTT and the UT had erred 'in failing to perform a rational and sustainable assessment of matters of risk in the context of findings recorded in the country guidance decisions' in *AAH* and *AA*.

42. The skeleton argument in support of the grounds of appeal makes five main points. First, the FTT and the UT erred in law in not referring to, or applying, the relevant country guidance, and in not making the findings which were necessary to assess risk on return. Second, the UT did not acknowledge or rectify the FTT's errors. Third, the FTT was wrong to find that RO would be returned to Baghdad, Erbil or Sulaymaniyah, in the light of paragraphs 81 and 150 of *AA*. The UT acknowledged this. That being so, the UT was obliged to assess risk in Baghdad, but avoided doing so by making irrational findings, such as that the FTT was entitled to find that there were international flights to the IKR, and thus that RO would be returned there. Fourth, the UT was wrong to infer that RO had identity documents, and the FTT's findings about RO's ability to get documents within a reasonable time were not informed by considering *AA* or *AAH.* Fifth, the finding that RO could get identity documents within a reasonable time 'was not rationally open to' the FTT. The skeleton argument then refers, among other things, to paragraph 179 of *AA* (affirmed in paragraph 102 of *AAH*), and to paragraphs 114, 115, 181 and 104 of *AAH*.

43. On 22 March 2021, Phillips LJ granted permission to appeal 'on the issue of whether the FTT was right to hold that RO, with the assistance of family in Iraq (such as supplying the volume and page number of the book holding his family information), could, within a reasonable time obtain a [CSID] in the UK or a CSID or [INID] on return to Baghdad'. He refused permission to appeal on 'all other grounds', observing that 'The remaining grounds will be resolved by, or add nothing to, the above issue and do not satisfy the second appeal test in any event'. The issue about obtaining a CSID, on the other hand, was one on which permission to appeal had been given in other cases. 'It remains live and fully satisfies the second appeal test'. He ordered that RO's appeal be listed to be heard with the appeal in MA's case.

(2) MA

44. MA was born on 18 January 1990. He is also an Iraqi Kurd. He claims to have fled from ISIL. He arrived in the United Kingdom on 25 September 2015 and claimed asylum.

45. His case is that he had never held an Iraqi passport and that he left his Iraqi identity card in Iraq. His case is that he does not know where his family are and he has not been able to contact them.

The procedural history

46. On 15 January 2016, the Secretary of State refused MA's asylum claim. The FTT dismissed MA's appeal against that decision on 6 September 2016. The UT dismissed MA's further appeal on 21 March 2017.

47. On 6 August 2019, MA made further representations to the Secretary of State. The Secretary of State dismissed those further representations on 11 October 2019, but recognised that the representations were a 'fresh claim' and that their refusal generated a further right of appeal.

48. The FTT dismissed MA's second appeal in a determination promulgated on 7 December 2019. MA was represented by Mr Henderson, and the Secretary of State by a HOPO, Mr Wain. In paragraph 6 the FTT described the issues. The Secretary of State accepted that MA was from Mosul, but did not accept that MA's account was credible, or that MA had lost contact with his family and would be unable to get a CSID within a reasonable time 'on return [sc to Iraq]'. Mr Wain accepted that MA could not be returned to Mosul. He accepted that if the FTT found that MA had lost contact with his family, and cannot, 'within a reasonable time obtain a CSID on return to Iraq', MA would be at real risk of destitution. He also accepted that country guidance indicated that without a CSID, MA would not be able to travel to the IKR by air or by road. Mr Henderson submitted that the 'central issue' was that MA could not re-locate in Iraq as he did not have, and could not get, a CSID.

49. The FTT described MA's case in paragraph 11. He relied on the country guidance. He maintained that he had no contact with his family and could not 'obtain a CSID upon return to Baghdad'. MA was in the category of returnee described in *AAH*, that is, a person who did not have a CSID, would not be able to get one within a reasonable period, and faced destitution in all parts of Iraq. The FTT described the Secretary of State's case in paragraph 12, by reference to the 2019 decision letter. The Secretary of State relied on the previous adverse credibility findings. MA was in contact with family and could get a CSID 'upon his return'. That meant that there was no barrier to return to Baghdad and onward travel to the IKR. The Secretary of State relied on the February 2019 CPIN which suggested that MA could travel to the IKR without a CSID. This referred to information provided by the Iraqi authorities after the decision in *AAH* was promulgated. The Secretary of State accepted that MA could not be returned to Mosul, but contended that internal re-location was reasonable.

50. MA and a witness gave evidence and were cross-examined (paragraph 8).

51. The FTT's findings are in paragraphs 13-33. Its starting point was the findings of the FTT in 2016. The FTT had found in 2016 that MA had decided to leave Iraq without any identity documents in order to make it harder for him to be returned, and that his claims not to be in contact with his family were designed to put further barriers in the way of his removal. The FTT had found that there was no reason why MA 'could not return to Baghdad, obtain a CSID, and re-locate in Iraq'. There was limited new evidence. The FTT commented adversely on MA's failure to use the Red Cross Family Tracing Service; instead, he reported on what his friends had told him about their experiences with the Red Cross. The situation in Mosul had changed recently. According to the report of Ms Laizer, MA's expert, it was again under the control of the government. She had travelled to Mosul by road in May 2019. If she could go there, it was likely that the Red Cross could, too. MA had given no credible explanation for his failure to contact the Red Cross. His failure to do that significantly undermined the credibility of his account that he was not in touch with his family. He was trying to impede his return to Iraq. 'If returned' he could contact his family, get his old CSID, or find out enough family information to get a CSID. The reduced fighting meant that his family could travel to Baghdad to help him.

52. In paragraph 18 the FTT referred to MA's evidence about his three visits to the Iraqi Embassy. The Embassy refused to engage with him because he had no documents showing that he was an Iraqi. 'Mr Wain accepted that [MA] would be unlikely to be able

to obtain identity documents in the United Kingdom and will have to be returned to Iraq to pursue this'. It is difficult to know why Mr Wain made this concession, but I note that MA's expert, Ms Laizer, supported his factual account of his experience at the Iraqi Embassy by reference to criteria set out on the Embassy's website. The FTT gave 'no weight' to MA's three visits to the Iraqi Embassy.

53. In paragraph 19, the FTT said that MA admitted having had an ID card, and having chosen to leave it with his family when he left Iraq. That made the decision in Mr Khalil's case irrelevant, as Mr Khalil had no documents.

54. In paragraph 20, the FTT considered *AAH*. *AAH* was decided after the 2016 FTT determination in MA's case. The FTT said, 'The key question is whether he could obtain the documents he needs on return'. The FTT said that the situation had moved on 'significantly' since *AAH*. It referred to the January 2019 CPIN, which, in turn, referred to two letters from the Iraqi authorities. These showed, in short, that a laissez passer (the document with which MA would return) enabled returnees to travel safely in Iraq, and suggested that re-documentation at a local Civil Status Department in Iraq was relatively straightforward. The FTT held that this was cogent evidence which enabled it to depart from the findings about laissez passers in *AAH*. MA could get a CSID 'by accessing the Civil Status Records which have been preserved at the central register in Baghdad, this includes records from Mosul. Alternatively, given the importance of the CSID to life in Iraq, I am confident [MA's] family will be able to provide him with either the ID card he left behind or the page reference he requires to obtain a new one' (paragraph 24). There was a conflict between Ms Laizer's report and *AAH* about whether a person would be admitted to the IKR at the border. The FTT resolved that by preferring *AAH*.

55. I consider that it is clear from paragraph 30.a that the FTT's reference to the 'central register' in Baghdad in paragraph 24 is a reference to 'the Central Archive'. Paragraph 30.b contains a finding that MA 'can only speak basic conversational Arabic'. He would not have a support network when he arrived in Baghdad.

56. If that was wrong, MA could reasonably re-locate in Iraq. The FTT considered the relevant country guidance case, *BA*, at some length, and made findings in relation to the factors identified in *BA*. It decided that MA would not face an article 3 risk in Baghdad (paragraphs 26-31).

57. The FTT dismissed all MA's protection claims. MA appealed to the UT. He had four grounds of appeal.

    i. The FTT's reasons for finding that MA could contact his family and get his old CSID, or find out the information necessary to get a new CSID did not bear scrutiny.
    ii. The FTT had given no reasons for rejecting the report of MA's expert.
    iii. The FTT failed to give proper reasons for finding that MA could get a new CSID in Baghdad within a reasonable time, in the light of the expert's report, and of *AAH* and of the decision of the Court of Appeal in *AA (Iraq) v Secretary of State for the Home Department* [2017] EWCA (Civ) 944. In the light of the expert evidence, the two letters referred to in the 2019 CPIN were an insufficient basis for departing from the country guidance.

iv. The FTT failed to deal with the finding in *BA* that Sunni Muslims were at risk in Baghdad.

v.

58. On 23 December 2019, the UT handed down its determination in *SMO*.

59. On 20 January 2020, the FTT gave MA permission to appeal on all grounds.

60. On 20 April 2020, the UT dismissed MA's appeal. MA was represented at the hearing by Ms Barhey and the Secretary of State by Mr Tufan, Senior Home Office Presenting Officer.

61. The UT summarised the decision of the FTT in paragraphs 5-8. The FTT had found that MA chose to leave Iraq without his identity documents in order to make his return difficult. MA was not at risk from the Ba'ath party. He would not be at risk on return. He could get a CSID in Baghdad. His family could provide him with the CSID he had left behind, or the page reference in the Family Book which would enable him to get a new CSID. He could move to the IKR or to Baghdad. The UT accurately summarised the grounds of appeal in paragraphs 9-16. It added a fifth ground, in paragraph 17. This was that the FTT had erred in law in relying on *Amin v Secretary of State for the Home Department* [2017] EWHC 2417 (Admin), as this Court had overturned that decision on appeal.

62. The UT recorded that Mr Tufan had referred to *SMO*. He accepted that 'there were some errors of law' in the FTT's decision. An example was the FTT's reliance on a laissez passer. *SMO* found that a laissez passer was useless without a CSID or INID. A further example was that *SMO* found that an individual returnee who was not from Baghdad would not be able to get a replacement document there, and 'certainly not within a reasonable time' (paragraphs 21-22).

63. The UT then said, 'It was however submitted that the judge had not erred in finding that [MA] could contact his family if he wished, and it followed from that finding that [MA] could in fact obtain a CSID from the Iraqi Embassy in London' (paragraph 23).

64. The UT dismissed the first ground of appeal (paragraphs 24-28). In paragraph 28 the UT said that the FTT put no weight on the evidence about visits to the Embassy 'having accepted the concession by [the Secretary of State] that [MA] would be unlikely to be able to obtain ID documents in the UK. It appears from SMO that the [FTT] was wrong to accept this concession.' The UT explained in paragraph 29 that the FTT was wrong to accept the concession 'as [the FTT] had found that [MA's] family would be able to provide him either with the CSID card left behind in Iraq, or the page reference he requires to obtain a replacement card'. The UT further explained that paragraph 101 of *AAH*, which referred to the expert evidence described in paragraph 177 of *AA*, showed that it was possible to get CSID in the United Kingdom, via the Iraqi Embassy, if the person concerned can produce a 'current or expired passport and/or the book and page number for their family registration details' (paragraph 30).

65. The UT then referred to paragraph 13 of the headnote, and paragraphs 391-2, of *SMO* to the effect that a CSID can be obtained in the United Kingdom if the volume and page reference are known. Given its importance, most Iraqis will remember that information,

but it can also be obtained from family members. It would be an exceptional case in which a person would not remember that information (paragraph 31).

66. The UT held that the FTT did not err in holding that MA would be returned to Baghdad: 'The error was in finding that he would be returned without a CSID, taking into account the [FTT's] finding that he had previously had a CSID, and could contact his family and obtain the relevant information from them' (paragraph 32).

67. The UT concluded that 'the error made by the judge' in relying on a laissez passer, and the finding that he could obtain a CSID in Baghdad 'is not a material error of law'. There was no error of law in finding that MA could travel safely to the IKR (paragraph 34). *SMO* confirmed that Mosul is no longer a contested area. MA would not be at risk there (paragraph 35).

68. The UT dismissed the second ground of appeal, holding that the FTT had given reasons for not accepting the expert evidence on which MA relied and was entitled to prefer the country guidance (paragraph 36). The UT accepted, in relation to the third ground of appeal, that the FTT 'was wrong in law to find that [MA] would be able to get a CSID in Baghdad'. That was not a material error, given the findings that MA had contact with his family. 'Therefore [sic]…the country guidance in both *AAH* and *SMO* indicates that [MA] would be able to obtain the relevant information from his family so that he could obtain a CSID from the Iraqi Embassy in London. [MA] chose to attend the Iraqi Embassy without that information' (paragraph 37).

69. In paragraph 38, the UT referred to *BA*. MA would not be at risk just because he was a Sunni Muslim. The FTT did not 'materially' err in law 'on this point and in any event the error would not be material, in view of the [FTT's] finding that [MA] could travel to the IKR. The situation has now changed, as demonstrated in *SMO*, and [MA's] home area in Mosul is no longer a contested area' (paragraph 38). The UT accepted that the FTT erred in law in relying on *Amin*. That error was immaterial in the light of the FTT's other findings.

70. MA applied for permission to appeal to the UT. He relied on four grounds of appeal.

vi. The Secretary of State conceded before the FTT that Mosul was not safe and did not withdraw that concession in the UT. The UT relied on *SMO* for the conclusion that Mosul was safe, without considering MA's circumstances or giving him an opportunity to comment. That was procedurally unfair and an error of law.

vii. The Secretary of State had also conceded before the FTT that MA could not be re-documented in the United Kingdom. That concession was not withdrawn before the UT. The UT considered that the concession was wrong, in the light of *SMO*, but did not consider the evidence in detail, or give MA an opportunity to respond. That was procedurally unfair and an error of law.

viii. The UT erred in finding that proper reasons had been given for rejecting the expert's report.

ix. The UT did not explain why the FTT's erroneous reliance on *Amin* was not a material error of law.

71. The UT refused permission to appeal. It did not refer to either of the procedural fairness arguments.

72. MA relied on five grounds in his application to this Court for permission to appeal. Four were the same as the grounds of appeal I have listed in paragraph 70, above. The new ground (ground (3)) was that the UT erred in finding that the FTT was entitled to give no weight to the evidence of Mr Khalil, which supported MA's evidence about having lost contact with his family, and his fruitless visit to the Iraqi Embassy.

73. Phillips LJ gave permission to appeal to this Court on 22 March 2021, on ground 2. He described that as 'the issue of whether the UT was right to hold that MA, with the assistance of family in Iraq (supplying the volume and page number of the book holding his family information), could within a reasonable time obtain a CSID in the United Kingdom'. He refused permission to appeal on all other grounds, observing that 'The remaining grounds will be resolved by, or add nothing to, the above issue, and do not satisfy the second appeal test in any event'.

iii. The law

(1) The powers of the UT on an appeal

74. Section 11(1) and (2) of the Tribunals, Courts and Enforcement Act 2007 ('the Act') give '[a]ny party to an appeal' a right of appeal to the UT on 'any point of law arising from a decision of' the FTT (other than an excluded decision). 'Excluded decision' is defined in section 11(5). That right may only be exercised with permission (section 11(3)). That permission may be given by the FTT or by the UT (section 11(4)).

75. Section 12 of the Act is headed 'Proceedings on an appeal to the [UT]'. By section 12(1) and (2), if the UT finds 'that the making of the decision concerned involved the making of an error on a point of law', the UT

> *'(2)(a) may (but need not) set aside the decision of the [FTT], and,*
>
> *(b) if it does, must either –*
>
> *(i) remit the case to the [FTT] with directions for its reconsideration, or*
>
> *(ii) re-make the decision.'*

76. When it acts under section 12(2)(b)(ii), the UT may 'make any decision which the [FTT] could make if the FTT were re-making the decision' and 'may make any such findings as it considers appropriate' (section 12(4)). As the UT pointed out in paragraph 22(d) of *VOM (Error of Law when appealable Nigeria)* [2016] UKUT 410 (IAC), the discretion conferred by section 12(2)(a) enables the UT to decline to set a decision of the FTT aside when the error of law in question is immaterial. The UT's reasoning in *VOM* was cited by the Court of Appeal, without disapproval, in *AA*.

77. That reasoning is similar to the approach of this Court in *R (Iran) v Secretary of State for the Home Department* [2005] EWCA (Civ) 982; [2005] Imm AR 535 (as summarised at paragraph 90.1 of the judgment in that case). At the relevant time the appellate tribunal was the Immigration Appeal Tribunal ('the IAT'), which was established by the Nationality Immigration and Asylum Act 2002 ('the 2002 Act'). In *R (Iran)* this Court

considered the powers of the IAT in the context of five appeals. The statutory regime was different, but, as is the case with the UT now, the right of appeal from the first instance tribunal (the adjudicator) to the IAT was on a point of law.

78. In *R (Iran)* this Court was also clear that the IAT had to identify an error of law in relation to one or more of the issues raised in the notice of appeal before it could lawfully exercise any of the powers conferred by section 102(1) of the 2002 Act (judgment, paragraph 90.5). It noted, by reference to earlier authorities, that 'short shrift' had been given to the idea that once the IAT had given permission to appeal, it could consider the up-to-date merits of the appeal (paragraph 61). In paragraph 90.6, it held that once the IAT had identified an error of law 'such that the adjudicator's decision could not stand' it could exercise its power to admit up-to-date evidence, or it might remit the decision to the adjudicator.

(2) Does the FTT err in law if it fails to refer to a decision, or to material, which post-dates its determination?

79. In paragraph 68 of *R (Iran)*, this Court observed that 'the idea that a first instance judge had erred by failing to take into account matters which by definition he could not possibly have known about unless he was a soothsayer is one worthy of Lewis Carroll' (paragraph 68). When addressing two of the appeals which were before it, this Court made clear that, if the IAT had had a power to correct errors of fact, the IAT might have admitted a decision which was similar to what is now a country guidance case, and which had been made after the decisions of the adjudicators, under the rule in *Ladd v Marshall* [1954] 1 WLR 1489. But 'it would stretch the principles identified by Carnwath LJ in [*E v Secretary of State for the Home Department* [2004] EWCA (Civ) 49; [2004] QB 1044] impossibly far if we were to accede to the submission that the adjudicators had committed errors of law. He was concerned with evidence which must have been "established" in the sense that it was uncontentious and objectively verifiable…' This Court then explained why the evidence was not of that character. It said that if the appellants wanted to rely on further evidence, they should make an application to the Secretary of State [sc under paragraph 353 of the Immigration Rules].

(3) The legal status of country guidance

80. The UT and its predecessor have made country guidance determinations for about 20 years (see paragraph 23 of *R (Iran)*). In paragraphs 21-27 and 90.4 of the judgment in *R (Iran)*, this Court held that a failure to identify and apply a relevant country guidance decision without good reason might amount to an error of law in that a relevant consideration had been ignored, and legally inadequate reasons had been given for the decision.

81. Paragraph 2.3 of the UT's Practice Direction, 10 February 2010, as amended on 13 November 2014, provides that country guidance cases 'shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the [UT] …that determine the appeal'. As a result, 'unless it has been expressly superseded or replaced by any later 'CG' decision, or is inconsistent with other authority that is binding on the [UT], such country guidance is authoritative in any subsequent appeal, so far as that appeal: '(a) relates to the country guidance in question; and (b) depends upon the same or similar evidence'. Paragraph 2.4 says that 'any failure to follow a clear, apparently applicable country guidance case or to

show why it does not apply to the case in question is likely to be regarded as grounds for appeal on a point of law'.

82. In paragraph 26 of the judgment in *MS (Zimbabwe) v Secretary of State for the Home Department* [2021] EWCA (Civ) 941 this Court recorded that the Secretary of State and the appellant in that case agreed that the test for departing from a country guidance is set out in paragraphs 11 and 12 of the UT's Guidance Note 2011 No 2. It is that there are 'very strong grounds supported by cogent evidence' for departing from any country guidance. This seems consistent with the position of the parties to these appeals.

iv. The issues

83. I will now consider, within the limits of the grants of permission, the issues in these two appeals. The common features in these cases, which led to the grants of permission to appeal, are evident from the terms of those grants. Although issues about returns to Iraq raise issues of general importance, which Phillips LJ recognised in those grants, I do not consider, having heard argument in these appeals, and as I have already indicated, that it is necessary for this Court to make any decisions about the country guidance cases that go further than is necessary to decide the issues on these two appeals, on their particular facts. Indeed, it would be unwise for this Court to do so, in the light of the fact that the expert specialist tribunal, the UT, will shortly be considering at least some of these issues in *SMO*, against the background of evidence which is more up-to-date than the evidence which this Court has seen in these two appeals. That point is particularly significant because the relevant determinations in these appeals are already quite old.

84. There are three issues

x. Are the relevant factual findings those of the FTT or those of the UT?
xi. What relevant findings of fact were made by the relevant tribunal?
xii. Did the UT err in law in either case in dismissing the appeals on the basis of the facts as found by the relevant tribunal?

v. Discussion

(i) Are the relevant factual findings those of the FTT or those of the UT?

85. In both cases, the UT consciously decided either that there was no error of law, or that any error of law was not material, and upheld the decision of the FTT. The UT did not set aside or re-make the decision of the FTT in either case. The clear effect of section 12 of the Act is that, having taken that approach, the UT had no power to re-visit the facts, or to decide the appeals on a different factual basis from the FTT. The relevant facts for the purposes of these appeals are therefore the facts found by the FTT. On that analysis, the views of the UT about facts other than those found by the FTT are legally irrelevant commentary.

(ii) What relevant findings of fact did the FTT make?

86. The FTT determination in RO's case was made on 10 October 2018, and that in MA's case on 11 December 2019. By those dates, all the relevant country guidance cases had been promulgated, except for *SMO*. It follows from what I have already said that neither constitution of the FTT erred in law by failing to follow *SMO*.

RO

87. The FTT found that RO was from the IKR. He had not been living in Mosul before he came to the United Kingdom. He had a laissez passer and had been recognised by the Iraqi authorities as an Iraqi citizen. He could be returned to Baghdad, Erbil or Sulaymaniyah. He had not shown that his family was no longer in Iraq; on his own account he had three close male relatives in Iraq when he left. He had not provided reliable evidence to show that he could not within a reasonable time obtain a new Iraqi passport or new CSID. He had not shown that he could not safely return to the IKR or that he could not reasonably obtain the CSID that he would need to access public services.

MA

88. The Secretary of State accepted that MA's home area was Mosul. The Secretary of State also made four relevant concessions.

    xiii. MA could not be returned to Mosul.
    xiv. If the FTT found that MA could not get a CSID within a reasonable time on return, he would be at risk of destitution.
    xv. If MA did not have a CSID, he would not be able to travel to the IKR by air or by road.
    xvi. MA would be unlikely to be able to obtain identity documents in the United Kingdom.

89. The FTT recorded that MA had admitted having an ID card, and having chosen to leave it with his family in Iraq. It found that if he were returned to Iraq, MA would be able to contact his family, and get his old CSID, or find out enough information to get a new CSID. The reduced fighting meant that his family could travel to Baghdad to help him. The FTT added that MA could get a CSID 'by accessing the Civil Status Records which have been preserved at the central register in Baghdad [ie the Central Archive; see paragraph 7, above], this includes records from Mosul. Alternatively, given the importance of the CSID to life in Iraq, I am confident [MA's] family will be able to provide him with either the ID card he left behind or the page reference he requires to obtain a new one'. The FTT also found that MA had a laissez passer, would be returned on a laissez passer, and, relying on the 2019 CPIN, which was cogent evidence enabling it in this respect to depart from the findings in *AAH* about the effect of a laissez passer, that that would enable him to travel safely in Iraq. It found that he would be admitted to the IKR.

(iii) Did the UT err in law in either case in dismissing the appeals on the basis of the facts as found by the FTT?

RO

90. Paragraph 7 of the UT's determination in RO's case contains two puzzling sentences: 'It was accepted that by the date of the hearing before the [FTT] the position as to international flights to the IKR had altered from the position at the time [*AAH*] had been promulgated. If RO refused to return voluntarily to the IKR, he would be removed to Baghdad'. It is not clear who accepted the proposition; I assume that it is likely that 'the Secretary of State' would have been the subject of the main verb had the verb been in the active voice.

91. The proposition itself is not easy to understand. At first reading the proposition seems to be that by the date of the hearing in the FTT, the position about international flights stated in *AAH* (that is, that there were no longer any international flights to the IKR) had changed. That is an implausible reading, for two reasons. First, *AAH* was promulgated only a few months before the FTT's determination. Second, as *AAH* was the current country guidance, the FTT would have had to have given cogent reasons for departing from it. It did not even advert to the fact that it was departing from the country guidance, and gave no reasons, let alone cogent reasons, for doing so. It merely referred to 'the recent background evidence'. I have explained what that evidence was (see paragraphs 25 and 28, above). The position as stated in *AAH*, of course, was that there were no longer international flights to the IKR.

92. I consider that when the two sentences are read together, they must mean that the Secretary of State accepted at the UT hearing that the FTT was wrong in its assumption that RO would be removed directly to the IKR, and that the FTT's finding was contrary to the extant country guidance (that is, *AAH*). That interpretation is supported by the first sentence of paragraph 7, which records Ms Sabic's second submission, which was that the FTT had failed to follow country guidance. I therefore read paragraph 7 as a whole as an opaque acceptance by the UT that the FTT had erred in law by failing to follow current country guidance without giving cogent reasons for doing so. I consider that it is, to say the least, unfortunate that the UT did not explain this point clearly.

93. The UT addressed the issue of return again in paragraph 13. Paragraph 13 is also puzzling. It says that the evidence before the FTT was that there were international flights to the IKR and the FTT was entitled to find that RO could be returned there. Paragraph 13 contradicts the opaque acceptance, in paragraph 7, that the FTT had erred in law by failing to follow current country guidance (that is, the statement in *AAH* that there were no international flights to the IKR) by asserting (contrary to that opaque acceptance) that the FTT was entitled to prefer the CPIN to the later country guidance in *AAH*. That contradictory reasoning is not saved by the UT's irrelevant digressions about voluntary returns and asylum policy (see paragraphs 34 and 36, above). I observe, in any event, that that reasoning cannot apply to all appellants. It can only apply to appellants (such as Kurds from the IKR) who had a safe home area which was, nevertheless, an area to which they could not, for some reason, be compelled to return.

94. This confused reasoning obscures an important aspect of the inquiry about documents, on which the UT, in paragraph 12, upheld the FTT's approach. It is clear from the headnote of *AAH* that the question about documents is fact-sensitive. It involves a number of factors which a decision maker should examine in order to see whether or not it is probable that P will be able, in practice, to obtain a CSID within a reasonable time after his return. The focus of that inquiry, if it is for a moment supposed that the FTT did err in law, and that the UT was re-making the decision, should have been how RO would get a CSID within a reasonable time of his return to Baghdad, and if not, on how he could get to the IKR without any documents. The UT did not grapple with the question whether or not the FTT had made enough findings of fact on either topic.

95. The UT tacitly accepted that the reasoning of the FTT could not stand, but did not explain on what basis it was, nevertheless, able to uphold the FTT's decision. The reasoning of the UT is indefensible.

MA

96. The first point about the reasoning of the UT is that it expressly identified 'errors of law' in the decision of the FTT, but decided that each was 'immaterial'. As I have already indicated (and whether or not the UT was correct to find that there were 'errors of law' in the determination of the FTT), its approach meant that it had no power to make any findings of fact. It follows that the UT was not entitled to substitute any findings of its own about the possibility of getting documents from the United Kingdom. The FTT had made no findings about that, in the light of Mr Wain's concession that MA was unlikely to be able to get a CSID while he was still in the United Kingdom. MA complains that it was unfair for the UT to make findings on this issue. It was unfair; but more fundamentally, the UT simply had no power to make any such findings.

97. The core of the UT's reasoning is that the FTT erred in law by not finding that MA could get a CSID from the United Kingdom, and erred in law by holding that he could get a CSID in Baghdad. The UT itself erred in law by approaching the case in this way. It characterised as errors of law decisions by the FTT which were based on the evidence before the FTT. It is not an error of law to base a decision on the current evidence. Nor is it an error of law to fail to base a decision on future evidence. Moreover, it was not open to the UT, having found that these 'errors of law' were not material, to substitute factual findings of its own.

98. I can understand Mr Tufan's pragmatic desire not to try to uphold aspects of the reasoning of the FTT which had been apparently overtaken by the reasoning in *SMO*. The question for the UT, however, was not whether the FTT was required to foresee the future, but whether it had erred in law. It could only have erred in law (in this context) by failing to follow extant country guidance without giving a cogent reason for that departure. The FTT engaged with this question, where relevant, and held that the January 2019 CPIN entitled it to depart from *AAH* (the country guidance current at the date the FTT determination was promulgated). It relied on the January 2019 CPIN for its conclusions that MA could safely return to the IKR.

99. The reasoning of the UT cannot stand. I do not consider that it would be right, in the light of the Secretary of State's unwillingness to defend the FTT's reasoning before the UT, to reinstate the decision of the FTT, even if that were theoretically possible.

vi. Procedural issues

100. RO and MA lodged a joint 'replacement' skeleton argument, dated 22 June 2021, shortly before the hearing of the appeal, which was listed for 6 and 7 July 2021. The Secretary of State responded with a 'replacement' skeleton argument dated 28 June 2021. In that skeleton argument, Mr Tabori made two procedural points.

    xvii. RO and MA were now relying on the Secretary of State's June 2020 CPIN, which was published two months after the promulgation of the later of the UT's determinations. They could not rely on post-decision material to show an error of law in either determination of the UT.

    xviii. RO and MA were now relying on an 'interpretation' of *AA*, which neither RO nor MA had advanced in their skeleton arguments in support of their applications for permission to appeal. The 'replacement' skeleton argument was therefore a supplementary skeleton argument, for which they needed the Court's permission.

101. In the light of my decision on the other issues in the appeals, I do not need to decide these points. I say no more about them, other than that, in an appeal on a point of law, an application to rely on matters which have arisen since the determinations which are the subject of the appeal is, in the light of *R (Iran)*, unlikely to succeed.

vii. Conclusion

102. I would allow both appeals. With some reluctance, since the FTT has already considered each case twice, I consider, that in fairness to both sides, there is no alternative but to remit both cases to the FTT, for it to make yet further findings of fact in the light of the up-to-date evidence and country guidance.

Lord Justice Jonathan Baker

103. I agree.

Lord Justice Underhill

104. I also agree.