**Upper Tribunal**
**(Immigration and Asylum Chamber)**

NM (Art 15(b): intention requirement) Iraq [2021] UKUT 00259 (IAC)

**THE IMMIGRATION ACTS**

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| **Heard remotely from Field House** | **Decision & Reasons Promulgated** |
| **On 27 July 2021** | |
| | …… |

**Before**

**UPPER TRIBUNAL JUDGE PLIMMER**
**UPPER TRIBUNAL JUDGE NORTON-TAYLOR**

**Between**

**NM**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, an anonymity order is made. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.**

**Representation:**

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| For the appellant: | Ms N Wilkins, Counsel, instructed by Barnes Harrild and Dyer Solicitors |
| For the respondent: | Mr J Holborn, Counsel, instructed by the Government Legal Department |

1. *In order for an applicant, who relies upon medical grounds, to meet the requirements for humanitarian protection under Article 15(b) of the Qualification Directive ("QD") s/he must demonstrate that substantial grounds exist for believing there to be a real risk of serious harm by virtue of actors of harm (as defined by Article 6 QD) intentionally depriving that individual of appropriate health care in that country.*

2. *To establish the intentionality requirement the individual will have to show by evidence a sufficiently strong causal link between the conduct of a relevant actor and the deprivation of health care. Reliance on a degradation of health care infrastructure/provision on the basis of the generalised economic and/or security consequences of an armed conflict in the country of origin will not, in general, suffice.*

3. *By contrast, Article 3 ECHR cases based on medical grounds do not require intentionality on the part of a third party.*

## DECISION AND REASONS

### Introduction

1. This appeal concerns three principal issues, all relating to the Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, better known as the Qualification Directive ("QD"). The issues are:

    (a) the status of the QD and its jurisprudence following the United Kingdom's departure from the European Union and whether the Upper Tribunal has jurisdiction to consider it in this appeal;

    (b) whether the appellant is entitled to humanitarian protection on the basis of Article 15(b) QD ("Article 15(b)");

    (c) whether the appellant is entitled to humanitarian protection on the basis of Article 15(c) QD ("Article 15(c)").

2. A protection claim based on the Refugee Convention has been determined against the appellant and this is no longer a live issue. Further, the respondent has conceded that the appellant's removal from the United Kingdom would violate Article 3 ECHR ("Article 3"), a position in respect of which further details will be provided, below. We will address these matters briefly at the end of our decision.

3. The appellant is a citizen of Iraq, born in 1994. He is of Kurdish ethnicity, a Sunni Muslim, and originates from Kirkuk city. He left Iraq in 2015 and arrived in the United Kingdom in February 2016, claiming asylum on the day of entry. This claim was refused and a subsequent appeal to the First-tier Tribunal was dismissed in November of that year. An onward appeal to the Upper Tribunal was unsuccessful. Further submissions were made to the respondent in October 2019. These were based largely on the fact that the appellant was then suffering from kidney failure, was in

receipt of regular dialysis, and, it was claimed, that a return to Iraq would violate Article 3. The further submissions were rejected the following month, but were deemed to constitute fresh protection and human rights claims, thus attracting a right of appeal.

**Decision of the First-tier Tribunal**

4. The First-tier Tribunal found that the appellant was suffering from end-stage chronic kidney disease and was receiving essential dialysis, a cessation of which could place him at risk of death within a few days or weeks. Whilst it was found that an uncle could assist the appellant with access to his original CSID or a replacement, which in turn would permit travel to Kirkuk and the obtaining of a biometric document (INID), the judge concluded that there would be insufficient means by which the appellant could access appropriate medical treatment either in Kirkuk or Baghdad. In addition, as an attempted relocation to the IKR would not be viable on this basis, the judge went on to allow the appellant's appeal on Article 8 ECHR grounds ("Article 8"). He reached no conclusion on Article 3 and expressly dismissed the appeal on Refugee Convention and humanitarian protection grounds.

**Procedural history in the Upper Tribunal**

5. The First-tier Tribunal's decision was challenged on the basis that the judge had failed to consider Article 3 at all and that his assessment of Article 15(c) was flawed. Permission to appeal was granted by the First-tier Tribunal. Following this, the respondent provided a rule 24 response in which it was conceded that the judge had erred by failing to consider Article 3, albeit that there was no error in respect of Article 15(c).

6. The respondent subsequently implemented the decision of the First-tier Tribunal as it related to Article 8 and granted the appellant 30 months' discretionary leave to remain on 28 August 2020.

7. When the appeal came before Upper Tribunal Judge Plimmer on 17 November 2020, the respondent maintained the position set out in her rule 24 response and additionally accepted that the judge's treatment of Article 15(c) was erroneous. By her decision promulgated on 23 November 2020, Judge Plimmer concurred with the parties' agreed position, set the judge's decision aside, preserved the core findings of fact summarised above, and issued directions.

8. At a case management review hearing 17 December 2020, Judge Plimmer extended time for the appellant to provide a notice under section 104(4B) of the Nationality, Immigration and Asylum Act 2002, as amended ("NIAA 2002"), with the effect that the appeal continued notwithstanding the grant of discretionary leave. An attempt to

resurrect a claim based on the Refugee Convention was rejected. The live issues were therefore limited to Article 3 and Article 15(c).

9. In compliance with further directions, the parties provided position statements, in which the respondent conceded that the appellant's appeal should be allowed on Article 3 grounds on the basis of an inaccessibility to vital medical treatment. In response, the appellant confirmed that he relied not only on Article 3 and Article 15(c), but also Article 15(b).

10. Following a further case management hearing on 4 March 2021, Judge Plimmer confirmed that Article 15(b) was a live issue in the appeal and there has been no objection to this from the respondent.

11. In compliance with directions, an agreed consolidated bundle was filed with the Upper Tribunal, together with skeleton arguments and a brief reply from the appellant.

12. At the hearing, no live evidence was called and instead we heard submissions from Ms Wilkins and Mr Holborn. We are grateful to Counsel for their concise written and oral arguments and we confirm that we have taken account of everything said, together with the accompanying relevant evidential references. We will address the pertinent matters arising from their respective submissions when dealing with the core issues, below.

**The first issue: jurisdiction**

13. The first issue which arises is whether we have jurisdiction to consider the body of EU law which underpins humanitarian protection, specifically Articles 15(b) and (c), following the United Kingdom's exit from the European Union. On this, both parties are agreed. Ms Wilkins submitted that the route to jurisdiction lies either through the implementation of the QD into domestic law through The Refugee or Person in Need of International Protection (Qualification) Regulations 2006 ("the 2006 Regulations"), or because the QD has direct effect, relying specifically on sections 2 and 3 of the European Union (Withdrawal) Act 2018. Mr Holborn has put the respondent's position in short form, submitting simply that the QD continues to have effect by virtue of section 4(2)(b) of the 2018 Act. We note that this was the same position seemingly adopted before, and accepted by, the Court of Appeal in G v G [2020] EWCA Civ 1185, at paragraph 50, and again when that case went up to the Supreme Court ([2021] UKSC 9; [2021] 2 WLR 705, at paragraph 84). Neither the Court of Appeal nor the Supreme Court deemed it necessary to examine the precise legislative basis for the conclusion that the relevant EU law was retained and applicable.

14. Jurisdiction is of course a matter for the Upper Tribunal to determine for itself, whether or not the parties are in agreement. Having said that, we do take the parties' position into account, as we do the willingness of the Court of Appeal and the Supreme Court in G v G to accept that the relevant EU law is retained. Soon after the

hearing in the present appeal, the decision of the Upper Tribunal in Ainte (material deprivation – Art 3 – AM (Zimbabwe) [2021] UKUT 00203 (IAC) was promulgated. There too, the parties collectively submitted that the QD has the status of retained EU law. The Tribunal noted what was said in G v G and was content to proceed on the basis that the QD continues to have direct effect (see paragraph 65).

15. In all the circumstances, we respectfully agree with the conclusion reached in Ainte, although we do so without having conducted a detailed examination of the precise legal basis on which the retained status is said to be founded.

**The second issue: Article 15(c)**

16. Whilst Article 15(c) obviously follows after Article 15(b), we address it here as it reflects the order in which the parties put forward their respective cases.

17. Article 15(c) provides as follows:

> "Serious harm consists of:
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> …
>
> (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

18. The QD was partially transposed into domestic law through 2006 Regulations. By regulation 2, "serious harm" is defined by reference to the Immigration Rules, paragraph 339CA of which precisely replicates the wording of Article 15(c).

19. There is no dispute between the parties as to the general approach we should adopt when assessing whether the appellant can succeed by virtue of Article 15(c). Having regard to relevant authorities including, but not limited to Elgafaji [2009] EUECJ C-465/07; [2009] Imm AR 477, QD (Iraq) [2009] EWCA Civ 620; [2010] Imm AR 132, and the other cases and discussion set out by the Upper Tribunal in SMO, KSP & IM (Article 15(c); identity documents) Iraq CG [2019] UKUT 400 (IAC), at paragraphs 203-207. Put shortly, we direct ourselves as follows:

    (a) It is for the appellant to show that there are substantial grounds for believing that he would face a real risk of serious harm, as defined in Article 15(c);

    (b) The appellant does not have to show that he would be specifically targeted by reason of factors particular to his personal characteristics;

    (c) However, personal characteristics are relevant to the question of whether the appellant can meet the risk threshold, having regard to the "sliding scale" applicable in Article 15(c) cases and the country information;

    (d) Personal characteristics should be considered individually and cumulatively;

    (e) It follows that the assessment of risk is highly fact-specific.

20. In the context of the present case, SMO clearly holds particular relevance, dealing as it does with Articles 15(c) and (b) against the country information. Although SMO was eventually remitted by the Court of Appeal to the Upper Tribunal by consent on a discrete issue, neither party suggested that we ought not to take account of the analysis and conclusions relevant to the issues before us. In our view, that must be right. The basis of the remittal was very narrow, relating only to the issue of identity documentation. In this appeal, there is a preserved finding that the appellant could obtain his CSID (or, if necessary, a biometric identity document). Further, neither party argued that the relevant analysis and conclusions on the wider issues should be departed from. Ms Wilkins accepted that the updated country information before us (the most recent of which is dated May 2021) only went to show that the situation on the ground had not materially improved since SMO.

21. Before turning to the examination of the particular facts of the appellant's case, we set out the relevant passages from SMO, as they bear on the Article 15(c) issue in the appellant's home area of Kirkuk (although we emphasise that we have taken account of all references to SMO set out in Ms Wilkins' skeleton argument). The general conclusion on the Kirkuk Governorate is set out at paragraph 257, the relevant part of which states:

> "We take account of indirect forms of violence, as required by HM2 and as described above but we do not consider that the level of risk to an ordinary civilian purely on account of his presence in Kirkuk, or any part of it, is such as to cross the Article 15(c) threshold. The existence and actions of permanently operating attacks cells, the coercion brought to bear on sections of the rural population by ISIL and the other forms of indirect violence from ISIL and other groups (including the PMU) are not at a sufficiently high level to cross that threshold when considered as a whole."

22. At paragraph 285, the Tribunal concluded that:

> "With one exception, however, we do not consider that the risk to an ordinary civilian, even in parts of those territories in which ISIL exerts a degree of physical and psychological control over the population, is such as to engage Article 15(c) in the generality of cases. The evidence clearly shows that the degree of indiscriminate violence characterising the current armed conflict taking place in Baghdad, Diyala, Kirkuk, Ninewah, Salah Al-Din and Anbar is not at such a high level that substantial grounds have been shown for believing that any civilian returned there would solely on account of his presence there face a real risk of a threat to his life or person."

23. In applying the "sliding scale" approach, the Tribunal analysed a large number of specific personal characteristics which might enhance the risk to an individual and, at paragraphs 313 and 314, condensed these down to eight:

    i. An actual or perceived association with ISIL;

    ii. Current personal association with local or national government or the security apparatus;

    iii. Opposition to or criticism of the GOI, the KRG or local security actors;

iv. Membership of a national, ethnic or religious group which is either in the minority in the area in question, or not in de facto control of that area;

v. LGBTI individuals, those not conforming to Islamic mores and wealthy or Westernised individuals;

vi. Humanitarian or medical staff and those associated with Western organisations or security forces;

vii. Women and children without genuine family support;

viii. Individuals with disabilities.

24. On the basis of SMO and the current country information, in particular the EASO "Common analysis and guidance note" of January 2021, we are prepared to accept that the Kirkuk Governorate remains one of the very few areas in Iraq where, whilst not reaching such a high level as to permit all civilians to succeed under Article 15(c), indiscriminate violence is at a high level and that a correspondingly lower level of individual elements is required to make out a claim for humanitarian protection. It is in this context that we assess the significance of relevant personal characteristics in the appellant's case.

25. Ms Wilkins relied on three personal characteristics of the appellant which, in her submission, permit the appellant to meet the relevant threshold: (a) his Kurdish ethnicity; (b) his Sunni faith; and (c) his disability. We will consider each of these in some detail shortly. It is worth noting here, however, that the appellant does not hold the two personal characteristics deemed by the Tribunal to be of particular importance, namely an actual or perceived association with ISIL, or a personal association with local or national government or the security apparatus. Indeed, the appellant has no political profile of any sort, actual or perceived.

26. The appellant is undoubtedly a member of an ethnic and religious minority in his home area and there is no question of him being able or expected to conceal this from enquirers. Thus, in general terms, two of the relevant personal characteristics apply. However, on the basis of the considerations set out below, we have concluded that these characteristics are not, when assessed individually, sufficient to disclose a risk under Article 15(c).

27. First, as is made clear at paragraph 300 of SMO, there is no presumption that members of an ethnic and/or religious minority are at an enhanced risk in any given area. A "contextual evaluation" is required.

28. Second, in our judgment the appellant's Kurdish ethnicity and Sunni faith are, in the context of Kirkuk, effectively interlinked: members of the Kurdish population are almost exclusively Sunni (by contrast, the Fayli Kurds, who now predominantly reside in Baghdad, are Shia) and it is somewhat artificial to disassociate the two and assess potential risks connected to ethnicity and religion entirely independently.

29. Third, whilst in no way decisive, we note that Sunni Kurds are not one of the religious and/or ethnic minorities which feature in the specific risk profiles set out in section 2.15 of the January 2021 EASO country guidance note. A reasonable inference can be drawn from this that Sunni Kurds are not regarded as one of the most vulnerable minority groups.

30. Fourth, Kirkuk has a sizeable Kurdish Sunni minority population. The EASO country guidance note describes the Governorate as having a "diverse and mixed population", with Sunni Muslims being the "predominant religious group".

31. Fifth, significant emphasis was placed on the existence of checkpoints in or around the Kirkuk metropolitan area and operated by the Shia PMU. It is said that these pinch-points would present the appellant with real difficulties arising from his ethnicity, religion, and disability. We consider the last of these in more detail, below. In terms of the first two characteristics, we accept there to be a risk, albeit in our judgment a relatively low one, of the appellant being repeatedly asked questions on identity, his reasons for a particular journey, or being the subject of a "shakedown" (a term which we take to mean the casual extraction of cash) whilst at the checkpoint if his journey requires him to pass through one (or more). There is a consequent possibility of any delay in the progression of the journey to the hospital in the centre of the city, which in turn might have an effect on the efficacy of the dialysis. We also take account of the fact, as we understand it to be, that the appellant would be required to attend dialysis at the hospital three times a week. That would necessitate regular journeys, perhaps of a greater frequency than applicable to other civilians without his medical condition.

32. However, there are countervailing considerations which, when taken cumulatively, go to materially reduce the risk of problems at checkpoints. The appellant will be documented and will, we find, be able to state a compelling reason for making the journey (namely, to attend essential medical treatment). He has no connection to any political or other group, and any imputation of such a connection, given his background and circumstances, is not reasonably likely. It is significant that there is an absence of specific evidence from the appellant to show whether in fact he would have to pass through any checkpoints between his home district within Kirkuk city and the hospital. Indeed, we were not taken to any evidence as to where in the city the home district actually is. Assuming there are checkpoints within the urban area, Ms Wilkins was only able to speculate that the appellant might have to pass through at least one on the way to and from the hospital. We find it surprising that no meaningful effort was made to explain or demonstrate to us the likely route the appellant would have to take. As Mr Holborn submitted, this left a gap in the evidence to support Ms Wilkins' claim that the appellant would have to travel through checkpoints. In any event, assuming that a checkpoint would be on the relevant route, we do not consider that in all the circumstances of this case it would cause this appellant any material hardship or delay. We do not regard the fact of the appellant's absence from Iraq for a relatively significant period as constituting a particular trigger for delay. There is no evidence that he is obviously "Westernised"

or that he has otherwise rejected or is now unable to generally conform to social/cultural norms.

33. Fourth, in respect of any checkpoints on the route between Baghdad and Kirkuk city, we bear in mind the points made in the preceding paragraph and also take account of the preserved finding that the appellant's uncle would be able to provide at least a degree of assistance to him on return. We find that whilst the assistance would be unlikely to constitute 24-hour a day care, it would encompass support at least on the initial journey.

34. Fifth, we do not accept that any process of "Arabisation" is such that it creates an enhanced risk to all Sunni Kurds or the appellant in particular.

35. We now turn to the appellant's disability. Paragraph 312 of SMO confirms that the inclusion of the category of persons with disabilities was premised on the then-current EASO report, which recorded that, in the Tribunal's words, "there is sadly discrimination, inadequate provision of healthcare and a higher risk of violence, particularly against those with mental illness." The January 2021 country guidance note contains a section on those with disabilities to similar effect. Relevant passages include:

> "Adults and children with disabilities are at a higher risk of violence than non-disabled, and those with mental illness could be particularly vulnerable.
>
> …
>
> In the case of persons living with mental and physical disabilities, the individual assessment whether or not discrimination and mistreatment by society and/or by the family could amount to persecution should take into account the severity and/or repetitiveness of the acts or whether they occur as an accumulation of various measures.
>
> Not all individuals under this profile would face the level of risk required to establish a well-founded fear of persecution. The individual assessment of whether or not there is a reasonable degree of likelihood for the applicant to face persecution should take into account risk-impacting circumstances, such as: age, nature and visibility of the mental or physical disability, negative perception by the family, etc."

36. It is common ground that the appellant is very unwell in this country and that this would apply on return to Iraq. We are bound to say that we agree with Mr Holborn's submission that there is a lack of up to date evidence, medical or otherwise, on the issue of how the appellant's illness might manifest itself on a day-to-day basis, in particular if or when he had to pass through a checkpoint. For the avoidance of any doubt, we remind ourselves of the specific direction issued by Judge Plimmer on 4 March 2021 for the appellant to file and serve a consolidated bundle "containing only the evidence relevant to resolve the remaining issue in dispute" (that being whether the appellant was entitled to humanitarian protection with reference to Articles 15(b) and (c)). In answer to the Tribunal's enquiry as to why there was an absence of such evidence, Ms Wilkins sought to suggest that the directions limited the evidence that could be adduced. The absence of relevant medical evidence is in no way

attributable to the Tribunal's directions, and it was entirely a matter for the appellant and his representatives to adduce evidence in support of his case under Article 15(c).

37. There is no expert evidence to demonstrate that the appellant would present as a person with mental illness (we do not seek to suggest that people suffering from particular conditions would always act in a certain way: our approach is simply to assess how, for example, an uninformed member of a PMU militia manning a checkpoint might perceive the appellant). We note that the First-tier Tribunal found that patients who stopped dialysis would present with symptoms of nausea, vomiting, and impaired consciousness. This finding is predicated on the relevant medical treatment having ceased. In the present case, we are proceeding from the premise that the appellant would be receiving dialysis. In any event, in our judgment such symptoms are unlikely to be interpreted as significant mental illness so as to attract societal stigmatisation. Indeed, there is a strong argument to suggest that the appellant's predicament would be perceived for what it is, namely a significant physical health condition requiring essential, regular medical treatment at the general hospital.

38. We do not regard the appellant's age as having any material bearing on an enhanced risk. Nor would there be any animosity emanating from his family. To an extent, the opposite is true: the uncle would be supportive. We accept that the appellant's condition will be visible to the extent that he will look unwell. Whilst not wishing to unduly speculate (noting that the EASO evidence provides no in-depth analysis), we would observe that on the evidence before us there is nothing to indicate that the appellant would look physically disfigured, nor is he an amputee. It may be that either of these could give rise to adverse attention on the basis of unjustified prejudice.

39. One particular matter relied on by Ms Wilkins in respect of checkpoints is the ability or otherwise of the appellant to escape if one were attacked by ISIL. SMO and the current country information do show that the remnants of that organisation continue to launch attacks on military/police targets and checkpoints in various parts of Iraq, including the Kirkuk Governorate, although there are only very few references to such attacks having taken place within Kirkuk city itself. Notwithstanding this, we accept that there is *a* risk of such attacks and/or IED devices being deployed in the urban area. On the evidence before us, though, we find that that the appellant has failed to show that there are substantial grounds that he would face a real risk (as opposed to simply *a* risk) of a serious and individual threat to his life or person by reason of indiscriminate violence in the context of his presence at checkpoints or during the course of his thrice-weekly journeys to and from the hospital.

40. Further, whilst we are prepared to accept that the appellant's mobility will be more restricted than that of an individual without his illness, there is no medical evidence to indicate that he would be unable, whether alone or with practical support, to walk or be driven away from a specific location if necessary. Without wishing to put it too bluntly, it would be very difficult for any civilian, able-bodied or not, to extract

themselves from the epicentre of an explosion or an ambush launched against a checkpoint.

41. Taking all of the above into account, we conclude that the appellant's disability would not of itself give rise to an enhanced risk such that he could bring himself within Article 15(c).

42. Thus far we have considered the three particular personal characteristics on an individual basis and have concluded that none of them is sufficient for the appellant to succeed. We now consider the same characteristics on a cumulative basis and against the general backdrop indicated by SMO and the current country information of continuing instability in the Kirkuk region, including a degree of sectarian animosity and ISIL activity.

43. Ultimately, we conclude that even combining his ethnicity, religion, and disability, and applying a lower level of individual elements necessary to meet the required threshold, the appellant has failed to show substantial grounds that he would face a real risk (again, as opposed to simply *a* risk) of a serious and individual threat to his life or person by reason of indiscriminate violence. This applies both to his situation in Kirkuk city and any journey from Baghdad to the home area. Put shortly, and on the particular facts of this case, the appellant's status as a Sunni Kurd returnee from the United Kingdom with end-stage kidney failure is not sufficient to bring him within Article 15(c).

**Issue 3: Article 15(b)**

44. Article 15(b) provides as follows:

> "Serious harm consists of:
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> …
>
> (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin."

45. Two leading authorities of the Court of Justice of the European Union ("CJEU") were the subject of submissions before us. The first of these is M'Bodj [2014] EUECJ C-542/13; [2015] Imm AR 513. Mr M'Bodj was a Mauritanian national residing in Belgium who had sought welfare benefits following the after-effects of an assault suffered in the host state. His application was refused, but he was subsequently granted indefinite leave to remain in Belgium by virtue of his ill-health and the absence of appropriate treatment in Mauritania. The reference made by the Belgian Cour constitutionelle essentially sought a preliminary ruling on the question of whether relevant provisions of the QD, including Article 15(b), required a Member State to grant a person in Mr M'Bodj's position social welfare and health care benefits under domestic legislation. The CJEU began its analysis by stating that a grant of the benefits would be required if third country nationals such as Mr M'Bodj could be

said to have been conferred subsidiary protection status. Article 15(b) is considered from paragraph 32 onwards. It is helpful to set out the relevant passages in full:

> "32 Article 15(b) of Directive 2004/83 defines serious harm as the torture or inhuman or degrading treatment or punishment of a third country national in his country of origin.
>
> 33 It is clear from that provision that it is applicable only to the inhuman or degrading treatment of an applicant in his country of origin. It follows that the EU legislature envisaged that subsidiary protection should be granted only in those cases in which such treatment occurred in the applicant's country of origin.
>
> …
>
> 35 Accordingly, Article 6 of Directive 2004/83 sets out a list of those deemed responsible for inflicting serious harm, which supports the view that such harm must take the form of conduct on the part of a third party and that it cannot therefore simply be the result of general shortcomings in the health system of the country of origin.
>
> 36 Similarly, recital 26 in the preamble to Directive 2004/83 states that risks to which the population of a country or a section of the population is generally exposed do not normally in themselves create an individual threat which would qualify as serious harm. It follows that the risk of deterioration in the health of a third country national suffering from a serious illness as a result of the absence of appropriate treatment in his country of origin is not sufficient, unless that third country national is intentionally deprived of health care, to warrant that person being granted subsidiary protection.
>
> 37 That interpretation is also supported by recitals 5, 6, 9 and 24 in the preamble to Directive 2004/83, from which it is apparent that, while the directive is intended to complement and add to, by means of subsidiary protection, the protection of refugees enshrined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951, through the identification of persons genuinely in need of international protection (see, to that effect, judgment in Diakité, EU:C:2014:39, paragraph 33), its scope does not extend to persons granted leave to reside in the territories of the Member States for other reasons, that is, on a discretionary basis on compassionate or humanitarian grounds.
>
> 38 The requirement to interpret Article 15(b) of Directive 2004/83 in a manner consistent with Article 19(2) of the Charter (see, to that effect, judgment in Abed El Karem El Kott and Others, C-364/11, EU:C:2012:826, paragraph 43 and the case-law cited), to the effect that no person may be returned to a State in which there is a serious risk that that person will be subjected to inhuman and degrading treatment, and having due regard for Article 3 of the ECHR, to which Article 15(b), in essence, corresponds (judgment in Elgafaji, EU:C:2009:94, paragraph 28), is not such as to call that interpretation into question.
>
> 39 It should be noted in that regard that, according to the case-law of the European Court of Human Rights that, while non-nationals subject to a decision authorising their removal cannot, in principle, claim any entitlement to remain in the territory of a State in order to continue to benefit from medical, social or other forms of assistance and services provided by that State, a decision to remove a foreign national suffering from a serious physical or mental illness to a country where the facilities for the treatment of the illness are inferior to those available in that State may raise an issue under Article 3 ECHR in very exceptional cases, where the humanitarian grounds against removal are

compelling (see, inter alia, European Court of Human Rights, judgment in N. v. the United Kingdom [GC], no. 26565/05, § 42, ECHR 2008).

40 None the less, the fact that a third country national suffering from a serious illness may not, under Article 3 ECHR as interpreted by the European Court of Human Rights, in highly exceptional cases, be removed to a country in which appropriate treatment is not available does not mean that that person should be granted leave to reside in a Member State by way of subsidiary protection under Directive 2004/83.

41 In the light of the foregoing, Article 15(b) of Directive 2004/83 must be interpreted as meaning that serious harm, as defined by the directive, does not cover a situation in which inhuman or degrading treatment, such as that referred to by the legislation at issue in the main proceedings, to which an applicant suffering from a serious illness may be subjected if returned to his country of origin, is the result of the fact that appropriate treatment is not available in that country, unless such an applicant is intentionally deprived of health care.

…

44 In the light of the considerations set out at paragraphs 35 to 37 above, it would be contrary to the general scheme and objectives of Directive 2004/83 to grant refugee status and subsidiary protection status to third country nationals in situations which have no connection with the rationale of international protection.

45 It follows that legislation such as that at issue in the proceedings before the referring court cannot be regarded, for the purpose of Article 3 of Directive 2004/83, as introducing a more favourable standard for determining who is eligible for subsidiary protection. Third country nationals granted leave to reside under such legislation are not, therefore, persons with subsidiary protection status to whom Articles 28 and 29 of the directive would be applicable.

…

47 In the light of the foregoing considerations, the answer to Question 1 is that Articles 28 and 29 of Directive 2004/83, read in conjunction with Articles 2(e), 3, 15, and 18 of that directive, are to be interpreted as not requiring a Member State to grant the social welfare and health care benefits provided for in those measures to a third country national who has been granted leave to reside in the territory of that Member State under national legislation such as that at issue in the main proceedings, which allows a foreign national who suffers from an illness occasioning a real risk to his life or physical integrity or a real risk of inhuman or degrading treatment to reside in that Member State, where there is no appropriate treatment in that foreign national's country of origin or in the third country in which he resided previously, unless such a foreign national is intentionally deprived of health care in that country."

46. In MP [2018] EUECJ C-353/16, a Sri Lankan national residing in the United Kingdom had asserted that, as result of the serious psychological after-effects of being tortured by the authorities of his home country in the past, he was entitled to succeed in his claim not only on Article 3 grounds (as the Upper Tribunal had found), but also in respect of humanitarian protection under the QD on the basis that his ill-health had been caused by state actors and the absence of any risk of further ill-treatment by those actors on return did not preclude entitlement under Article 15(b). When the appeal reached the Supreme Court, a reference was made to the CJEU for a preliminary ruling on whether Article 15(b) covers a real risk of serious harm to the

health of an individual on return to their country of origin which resulted from previous ill-treatment for which the authorities of that country were responsible.

47. Having noted the factual differences from the scenario arising in M'Bodj and the nature of protection afforded by Article 3, the CJEU confirmed that intentionality was inherent in the Article 15(b) analysis. For present purposes, the following passages are of particular relevance:

> "48 In those circumstances [the fact that the ill-treatment had been at the hands of the authorities of the country of origin], both the cause of the current state of health of a third country national in a situation such as that in the main proceedings, namely acts of torture inflicted by the authorities of his country of origin in the past, and the fact that, if he were to be returned to his country of origin, his mental health disorders would be substantially aggravated on account of the psychological trauma that he continues to suffer as a result of that torture, are relevant factors to be taken into account when interpreting Article 15(b) of Directive 2004/83.
>
> 49 Nevertheless, such substantial aggravation cannot, in itself, be regarded as inhuman or degrading treatment inflicted on that third country national in his country of origin, within the meaning of Article 15(b) of that directive.
>
> 50 In that regard, it is appropriate to examine, as requested in the order for reference, the effect that may result from a lack, in the country of origin of the person concerned, of facilities offering appropriate care for the physical and mental after-effects resulting from the torture inflicted by the authorities of that country.
>
> 51 In that respect, it should be recalled that the Court has held that the serious harm referred to in Article 15(b) of Directive 2004/83 cannot simply be the result of general shortcomings in the health system of the country of origin. The risk of deterioration in the health of a third country national who is suffering from a serious illness, as a result of there being no appropriate treatment in his country of origin, is not sufficient, unless that third country national is intentionally deprived of health care, to warrant that person being granted subsidiary protection (see, to that effect, judgment of 18 December 2014, M'Bodj, C-542/13, EU:C:2014:2452, paragraphs 35 and 36).
>
> …
>
> 57 It is therefore for the national court to ascertain, in the light of all current and relevant information, in particular reports by international organisations and non-governmental human rights organisations, whether, in the present case, MP is likely, if returned to his country of origin, to face a risk of being intentionally deprived of appropriate care for the physical and mental after-effects resulting from the torture he was subjected to by the authorities of that country. That will be the case, inter alia, if, in circumstances where, as in the main proceedings, a third country national is at risk of committing suicide because of the trauma resulting from the torture he was subjected to by the authorities of his country of origin, it is clear that those authorities, notwithstanding their obligation under Article 14 of the Convention against Torture, are not prepared to provide for his rehabilitation. There will also be such a risk if it is apparent that the authorities of that country have adopted a discriminatory policy as regards access to health care, thus making it more difficult for certain ethnic groups or certain groups of individuals, of which MP forms part, to obtain access to appropriate care for the physical and mental after-effects of the torture perpetrated by those authorities.

> 58 It follows from the foregoing that Articles 2(e) and 15(b) of Directive 2004/83, read in the light of Article 4 of the Charter, must be interpreted as meaning that a third country national who in the past has been tortured by the authorities of his country of origin and no longer faces a risk of being tortured if returned to that country, but whose physical and psychological health could, if so returned, seriously deteriorate, leading to a serious risk of him committing suicide on account of trauma resulting from the torture he was subjected to, is eligible for subsidiary protection if there is a real risk of him being intentionally deprived, in his country of origin, of appropriate care for the physical and mental after-effects of that torture, that being a matter for the national court to determine."

48. The following essential points regarding Article 15(b) arise from the judgments in M'Bodj and MP:

    (a) Serious harm (as defined) can encompass a deterioration in health as a result of the absence of appropriate treatment;

    (b) The risk of serious harm must arise in the individual's country of origin;

    (c) The infliction of such harm must take the form of conduct by a third party (an "actor of persecution or serious harm" as defined in Article 6 QD) and cannot simply be the result of "general shortcomings in the health system of the country of origin";

    (d) It follows that in order to establish the nexus between the serious harm and the conduct of a third party, the individual must show intentionality, i.e. that they would be intentionally deprived of relevant healthcare by a third party;

    (e) The intentionality requirement under Article 15(b) has been found to apply even where an individual can benefit from the protection of Article 3 on the basis of ill-health and the unavailability of appropriate healthcare in the country of origin.

49. On behalf of the appellant, Ms Wilkins accepted that there is a limited distinction between the protection afforded by Article 3 and that under Article 15(b). In our judgment, that position is correct. On the one hand, the intentionality requirement under Article 15(b), as clearly established in the CJEU's jurisprudence, precludes entitlement to humanitarian protection under the QD in what is often referred to as a "pure medical claim". Whether the illness in question is naturally occurring or a consequence of the conduct of a third party, where the deterioration in health as a result of the unavailability of appropriate care in the country of origin is due to "general shortcomings in the health system of the country of origin", there will be no causal link between the conduct of a third party and the serious harm (see paragraph 35 of M'Bodj and paragraph 51 of MP).

50. On the other hand, the "pure medical claim", in which there is no question of intentionality and is therefore not covered by Article 15(b), can, in appropriate cases, fall within the scope of Article 3, as confirmed in numerous well-known judgments of the European Court of Human Rights including N v United Kingdom [2008] Imm

AR 657 and more recently in Paposhvilli v Belgium (App No 41738/10); [2017] Imm AR 876, and as recognised by the CJEU in M'Bodj and MP.

51. Claims based on non-intentional material deprivation, or dire humanitarian conditions which are "naturally occurring", can also fall within the ambit of Article 3 (see SHH v United Kingdom (2013) 57 EHRR 18 and the detailed analysis provided in Ainte (material deprivation - Art 3 - AM (Zimbabwe)) [2021] UKUT 203 (IAC), at paragraphs 19-35). In Ainte the Upper Tribunal concluded that the risk of being exposed to Article 3 ill-treatment as the result of very poor humanitarian circumstances in Somalia arose not because of the intentional conduct or omissions of the authorities, but as a result of a plague of locusts and the effect of this on successive harvests. From this factual premise, the Tribunal went on to conclude that there was no jurisprudential distinction between health cases and those concerned with non-intentional material deprivation, and that the appropriate threshold was now that set out in Paposhvili (supra) and AM (Zimbabwe) [2020] UKSC 17; [2020] Imm AR 1167. Ultimately, it was found that Mr Ainte would not, despite acknowledged difficulties, be exposed to a risk of inhuman or degrading circumstances on return to Somalia.

52. We make one observation on Ainte. At paragraphs 66 and 67, the Tribunal recorded the parties' agreement that if the Article 3 claim was made out, entitlement to humanitarian protection under Article 15(b) would automatically follow. With respect, and recognising that the point was not the subject of argument and was immaterial to the core issues in that case, we find it difficult to see how that position could be correct. Indeed, such an approach would not accord with M'Bodj and MP, which we note were not authorities drawn to the attention of the Tribunal in Ainte. If, as we find to be the case, Article 15(b) requires intentionality, and given that the Tribunal analysed Article 3 on the basis of non-intentional material deprivation, success under the latter would not necessarily lead to success under the former.

53. The clear focus of the Tribunal in Ainte was upon the Strasbourg and domestic authorities on Article 3. There was no exploration of the authorities that distinguished Article 15(b) from Article 3 or the authorities that suggested the requirement of intentionality for the purposes of Article 15(b). That is not meant in any way as a criticism of the Tribunal or the representatives that appeared before it. The distinction we have highlighted here became obvious because the respondent has accepted that this appellant's return to Iraq would breach Article 3 but not Article 15(b), whereas in Ainte Article 3 was not conceded and the Tribunal's legal enquiry was dominated by the question of whether Article 3 can be engaged in cases of extreme material deprivation and the appropriate threshold to apply.

54. Notwithstanding the distinction in coverage described above, there is a significant overlap between the protection afforded by Article 3 and that under Article 15(b). Obvious examples include a risk of torture by state authorities or serious ill-treatment by non-state actors against which the state is unable or unwilling to provide sufficient protection. In both scenarios the presence of intentionality is immediately apparent.

55. Ms Wilkins' principal argument on Article 15(b) is that the appellant's case is not a "pure medical claim", but rather one which is based on the conduct, direct or indirect, of a party or parties involved in the ongoing conflict in Iraq. The degradation in health care has been caused, at least in part, by that conflict. Thus, intentionality can be shown. This proposition is, she submits, further supported by the respondent's concession that the Article 3 threshold has been met.

56. The first question we must decide is whether Article 15(b) can in principle apply to a case concerning an individual with significant health conditions (whether naturally occurring or the result of deliberate ill-treatment) who can show substantial grounds for believing there would face a real risk of serious harm by virtue of the intentional deprivation of healthcare in their country of origin because of the effects of an ongoing conflict.

57. In our judgment, the answer to this question must be "yes". We can think of no principled reason why the protective coverage of Article 15(b) should not extend to such a scenario. Provisions of the QD must, like EU legislation in general, be given an interpretation which is purposive and ensures the effectiveness of what is set out, subject to any relevant limitations. Here, significant ill-health will constitute a relevant personal characteristic in any fact-specific risk assessment. The introduction of such an individual into a conflict zone (even at the lower end of a spectrum of intensity) is also, in our view, a factor which the protection afforded by Article 15(b) must contemplate.

58. Our view from first principles is supported by the case-law of the CJEU itself. In MP, it was said that the deprivation of health care in the country of origin could lead to success under Article 15(b), provided that intentionality was established. Examples given were the refusal of the authorities to provide for rehabilitation (by which we take to mean appropriate health care) or the adoption of a health care policy which was discriminatory against a group of which the individual was a member. Whilst MP was not concerned with a country in which an ongoing conflict was taking place, the point is that deprivation of health care could engage Article 15(b). Its engagement could not be precluded or otherwise weakened simply by the addition of a conflict into the equation.

59. Finally, we take account of the complementary nature of the ECHR and the QD, as recognised in the case-law, whilst at the same time bearing in mind that provisions of EU law will bear their own autonomous meanings. Article 3 has been found to be engaged in situations where dire humanitarian conditions existed because of an ongoing conflict, thus establishing intentional conduct on the part of third parties (see Sufi and Elmi (2012) 54 EHRR 9, at paragraph 282 and MI (Palestine) [2019] EWCA Civ 1782; [2019] Imm AR 75, at paragraph 32). This may be said to lend at least some support to the proposition that Article 15(b) should similarly apply.

60. The second question is the key to the point of law arising in this appeal, namely the meaning of the intentionality requirement under Article 15(b). Ms Wilkins submits that it should be viewed broadly and encompasses cases in which, to quote from her

reply to the respondent's skeleton argument, "lack of access to healthcare is due to the ongoing effects of conflict on the security and economic situation in the country, e.g. damaged hospitals, diversion of resources, departure of medical professionals, lack of livelihood opportunities/a safety net." In this way, it is submitted that intentionality can be established by direct or indirect conduct of third parties.

61. By contrast, Mr Holborn asserts that the appellant's case is, in truth, simply a "pure medical claim" and that the appellant's position impermissibly extends the scope of Article 15(b) to effectively cover "any country dealing with the aftermath of almost any conflict or political unrest, even if that conflict had long ceased and the "actors of harm" were no longer active."

62. In our judgment, the position contended for by Ms Wilkins is unsustainable and we prefer that put forward by Mr Holborn.

63. As a starting point, the existence of the intentionality requirement at all shows that something more than the general impoverished circumstances of a country is required. The difference must be given substance.

64. Whilst we accept that there is no authority dealing with the particular set of circumstances with which we are concerned (namely a combination of ill-health, deprivation of health care, and ongoing conflict), the examples of intentional conduct set out in MP are, to an extent, illuminating. Both the deprivation of health care on an individualised basis and the denial of access to health care by virtue of discriminatory policies aimed at particular groups indicates the importance of a clearly identifiable causal link between conduct and outcome. Beyond those examples, we conceive of others which could, if the evidence supported it, disclose intentionality on the part of relevant actors: the targeting of hospitals or other healthcare institutions; the prevention of medical aid getting into particular locations; or preventing medical professionals from working. It might also be possible to show by evidence that the wilful failure by the authorities to prevent non-state actors from pursuing one or other of the aforementioned practices amounted to intentional conduct.

65. All of the above bear a reasonable relationship with one of the definitions of "intentional" set out in the Oxford English Dictionary (3rd Edition): something "done on purpose". They do not require the ill-health itself to have been caused by a third party, nor do they require there to be a specific targeting of the individual concerned. What they do illustrate is the need to imbue intentionality with a necessary degree of causation between the conduct of the actors and the risk of inhuman or degrading treatment consequent on the deprivation of health care.

66. As we understand Ms Wilkins' submissions, the overall degradation of health care in a country in which conflict was ongoing would, of itself, be sufficient to make out a case under Article 15(b) because, at very least, engagement in conflict necessarily has adverse economic and general security consequences which in turn will have an impact on the provision of such care.

67. Relying on such indirect consequences is, in our view, stretching the concept of intentionality too far. It would necessitate the importation of threadbare, or indeed non-existent, causation and would lead to significant difficulties in the practical application of the provision.

68. It is perhaps uncontroversial to assume that an armed conflict within a state is likely to have implications for its economy and security. However, by positing a number of questions, one can see the potential difficulties in establishing a proper causal link (i.e. intentionality) between the conduct of relevant actors and the real risk of the deprivation of health care in any given case. For example:

    (a) Would conflict in only limited locales establish causation in respect of the degradation of health care throughout the whole country, thus extending the potential protection of Article 15(b) to an entire population?

    (b) If intentionality can be established by ongoing conflict, why not in respect of the consequences of historical conflict as well?

    (c) If the authorities have had to divert financial resources to defend the country against an insurgency in a particular region, but was making every (albeit inadequate) effort to maintain health care everywhere else, how can it properly be said that the actor holds any intention to deprive?

    (d) A non-state actor may engage in conflict solely to take control of a particular region, or indeed the entire country, but permits all forms of medical care to continue in so far as is possible. Again, where lies the intention to deprive?

    (e) How would decision-makers be able to disentangle inadequacies in, for example, a health care system consequent on purely political/economic decisions from those arising as a result of expenditure on an ongoing conflict?

    (f) What if the health care was inadequate as a result of general shortcomings before the conflict in question began? The existence of the conflict may or may not have exacerbated the problems, but to impute an intention to a third party at that later stage would appear artificial.

69. The overall effect of our concerns is that the appellant's position is unprincipled, unworkable and tantamount to the adoption of an approach under Article 15(b) which would in effect cover "pure medical claims". This would be contrary to the CJEU authorities.

70. Ms Wilkins has referred us to the respondent's guidance on Humanitarian Protection, version 5.0, dated 7 March 2017. It may be said that the wording of what is said under the sub-heading "General violence and other severe humanitarian conditions" in internal page 12 could have been drafted more clearly so as to avoid any doubt as to the limited distinction between the protection offered by Article 3 and Article 15(b). However, when this section is read in conjunction with that on

"Medical cases" in internal page 16, the overall sense is tolerably clear. It does not assist the appellant.

71. In any event, whatever the guidance might state, it cannot of course operate as any aid to the interpretation of Article 15(b).

72. We conclude that in order to show entitlement to humanitarian protection under Article 15(b) in cases based on medical grounds and return to a country in which there is an ongoing armed conflict, an individual must show by evidence that substantial grounds exist for believing there to be a real risk of serious harm by virtue of actors of harm (as defined by Article 6 QD) intentionally depriving that individual of appropriate health care in that country. To establish the intentionality requirement the individual will have to show by evidence a sufficiently strong causal link between the conduct of a relevant actor and the deprivation of health care. Reliance on a degradation of health care infrastructure/provision on the basis of the generalised economic and/or security consequences of an armed conflict in the country of origin will not, in general suffice.

73. By contrast, Article 3 cases based on medical grounds do not require intentionality on the part of a third party.

74. We end this aspect of our analysis by observing that, to a significant extent, and in the light of the Charter of Fundamental Freedoms of the European Union and the ECHR, Article 3 and Article 15(b) are complementary, with the consequence that there is no material protection gap. This is in effect, what the CJEU meant when stating at paragraph 28 of Elgafaji [2009] Imm AR 477; EUECJ C-465/07 that Article 15(b) "corresponds, in essence, to Article 3 of the ECHR." (see also, paragraph 38 of M'Bodj and paragraph 206 of SMO, in which the Tribunal stated that Article 15(b) was "essentially" - therefore not precisely - coterminous with Article 3). It would, however, be incorrect to state that the two provisions are entirely commensurate. If (which we seriously doubt) SMO purported to find that there was equivalence across the board, we would respectfully disagree.

75. We now turn to the country information in order to discern whether the appellant can make out his Article 15(b) case in light of our conclusions on the correct legal approach.

76. A certain amount of the country information was considered in SMO and Ms Wilkins has placed relatively significant reliance thereon, with particular reference to paragraphs 326-331 of that decision. Before considering that evidence, it is right to place it in context. The Tribunal had already concluded that the element of intentionality was absent from the prevailing situation in Iraq and therefore the less stringent approach to Article 3 under Sufi and Elmi did not apply (see paragraph 322). Whilst, as we have seen, Article 3 does not precisely mirror Article 15(b), SMO does not perhaps provide the level of assistance to the appellant's case that Ms Wilkins has suggested.

77. Having considered what is said in SMO, we see no material support for the contention that there is a real risk of the appellant being intentionally deprived of appropriate health care by any of the actors of harm in Kirkuk city, or indeed on a journey from Baghdad to that location. The Tribunal accepted that the humanitarian situation in the formally contested areas was "very problematic", but the evidence did not refer, for example, to the targeting of health care facilities, the prevention of medical supplies getting through to particular areas, or the denial of access to care for any particular ethnic and/or religious group.

78. Reliance has been placed on a UNHCR report from May 2019 entitled "International Protection Considerations with Regard to People Fleeing the Republic of Iraq" (quoted in the respondent's CPIN of January 2021 entitled "Iraq: Medical and healthcare provision"):

> "Over the past decades, Iraq's public health care system has seen a steady decline as a result of cycles of conflict, years of economic sanctions, funding shortfalls, corruption and neglect. The conflict against ISIS [Islamic State of Iraq and Syria] severely damaged or destroyed many healthcare facilities and despite the rehabilitation of part of these facilities, capacity has not yet reached pre-war levels. 'Public health facilities are often poorly maintained and recurring shortages of medicines are a major concern, as is the lack of qualified health workers. Conditions are relatively better in the KR-I [Kurdistan Region of Iraq]; however, the region's health care infrastructure has been overstretched as a result of high numbers of displaced persons, and the rise in conflict-related injuries and disabilities."

79. This extract takes the appellant's case no further for two reasons. First, it does not disclose intentionality on the part of relevant actors, as we have interpreted that term. Second, and in any event, it expressly refers to the ongoing effects of historical conflict. That in itself highlights one of the problems with the appellant's principal case on the scope of Article 15(b) (see paragraph 68(b), above).

80. We have considered the report from Physicians for Human Rights, dated April 2021. This ostensibly deals with the challenges faced by the Iraqi health sector in response to Covid-19. However, what it says in more general terms does not in our view assist the appellant's case, but once again illustrates the difficulties with it. Weaknesses in the health care infrastructure are put down to "Decades of conflicts, coupled with international sanctions and lack of attention to the health sector." Further, "the long-term neglect of the health sector has also had a demonstrably negative impact on the country's health infrastructure." This clearly does not disclose intentionality in any proper sense. Rather, it recognises the complex, interrelated, causes of the deficiencies in the health care system in Iraq. At its highest, the consequences of conflict (in a general sense, absent evidence of the targeting of facilities, supplies, or suchlike) over the course of time would constitute *a* broad reason for the current situation. In our view, it is far from sufficient to establish a case under Article 15(b).

81. The EASO country information note discussed earlier in our decision in relation to Article 15(c) does not add anything to the evidential issue under Article 15(b).

82. Having considered the country information to which we have specifically been referred and more generally, we have not found any which indicates that the appellant as an individual or a member of any particular cohort of the population would be targeted such as to deprive him of health care. In short, the evidence before us does not discloses substantial grounds for believing that the appellant would face a real risk of being intentionally deprived of relevant health care in Iraq. Therefore, the Article 15(b) claim must fail.

83. Even if our interpretation of Article 15(b) was said to be too restrictive, we conclude that the appellant could not succeed in any event. He has not adduced evidence of relevant medical provision in Kirkuk city. The only evidence on this specific issue has come from the respondent in the form of the MedCOI note referred to in a letter of 15 January 2021. This indicates that there was provision for dialysis at Kirkuk General Hospital. Therefore, on the assumption that intentionality bears a broader meaning, the case is simply not made out on the evidence.

84. Bringing all of the above together, we conclude that the appellant's case is, and always has been, a "pure medical claim" and that the appropriate protection comes from Article 3, not Article 15(b).

**Article 3**

85. We can deal with this issue briefly. We find that the respondent's concession on Article 3, as set out in her position statement of 25 January 2021, was considered and properly made. As the grant of leave given to the appellant in August 2020 was on the basis of Article 8, it is incumbent on us to state our conclusion on the Article 3 issue. We do so by following the respondent's concession and concluding that the appellant's removal from the United Kingdom would expose him to a real risk of ill-treatment, contrary to Article 3. It follows that his appeal must be allowed on that basis.

**The Refugee Convention**

86. For the sake of completeness, we reiterate the uncontroversial position that the appellant is not a refugee and his appeal falls to be dismissed on that basis.

**Anonymity**

**87.** We have maintained the anonymity order because this is an international protection case, wherein the importance of facilitating the discharge of the United Kingdom's obligations under the Refugee Convention and the ECHR outweighs the principle of open justice.

**Notice of Decision**

**88. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.**

**89. We re-make the decision by:**

**(a) Dismissing the appeal on Refugee Convention grounds;**

**(b) Dismissing the appeal on humanitarian protection grounds;**

**(c) Allowing the appeal on Article 3 ECHR grounds.**

Signed: *H Norton-Taylor* Date: 3 September 2021

Upper Tribunal Judge Norton-Taylor

**TO THE RESPONDENT**
**FEE AWARD**

No fee is paid or payable and therefore there can be no fee award.

Signed: *H Norton-Taylor* Date: 3 September 2021

Upper Tribunal Judge Norton-Taylor

**APPENDIX: ERROR OF LAW DECISION**

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: [ ]

**THE IMMIGRATION ACTS**

**Heard at Manchester CJC** **Decision & Reasons Promulgated**
**At a remote hearing via Skype for Business**
**On 17 November 2020**

**Before**

**UPPER TRIBUNAL JUDGE PLIMMER**

**Between**

**NM**
**ANONYMITY DIRECTION MADE**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Ms Wilkins, Counsel
For the Respondent: Mr Howells, Senior Home Office Presenting Officer

**DECISION AND DIRECTIONS (V)**

*Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) an Anonymity Order is made. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.*

1. The appellant has appealed against a decision of First-tier Tribunal ('FTT') Judge TR Smith sent on 18 February 2020, dismissing his appeal on international protection grounds and allowing it on human rights grounds.

2. I maintain the anonymity direction made by the FTT because the appellant, a citizen of Iraq, has made a claim for international protection.

3. The grounds of appeal challenged the FTT's approach to Article 15(c) of the QD as well as the failure to directly address Article 3 of the ECHR, in the light of, *inter alia*, the appellant's very serious chronic kidney disease which requires dialysis three times a week.

4. At the hearing before me both representatives agreed that there was an error of law in the FTT's decision, such that it should be set aside and remade in the Upper Tribunal ('UT'), albeit the findings of fact are preserved as they have not been challenged. In particular:

   (i) The respondent accepted that the FTT clearly erred in law in failing to address Article 3, yet found a breach of Article 8 apparently on the basis that the appellant could not access the necessary dialysis to treat his chronic kidney disease in his home area of Kirkuk.

   (ii) Although the challenge to Article 15(c) is less strong for the reasons set out in the respondent's rule 24 notice, Mr Howells pragmatically accepted that when addressing the risk on return for Article 3 or Article 15(b) purposes, it would be prudent to consider the wider circumstances, including the risk of indiscriminate violence at the date of the UT hearing, and in all the circumstances Article 15(c) should also be reconsidered at the UT hearing. I am satisfied that Mr Howells was correct to make this concession. When making the findings on Article 15(c), and applying the requisite 'sliding scale', the FTT failed to address all the relevant circumstances including the cumulative impact of: the very serious nature of the appellant's disability and the extensive medical treatment required; the appellant's Kurdish ethnic origin, and; the country background evidence relevant to both.

   (iii) Both representatives accepted that this case might be suitable to be linked to a case due to be heard by a Presidential panel on 26 and 27 January 2021 on the application of AM (Zimbabwe) v SSHD [2020] UKSC 17 but that a further telephone case management hearing should be held on 17 or 18 January 2020 to determine this. This is because the appellant has already been granted leave to remain (based upon the Article 8 findings) and the respondent required further time to consider the proper approach to Article 3 and Article 15, in the light of updated country background evidence. With this is mind the representatives agreed to the following directions:

      1. Within 7 days of the date of this hearing the appellant shall file and serve a summary of his considered position on Article 3 and Article 15;

      2. By 4pm on Friday 11 December 2020 the respondent shall file and serve a position statement summarising her position on Article 3 and Article 15 and any evidence relied upon;

      3. By 4pm on Wednesday 16 December 2020 the appellant shall file and serve an updated position statement clearly indicating

whether he wishes to pursue his appeal (bearing in mind that he has already been granted leave on the five-year route to settlement).

4. The matter will be listed for a telephone case management hearing before UTJ Plimmer at 9am on 17 December 2020 (preferably) or 9am on 18 December 2020.

**Decision**

5. The decision of the FTT is set aside and shall be re-made in the UT, with the FTT's findings of fact preserved.

Signed: *Melanie Plimmer*
Upper Tribunal Judge Plimmer

Dated: 17 November 2020