Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/50152/2020
UI-2021-000663; LP/00238/2020

THE IMMIGRATION ACTS

Heard at IAC	**Decision & Reasons Promulgated**
On the 26 August 2022	**On the 7 October 2022**

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

AND

G A
(ANONYMITY DIRECTION CONTINUED)

Respondent

Representation:
For the Appellant: Ms Young, Senior Presenting Officer
For the Respondent: Mr Cole, Solicitor advocate on behalf of the respondent, GA

DECISION AND REASONS

Anonymity was granted at an earlier stage of the proceedings by the FtT because the case involved the consideration of medical evidence relating to the mental health of the appellant and upon evidence regarding minors and their involvement with the local authority and the social services. Neither party sought to discharge that order and in the circumstances it is appropriate to continue the order.

Unless and until a tribunal or court directs otherwise, the appellant and his family members are granted anonymity. No report of these proceedings shall directly or indirectly identify him or his family members. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Introduction**:**

1. The Secretary of State made a decision that the appellant is to be deported from the United Kingdom ('UK'), following his criminal convictions as it was considered that his presence in the UK was not conducive to the public good. The respondent refused the appellant's protection and human rights claim in the context of the revocation of the deportation order in a decision letter dated 10 March 2020.

2. The appellant, a citizen of Iraq, appealed this decision to the First-tier Tribunal (Judge Turner) (hereinafter referred to as the "FtTJ"). In a decision sent on 7 July 2021, the FtTJ allowed his appeal on human rights grounds, and the Secretary of State has now appealed, with permission, to the Upper Tribunal.

3. Whilst this is the appeal brought on behalf of the Secretary of State, for sake of convenience I intend to refer to the parties as they were before the First-tier Tribunal.

4. The FtT did make an anonymity order and no grounds have been raised by the parties that the anonymity direction should be discharged. The order shall be continued.

5. The hearing took place on 26 August 2022 whereby both advocates presented their respective oral submission.

6. I am grateful to Ms Young and Mr Cole for their detailed and clear oral submissions.

Background:

7. The appellant's immigration history and background to the claim is summarised in the decision of the FtTJ at paragraphs 19-31.

8. The appellant is a national of Iraq and of Kurdish ethnicity. He arrived in the United Kingdom on 28th of March 2000 and made a claim for asylum which was refused by the respondent. He appealed that decision, and it was dismissed on the 24 February 2004, and he had exhausted his appeal rights by 30 July 2004.

9. The appellant remained in the United Kingdom and was convicted of using a false instrument, other than prescription, for scheduled drugs on 27 August 2008 and was sentenced to a period of 15 months

imprisonment. As a result of that conviction, he was made the subject of a signed deportation order dated 21 November 2008. The appellant appealed this decision, and the appeal was dismissed on 3 February 2009 (decision of Judge Kelly).

10. The appellant sought a reconsideration of the decision and an order for reconsideration was made by SI J Taylor on 10 August 2009. A further hearing took place on 23 June 2010 before IJ Lane, and his appeal was allowed on article 8 grounds. The deportation order was revoked, and the appellant was granted discretionary leave until 3 February 2011 which the appellant applied to have extended.

11. The appellant was convicted of a further criminal offence on 4 March 2013 (drug related offences) for which he was received a sentence of 18 months imprisonment.

12. A further notice of liability for deportation was issued and further submissions were received from the appellant's legal representatives on 21 May 2013 and 2 July 2013.

13. The application for extension of leave was refused on 11 October 2013 and a signed deportation order was made on the same day. The appellant appealed the decision, and it was dismissed on 30 January 2014 (decision of IJ Saffer) and again the appellant's appeal rights were exhausted by 27 March 2014.

14. Further representations were received by the Secretary of State on 27 April 2017 on article 3 and article 8 grounds. Medical evidence in the form of a psychiatric report had been presented with those submissions relying upon the diagnosis provided by the author of the report. An application for settlement protection was submitted on 3 May 2019 which resulted in the decision taken on 10 March 2020 refusing his protection of human rights claim in the context of the revocation of the deportation order that had been made.

15. The decision letter is a lengthy document. The FtTJ summarised the decision letter and the respondent's case at paragraphs [19]-[77]. It is not necessary to set out that letter as it is a matter of record and accurately summarised at length in the decision of the FtTJ.

16. The appeal came before the FtTJ on 5 July 2021. At paragraph [90] the FtTJ recorded that it was agreed between the parties that the FtTJ would not need to hear from the appellant and his partner (although both were present) and that the appeal would be considered on submissions only.

17. The FtTJ also had a bundle of documentation on behalf of the appellant including a skeleton argument, a witness statement of the Appellant, a psychiatric report, the independent social worker report and objective evidence (see [89]). The Respondent submitted a

bundle which contained the earlier appeal determinations of 2004, 2009, 2010 and 2014, discretionary leave to remain grant dated August 2010, sentencing remarks from March 2013, refusal letter dated October 2013, deportation order dated 11 October 2013, further representations, objective evidence, Dr K's report dated 11 October 2016, witnessed stem from appellant's partner, letter from Dr H dated 4 July 2018, settlement protection application, PNC print and decision letter explaining the reasons for refusing the protection claim. A review was also completed (at [88]).

18. The FtTJ set out the issues in the context of articles 3 and 8 of the ECHR to determine at [92] as follows:

    (1) If the appellant will be able to redocument by way of CSID card from the UK or reasonably soon after arrival in Iraq?

    (2) Is there a risk the appellant will suffer serious harm on account of his mental health in Iraq?

    (3) Would it be unduly harsh for the appellant's partner or children to remain in the UK without the appellant?

    (4) Are there very compelling circumstances, noting the proportionality assessment, sufficient to outweigh the public interest in the appellant's deportation?

19. The FtTJ also recorded at [93] that Mr Cole behalf of the appellant did not pursue a protection claim.

20. The FtTJ findings of fact and analysis of the issues are set out at paragraphs [94]-[147]. I shall set out a summary of the factual findings made, and the decision reached by the FtTJ in my assessment of the respondent's grounds of challenge.

21. When addressing the first issue of redocumentation, the FtTJ considered that a significant issue was whether the appellant had family in Iraq. The FtTJ also found that it was relevant to whether he would have support in terms of his mental health and whether he could be supported on return or face destitution.

22. The factual findings on this issue are set out at paragraphs [94]-[112] and having undertaken an assessment of the evidence, including the previous factual findings made by IJ Kelly and IJ Saffer, the judge concluded at [113] that the majority of the evidence was consistent with the fact that the appellant no longer had family in Iraq.

23. As to the issue of redocumentation, the FtTJ addressed this between paragraphs [114 – 118] and did so in the light of the country guidance in SMO and others (Article 15(c); identity documents) Iraq CG [2019] UKUT 00400 (hereinafter referred to as "SMO") and the respondent's evidence. The FtTJ concluded that the appellant would not be able to redocument for the purpose of return, and that this would be a breach

of his rights under article 3 of the ECHR applying the country guidance decision in SMO.

24. Between paragraphs [120]-[135] the FtTJ addressed the issue of article 8 in the context of the appellant's family life with his partner and his 4 children all of whom lived with him and were British citizens. There was no dispute that it would be unduly harsh for the children to live in Iraq and the issue was whether it be unduly harsh of the children to remain in the UK without the appellant. The FtTJ set out her reasoning by reference to the evidence principally contained in the ISW report and concluded that having applied the elevated threshold necessary, that it would be unduly harsh for the children to remain in the UK without the appellant.

25. The omnibus conclusions were set out at [138] –[148] and that having concluded on the evidence that the appellant was not in contact with his family or anyone in Iraq who could reasonably assist him in re-documenting to enable him to return to Iraq and that he could not re-document from the UK or within a reasonable period upon arrival in Iraq and that in those circumstances it would breach the appellant's rights under article 3 of the ECHR.

26. In the light of the FtTJ's assessment that it would be unduly harsh for the appellant's children, the eldest two children in particular, to remain in the UK without the appellant, the judge found that he met the requirements of the exceptions to deportation based on family life with the children.

27. The FtTJ considered the factors listed in paragraph 390 of the Immigration Rules when considering whether the deportation order should be revoked. The FtTJ took into account that the deportation order was clearly made on strong grounds given that he had committed serious offences which led to custodial sentences. The last set of convictions dated back to 2013 following that much had changed. The appellant had a diagnosis of a serious mental health condition which was well documented and that he was receiving substantial support from his close family unit and his partner. This had been substantiated by the ISW and from the evidence of the psychiatrist. The judge found that the prognosis of the appellant was poor, and it appeared to be dire if the appellant was returned to Iraq. The judge set out that that was particularly so given her findings that the appellant had no support in Iraq. The judge took into account that the appellant had remained away from offending behaviour on account of his mental health and support given to him by his family since 2013. Reference was made to the appellant's older children who were now placed with him and his partner which provided additional support but also added responsibility to the appellant.

28. The FtTJ therefore allowed the appeal.

The Appeal before the Upper Tribunal:

29. The Secretary of State sought permission to appeal that decision on 13 July 2021. Permission was refused by First-tier Tribunal Judge Beach on 22 November 2021 but on renewal permission was granted by UTJ Pickup on 14 March 2022.

30. The Secretary of State was represented by Ms Young, Senior Presenting Officer. The appellant was represented by Mr Cole who had represented the appellant before the FtTJ.

The grounds and submissions:

The respondent:

31. Ms Young relied upon the written grounds. No further written submissions have been filed on behalf of the respondent. However, Ms Young made oral submissions to which I have given careful consideration.

32. Ms Young submitted that there was one ground of appeal entitled "making a material misdirection of law and failing to give adequate reasons" and that it was split into 2 parts.

33. Dealing with the first part, she submitted that the FtTJ failed to give adequate reasons for finding that the appellant's deportation would result in undue harshness for the appellant's family. In particular, she submitted that the FtTJ failed to set out how the high threshold was met.

34. In particular, the judge failed to have adequate regard to the fact that the appellant need to care for himself and the extent to which he would be able to assist with the care of the children had not been adequately considered (at [61]).

35. The grounds further state at paragraph 2, that the judge opines that the appellant's partner may be unwilling to care for all the appellant's children as they are not "blood relatives" (at [132]), however it is submitted that they are currently living as a family unit and there is therefore no reason in the absence of any evidence to consider that the appellant's partner would be unwilling to continue to care for them as at present.

36. Furthermore the judge failed to have regard to the assistance available to the children from the public services in the UK.

37. Ms Young submitted that the failure to give adequate reasons on the points in issue and why the high threshold was met was a material error of law. The grounds set out the test at paragraphs 4, 5 ,6, 7, 8, 9, 10, 11. She submitted that when the decision was read it was not

clear what reasons the judge gave for finding that the threshold was met.

38. She submitted that whilst the decision of the FtTJ was a lengthy one, it did not mean that adequate reasons had been given.

39. Dealing with the second part of the grounds, they are set out at paragraphs 12 – 13 of the written grounds and deal with the issue of redocumentation.

40. Ms Young submitted that it was the respondent's case that the FtTJ failed to give adequate reasons for reaching the decision that the appellant would not be able to redocument himself on return to Iraq and would therefore suffer conditions contrary to article 3 rights (at [118]) when at paragraph [119] the FtTJ found that the appellant would not become destitute as a result. It is therefore submitted the FtTJ failed to give adequate reasons for finding that the appellant's article 3 rights would be breached.

41. It is further submitted that in light of the appellant's past proven dishonesty set out at paragraphs [42] and [99] of the decision, that the judge gave inadequate reasons for accepting the appellant's bare assertion that he did not have family in Iraq. At paragraph [35] the judge referred to the appellant's family, but Judge Saffer did not accept the appellant was a credible witness. Judge Kelly had concerns regarding the truthfulness of the appellant. At paragraph [101] the judge references the 2014 decision. At paragraph [102] the judge provides no basis for the conclusion reached.

42. Ms Young submitted that the starting point for the FtTJ's factual findings were the previous decisions applying the decision in Devaseelan and the judge was not conducting an appeal against the 2014 decision.

43. It is further submitted on behalf of the respondent that given the appellant's dishonesty it would not be unreasonable for him to have at least contacted the Red Cross to attempt the tracing of his family in Iraq and a negative trace result would have been of some assistance however the judge failed to consider those matters.

44. It is further submitted that the appellant had a friend in Iraq (see paragraph [35]) and no consideration was given that he could not provide assistance in the redocumentation process.

45. In summary it was submitted that the approach taken by FtTJ Turner materially undermined the finding of contact with family members and the issue of redocumentation.

46. Overall it was submitted by Ms Young that the decision was very generous, and the judge had not looked the evidence "in the round."

The decision was therefore unsustainable due to inadequate reasoning.

47. Dealing with paragraph 14 of the written grounds, Ms Young stated she had nothing further to add. This asserted that the judge had made no separate findings in respect of the appellant's medical condition resulting in a breach of article 3 rights.

48. As to paragraphs 15 – 17 of the written grounds it is submitted that the judge failed to have adequate regard to the wider public interest which is not only concerned with the appellant's risk of reoffending. The grounds cite the decision in OH (Serbia) v SSHD [2008] EWCA Civ 694 at paragraph [77] and submit that the judge failed to have regard to elements B and C of the wider public interest as set out in the above decision and erred in law in failing to do so.

The appellant:

49. Mr Cole confirmed he relied upon the Rule 24 response filed on behalf of the appellant.

50. In that document he set out the submissions made on behalf of the appellant relating to both article 8 and article 3. It noted that the arguments set out at paragraphs 1 to 11 and 15 to 17 in the respondent's grounds related to article 8 and made the point that even if there were any error of law in the article 8 decision (which was not accepted) that it would not be material as the judge also allowed the appeal and article 3 grounds.

51. Mr Cole therefore began his submissions by answering the arguments set out in paragraphs 12 to 13 in the respondent's grounds which dealt with article 3.

52. In respect of paragraph 13, the FtTJ considered the issue of "family support in Iraq" from paragraphs [94] to [113] of her decision. When looking at the breadth of the decision covering almost 4 pages, it was submitted that it was not possible to state the judge given inadequate reasons for her findings on this issue. The judge both considered and dealt with the Red Cross issue and therefore the grounds had no merit.

53. In his oral submissions, he stated that FtTJ Turner was not trying to relitigate the issues but was entitled to work out what the starting point was, and this was a legitimate task for her to undertake. The judge was required to analyse those decisions as to what the concrete points were as the starting point for her decision. He submitted that her decision making process was detailed from paragraphs [94] – [113] which demonstrates that it was very thorough, and that she had considered the matter carefully. The assessment made that there

were conflicting findings in the 2 decisions demonstrates that she had looked at them carefully as she was required to do so.

54. He submitted that as the hearing was 7 years later and even if the 2014 decision was a starting point, much had happened in Iraq since the previous decision and there was nothing to suggest that the FtTJ's acceptance of the evidence of the appellant was not adequately assessed. The judge went through the evidence of the appellant's partner and also considered the issue of Red Cross tracing. He submitted that it was difficult to prove a negative. The judge looked at the evidence of the appellant's partner who was not aware of any contact with family members in Iraq therefore the judge was not solely relying on the appellant's evidence who had previously found not to be credible but was looking at the evidence "in the round." Whilst the decision of Devaseelan makes it clear that previous decisions were the starting point, the judge had new evidence from the appellant's partner whose evidence she accepted.

55. Mr Cole submitted that the decision was well reasoned and very detailed, and it could not be said that inadequate reasons were given for her overall decision. The judge did not fail to take into account any material evidence and the suggestion that the decision was "generous" does not amount to an error of law and the respondent would need to demonstrate that the judge had made an unlawful decision if seeking to set the decision aside.

56. As to paragraph 13, the respondent asserts that the appellant had a friend in Iraq to provide assistance in the redocumentation process. Despite those written grounds, it was well known from the country guidance decisions that a friend could not provide any realistic assistance as the appellant would need to attend his Civil Status Affairs Office in person to provide biometrics to be issued with an Iraqi national identity document. The appellant would also have to travel from Baghdad to his home area without there being a breach of article 3. In any event the issue was considered by Judge Turner at the end of paragraph 117 of the decision. Mr Cole submitted that at paragraphs [114] – [118] the judge provided a sustainable decision on the issue of redocumentation.

57. As regards paragraph 12 where it was argued that the judge failed to give adequate reasons for her finding that the appellant's article 3 rights would be reached, Mr Cole accepted that paragraph 119 of the decision which relates to "article 3 – destitution" is confusing. However he submitted, the judge's reasoning and conclusions on the "family support in Iraq" and "redocumentation" issues are clear. Mr Cole relied upon SMO CG decisions on Iraq where it was conceded that "it remains the position that a person returning to Iraq without either family connections able to assist him, all the means to obtain a CSID, may be at risk of enduring conditions contrary to article 3 ECHR." As the CG decision stated " the CSID has been replaced with a

new biometric Iraqi national identity card- the INID. As a general matter, it is necessary for an individual to have 1 of these 2 documents in order to live and travel within Iraq without encountering treatment or conditions which are contrary to article 3 of the ECHR."

58. Therefore, notwithstanding the confused expression of paragraph [119], when reading paragraphs [94] to [118] of the decision it is plain why the FtTJ allowed the appeal on article 3 grounds and her conclusions on this issue are reiterated at paragraph 139.

59. Therefore in the light of those reasons Mr Cole submitted there was no legal error in the article 3 decision therefore it was not necessary to consider the arguments relating to article 8 raised by the respondent in the grounds.

60. However for sake of completeness he addressed the tribunal on these issues.

61. Mr Cole submitted that much of the grounds quoted general case law and made bare assertions.

62. Whilst it was asserted that the FtTJ's reasoning did not establish the high threshold of undue harshness (see respondent's grounds at paragraph 1 and paragraphs 4 to 11), the FtTJ was clearly aware of the relevant legal threshold having reference the direction from MK (Sierra Leone) v SSHD [2015] UKUT 233. Mr Cole referred to the more recent decision of the Supreme Court in HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22 stated that, when considering the appropriate way to interpret and apply the undue harshness test, "the best approach is to follow the guidance which is stated to be "authoritative" in KO (Nigeria) namely the MK self-direction.."

63. The Supreme Court continued by stating "having given that self-direction, and recognised that it involves an appropriately elevated standard, it is for the tribunal to make an informed assessment of the effect of deportation on the qualifying child or partner and to make an evaluative judgement as to whether that elevated standard has been met on the facts and circumstances of the case before it."

64. Mr Cole submitted that whilst the grounds appear to be suggesting that the FtTJ was wrong in referencing the decision of MK, the FtTJ properly followed that test and therefore decision should not be impugned. He submitted that the judge undertook an evaluative approach to the evidence.

65. He further submitted that the respondent set out case law regarding the undue harshness test in the grounds but failed to identify any basis for undermining the FtTJ's informed assessment of the evidence and her evaluative judgement that the test had been met. In this

respect the respondent's arguments are merely disagreements with the FtTJ's conclusions and failed to identify any errors of law.

66. Dealing with minor issues set out at paragraphs 1 to 3 of the respondent's grounds, it was submitted that the FtTJ did take into account the fact that the respondent needed care himself (see paragraph [129]).

67. As regards paragraph [132], the judge did not opine that the respondent's partner would be "unwilling" to care for the respondent's children that are not hers biologically. The judge actually stated that, the fact that the respondent's partner is not a blood relative of the children, "calls into question what would happen in terms of their care if the appellant were removed from the UK." It was submitted that this was an observation and not a material part of the assessment. Nonetheless it was a legitimate concern although it is clear that it was not particularly central to the decision-making process of the FtTJ.

68. Further, whilst the respondent stated that the judge "failed to have regard to the assistance available to the appellant and the children from public services in the UK," it is unclear what is meant by this and what public services the respondent is referring to. One of the children was already receiving support from the child and adolescent mental health services and the youth justice service as set out at paragraph [125].

69. As to the argument set out in paragraphs 15 to 17, it is submitted on behalf of the appellant that they are irrelevant. The judge was clearly aware of the public interest in deportation of foreign criminals; however, she found that the respondent met one of the statutory Exceptions (namely Exception 2 in Section 117C (5)) and as such the public interest did not require the respondent's deportation.

70. In summary Mr Cole submitted that this was a well-reasoned decision, where the FtTJ made the appropriate self-directions, and it should be assumed that having given those self-directions the FtTJ can be taken to have known that this was an elevated threshold.

71. Ms Young did not seek to provide any reply to the submissions made by Mr Cole.

72. At the conclusion of the hearing, I reserved my decision.

Discussion:

73. The grounds of challenge advanced on behalf of the respondent have been described as a "reasons challenge." Ms Young on behalf the respondent sought to argue in her submissions that the decision of the FtTJ failed to provide adequate reasons for firstly finding that the elevated threshold was met when considering the issue of undue

harshness (see written grounds at paragraphs 1 – 11) and secondly, on the issue of redocumentation set out at paragraphs 12 – 13 of the grounds.

74. In respect of the submissions made on the issue of redocumentation, no reference has been made to the country guidance decision of SMO (1) which was the country guidance decision in force at the relevant date or by reference to country materials before the FtTJ. Similarly, beyond a number of references in the grounds to KO (Nigeria) and HA (Iraq) EWCA civ 176, this tribunal has not been directed to the recent case law on these issues in the Supreme Court decision of HA (Iraq).

75. Before addressing the substance of the grounds, I remind myself that an appeal to the Upper Tribunal may only lie where there is an error of law.

76. There are many authorities on the approach of an appellate tribunal or court to reviewing a first instance judge's findings of fact. In particular the need to "resist the temptation" to characterise disagreements of fact as errors of law, as it was put by Warby LJ in *AE (Iraq)*. The constraints to which appellate tribunals and courts are subject in relation to appeals against findings of fact were recently (re)summarised by the Court of Appeal in *Volpi v Volpi* [2022] EWCA Civ 464 in these terms, per Lewison LJ:

> "2. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
>
> i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.

> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract."

77. As to the duty to give reasons, a failure to give sufficient reasons may amount to an error of law. The duty to give reasons is well established. There is authority specific to the issue from this tribunal: see, for example, *MK (duty to give reasons) Pakistan* [2013] UKUT 641 (IAC). There is also higher authority from elsewhere covering the point. In *Flannery v Halifax Estate Agencies Ltd* [1999] EWCA Civ 811, [2000] 1 WLR 377 at 381 Henry LJ set out the underlying rationale behind the duty to give reasons:

> "... a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not..."

78. In *English v Emery Reimbold & Strick Ltd. (Practice Note)* [2002] EWCA Civ 605, the Court of Appeal surveyed the domestic and Strasbourg authorities on the issue. We highlight just two extracts from the judgment. Lord Phillips MR (as he then was) held:

> "19. [The duty to give reasons] does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue were one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

79. Lord Phillips made two concluding observations about the duty to give reasons, in light of his discussion of the principle, and its application to the individual cases that were before the Court. The observations were as follows:

> "118. The first is that, while it is perfectly acceptable for reasons to be set out briefly in a judgment, it is the duty of the Judge to produce a judgment that gives a clear explanation for his or her order. The second is that an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the

> trial, that party is unable to understand why it is that the Judge has reached an adverse decision. "

The challenge to the article 3 assessment:

80. The grounds challenge the decision of the FtTJ to allow the appeal on article 3 (human rights grounds) for 2 reasons. The first challenge is contained in paragraph 13 of the grounds where it is submitted that in light of the appellant's dishonesty, the judge gave inadequate reasons for accepting the bare assertion that the appellant did not have family in Iraq. It is also asserted that "in any event given the appellant's dishonesty it would not be unreasonable for him to have at least contacted the Red Cross to attempt tracing a family in Iraq, a negative trace result would have been of some assistance, however the FtTJ failed to consider these matters." Further reference is made to the fact that the appellant has a friend in Iraq and that no consideration being given that he could not provide assistance in the redocumentation process.

81. In her oral submissions Ms Young submitted that the FtTJ 's starting point on the issue of family in Iraq were the previous findings made and that the judge was in error by conducting what she described as "an appeal against the 2014 decision".

82. In addressing those submissions, the relevant part of the decision is set out between paragraphs [94] – [113] of the FtTJ's decision. At [92] the FtTJ set out the issues that she was required to determine when addressing (i) is the appellant able to redocument by way of CSID or INID in the UK or reasonably soon after arrival in Iraq? and at [94] the judge set out that "a significant issue in my view is whether the appellant has family in Iraq".

83. Contrary to the grounds on a proper reading of the decision and paragraphs [94]-[113] , the FtTJ did properly direct herself to the decision in Devaseelan and to the findings made in the previous appeals heard in 2004, 2009 (IJ Kelly) and 2014 (IJ Saffer) (see paragraphs [95] onwards).

84. The judge noted at [95] that she was referred to the previous decisions of IJ Kelly and IJ Saffer and that the presenting officer at the appeal conceded that there was an inconsistency in the findings reached between those 2 judges. From paragraphs [96 – 113] the FtTJ addressed the evidence before the tribunal "in the round" and having considered the previous decisions.

85. Having read those paragraphs in the context of the previous decisions set out in the respondent's bundle, there is no merit in the submission that the FtTJ failed to either take those decisions into account as a starting point or that she gave inadequate reasons for her final conclusion at [113] where the judge set out her finding that the

majority of the evidence was consistent with the fact that the appellant no longer has family in Iraq.

86. As regards the previous decisions, the FtTJ set out the decision of IJ Kelly between paragraphs [96] – [98]. I am satisfied it was necessary to do so because the assessment or findings made by IJ Saffer relied upon that decision as demonstrated by IJ Saffer's assessment set out at paragraph [70]. In particular, the judge set out paragraph 13 of IJ Kelly's decision (see [96]) and at [97] and accurately summarised those findings noting that Judge Kelly accepted that the appellant's brother was killed (albeit noting that the appellant's explanation as to why he was killed was not accepted). Furthermore, it appeared to be accepted that the appellant's family were killed in 2008 in a roadside bomb although the present FtTJ observed that this was "without any real scrutiny".

87. Furthermore as the FtTJ observed at paragraph [97] the protection claim (in the context of the appellant's deportation) was based on the death of the appellant's brother as opposed to the death of the appellant's family and this resulted in limited consideration of the appellant's claim concerning the circumstances leading to his death of his family members.

88. Again, the FtTJ's view expressed at paragraph [97] was an entirely legitimate view that "this is understandable given the limited relevance of the issue had on the overall determination reached in 2009" and also at [103]. This is consistent with the decision of IJ Kelly at paragraphs 9 and 12 of his decision.

89. IJ Kelly at paragraph 13 of his decision did appear to accept the appellant's account that the appellant's brother had been killed (although not for the reason the appellant gave) and that his family had moved to Baghdad and that the "tragic death of the parents and siblings in 2008 was unconnected to the events he claimed to cause him to flee Sulamaniyah".

90. Notwithstanding those findings made by Judge Kelly, the FtTJ went on to consider the view taken of the appellant's overall credibility between paragraphs [98 – 99] and in particular the references made to the 2004 decision which raised "serious misgivings as to his credibility" and that in this context Judge Kelly held a similar view and that he was not persuaded that the appellant's brother was killed as a result of the issues the appellant had in his home area in Iraq.

91. However it is plain from reading paragraph [98] that the FtTJ accurately summarised the general credibility assessment made by Judge Kelly. At [99] the judge considered other aspects of the evidence which was relevant to the appellant's credibility including the circumstances of the original asylum claim and the appellant's convictions for dishonesty. Whilst the grounds refer to the FtTJ's

failure to have regard to the appellant's dishonesty in her assessment of the issue, that is not borne out in the FtTJ's decision as reflected in paragraphs [98 – 99]. In fact the judge expressly stated that those points as identified supported the respondent's case.

92. Notwithstanding the findings made by IJ Kelly which appeared to accept the appellant's claim that his brother died, and his other family members were killed in a roadside bomb in Baghdad, the judge went on to assess the findings made by IJ Saffer in 2014.

93. Having considered that assessment set out at paragraphs [100 – 102], it is consistent with the contents of the decision of IJ Saffer. I observe that it is not submitted that the judge made any errors of fact in her assessment of that decision.

94. The case before IJ Saffer concerned the appellant's deportation in the context of his family life and in particular his children, as raised in respect of article 8. In so far as his claim related to protection grounds or article 3 grounds, IJ Saffer stated the following:

> "70. In relation to his asylum appeal, there is no new evidence to undermine the previous dismissals of his asylum appeals. Having considered the mater ourselves, we agree with the Respondent that his multiple heterosexual relationships while here further indicates that he is not a homosexual or would be perceived to be one. We dismiss it for the same reasons as previously and will not simply repeat what was said in those determinations.
>
> 71. In relation to humanitarian protection, he is excluded from the protection afforded by this as his sentence exceeded 12 months.
>
> 72. In relation to his Article 3 appeal, he is from Sulamaniyah which is in the Kurdish region of Iraq. He is a Kurd. There is no evidence he will be returned to Baghdad International Airport as opposed to, for example, the international airport in Sulamaniyah. He does not therefore fall within the risk category identified in HM. He would not need to internally relocate as he has failed to establish it is reasonably likely he had any problems in Sulamaniyah. In addition he has support in Iraq from an old school friend and neighbour. He has skills, speaks the language, understands the culture, is a member of the majority religion, and would be able to re-settle without any significant problem. He also has a niece he could seek to trace. In addition he has failed to establish his parents and siblings have been killed in a roadside bomb as claimed."

95. The findings made at [72] that the appellant had failed to establish that his parents and siblings have been killed in a roadside bomb is not consistent with paragraph [70] where judge Saffer had regard to the protection claim as follows "we dismiss it for the same reasons as previously and we will not simply repeat what was said in those determinations".

96. When that is applied to the decision reached by IJ Kelly, IJ Kelly appeared to accept that the appellant's brother was killed (albeit for different reasons) and proceeded on the basis of the appellant's parents and siblings had been killed in a roadside bomb therefore if IJ Saffer was relying on what had been found before, it would include those recorded findings.

97. Consequently where the FtTJ stated at [102] that that that the findings set out at [72] made by IJ Saffer appeared to have no basis, and that "although IJ Saffer may have been presented with further evidence and submissions on this point, it is not been referred to in the determination", that was an accurate and legitimate analysis of the previous decision given the matters set out by the FtTJ. The judge properly considered that at paragraph 70 IJ Saffer did note that the appellant had not been believed about his initial asylum claim and thus her assessment that it was "intimated that the appellant was not a truthful witness" was also correct. It was open to the judge to reach the conclusion that she could not be satisfied as to the basis of the conclusion reached by IJ Saffer regarding the death of the appellant's family and that as such she found herself in what she described as an "unusual position and that I have two previous determinations which have considered the issue in question but with no clear starting point."

98. It is against that evidential background that the judge went on to consider the other evidence available on the issue of whether the appellant had family members in Iraq as set out between paragraphs [104 – 112] before reaching her overall conclusion at [113].

99. There is no merit in the submission that the FtTJ erred in law by failing to give adequate reasons for her conclusions on this issue. A careful reading of the relevant paragraphs demonstrates that the judge accurately set out the factual findings made by the previous judges and also sought to identify the problems with the decision of IJ Saffer when seen in the context of the findings made by IJ Kelly and the basis upon which he made the decision (see paragraphs [95 – 99]).

100. The judge also considered issues of general credibility at paragraphs [98 – 99] by reference to his failed asylum claim and his general dishonesty from his convictions both of which were relied upon by the respondent. The judge also considered other evidence that was available to the tribunal and relevant to this issue and gave reasons for either rejecting that evidence or for accepting it.

101. In this context at [104] the judge set out the evidence of the appellant's partner by reference to her witness statement. The appellant's partner had stated that the appellant "has no family in Iraq and would not be able to cope without us" (at paragraph 13). The FtTJ took into account that the appellant had been in a relationship with his partner for many years and that she would be aware if the

appellant had any ongoing contact with family members in Iraq. The judge also noted that the presenting officer had no questions for the appellant's partner who was present at the appeal hearing which left the witness statement unchallenged. The FtTJ however did observe that the witness statement could be "self-serving."

102. At [105] the judge took account of evidence contained in the expert reports which recorded an understanding of whether the appellant had family in Iraq. The psychiatric report recorded the appellant's partner's understanding that he had no remaining relatives or family in Iraq and the ISW report recorded a discussion with the appellant's partner that "he has no one there to care for him, he would end up on the street them educational support for his mental health, he could not cope on any level on his own." Having considered that evidence the FtTJ found that the appellant and his partner had remained consistent in their evidence when speaking with 2 independent professionals as to whether he had family in Iraq. At [106] the judge also found that to be consistent with the length of residence in the United Kingdom, which was 21 years, and on any account was a long period of time outside the country of his nationality.

103. Between paragraphs [107 – 112] the FtTJ expressly addressed points raised by the respondent which included the inconsistency in his account given to the doctor (at [108]), the failure to raise the death of his family in the further submissions (at [107]), the lack of evidence at [109], and [111] the evidence relating to the red cross. In doing so, the FtTJ gave adequate and sustainable reasons for rejecting those submissions. Whilst it was argued the appellant did not raise the death of his family in the further submissions made in September 2008, but waited until the hearing in 2009, the judge was entitled to take into account the fact that the appellant did not rely upon this is the basis for his protection claim and therefore did not consider it relevant at that time. At [108] it was open to the judge to find that the report in 2016 was compiled at the time when the appellant had received a diagnosis of schizophrenia which would call into question the reliability of his recall. A further reason was given that in any event the dates were obviously incorrect as it was accepted that the appellant arrived in 2000. The judge therefore gave reasons why she did not place any reliance upon any inconsistency with regards to dates.

104. At [109] the judge dealt with the respondent's submission that the appellant failed to provide evidence to substantiate his claim. The FtTJ gave reasons for rejecting that submission. The FtTJ found that it would be difficult to consider how he could evidence that he had no family in Iraq as he could not "prove a negative." The 2nd reason given is that the appellant was in the UK when he was informed that his family was killed, and the judge questioned what enquiries he could have made and what documents he could have obtained to evidence the incident. The FtTJ concluded that she did not consider that any

such evidence would be reasonably available to the appellant and thus did not attach any weight to the lack of evidence to substantiate that aspect of his claim particularly noting the passage of time.

105. Whilst the respondent referred to the FtTJ's failure to consider the appellant's friend, the FtTJ addressed this at paragraph [110]. As the judge stated, for the reasons given when dealing with the issue of redocumentation, it would not have been of any relevance to that issue. Similarly whilst the grounds assert at paragraph 13 of the judge failed to consider the issue of the Red Cross tracing, the judge expressly addressed this at paragraph[111] and gave reasons why she did not consider it reasonable for the appellant to use that organisation or a similar organisation. If the appellant were being truthful about his family, and that they are all dead there would be no one to locate. The FtTJ considered that on the evidence his life and family are in the UK.

106. The judge also was entitled to take into account the appellant's mental health and to find that this did not undermine the appellant's credibility.

107. At [112] the FtTJ addressed the respondent's submission that it was not plausible that the family would relocate to Baghdad and the reliance placed on the decision of IJ Kelly. However it was open to the judge to reach the conclusion that she had been presented with no further evidence about this aspect of the previous protection claim therefore she did not intend to go behind the finding made by IJ Kelly as previously set out in her decision.

108. In conclusion, the analysis conducted by the FtTJ as to whether the appellant had family members available to him in Iraq was one that was open to her on the evidence. The respondent's submissions do not demonstrate that the judge failed to address the respondent's submissions made as to the appellant's credibility as seen by paragraphs 98, 99, 100, 107, 108 – 111 where the judge engaged with those submissions but gave sustainable evidence-based reasons which were plainly adequate to reach the overall conclusion set out at paragraph [113] that she was satisfied that the appellant did not have family members available to him in Iraq.

109. Dealing with the 2nd point raised in the grounds (paragraph 12) it is submitted that the finding that the appellant would not be able to redocument himself on return to Iraq and therefore would suffer conditions contrary to article 3 (at [118]) but found at [119] that the appellant would not become destitute as a result, led to the conclusion that the judge had given inadequate reasons the finding that his article 3 rights would be breached.

110. In assessing that submission Mr Cole properly observed that neither the written grounds nor the oral submissions raised any challenge to

the actual issue of redocumentation set out in the decision and in light of the country guidance decision of SMO (1) which was the operative CG decision at the time.

111. The issue of redocumentation is set out in the decision between paragraphs [114 – 118]. There does not seem to be any dispute that the appellant did not have a CSID and that whilst his nationality had been confirmed and he could be issued with a laissez passer, in accordance with the CG decision the respondent acknowledged that this would not assist the appellant on return in terms of internal travel or integration (see[114]).

112. Thereafter the FtTJ considered the country guidance decision of SMO alongside the evidence filed on behalf of the respondent (at [115]). The FtTJ's assessment at paragraphs [116 -118] was consistent with the country guidance decision of SMO. . The Upper Tribunal in SMO expressly considered the issue of the use of Laissez Passer at paragraphs 376 – 379 setting out the evidence of Dr Fatah who had not heard of any person being able to use a document for onward travel. The Upper Tribunal found the reason for this was that such a document was confiscated on arrival and therefore could not be used for internal travel. The appellant did not have a CSID card and a laissez passer would be taken upon arrival and would not assist on travel into Iraq or from Baghdad to his home area.

113. The reference made to the CSID being replaced by the INID and which could not be issued in the UK as it required the appellant's presence to register his biometrics at his local CSA office was also consistent with the country guidance decision. . There is no dispute that for an INID there is a requirement for enrolment of biodata including fingerprints and iris scans and must be applied for in person (at paragraph 388 of SMO).

114. Dr. Fatah's evidence in SMO, records at (para 366): Dr Fatah did not believe that a CSID could be obtained from abroad anymore, since it had been replaced by the INID. At [968]-[980], however, he described how a CSID could have been obtained in the past from an embassy. At paragraph 2.6.16 of the June 2020 CPIN it was stated that "it is highly unlikely that an individual would be able to obtain a CSID from the Iraqi Embassy while in the UK. Instead a person would need to apply for a registration document (1957) and would then apply for an INID upon return to their local CSA office in Iraq."

115. It was the respondent's evidence that the appellant would not be able to apply for or obtain a CSID in the UK. The alternative route suggested in the CPIN is an application for a "1957 document" which in turn relied upon certain documentation being provided by family members. However on the factual findings made by the FtTJ the appellant did not have contact with his family members and therefore it follows he would not have access to that documentation.

116. The FtTJ considered the issue of the 1957 Registration Document which did not form part of the CG decision but was based on the respondent's CPIN but was entitled to find that in light of her assessment that such a document would be unlikely to be of any assistance to the appellant as there was no evidence as to the use or purpose of the document. In particular, the FtTJ's finding that there was no evidence that the registration document would be of any use to the appellant to assist in passing through checkpoints in Baghdad to his home area where he CSA office is based was also a finding consistent with the CG decision. I observe that in SMO (2) the UT expressly reached a finding to the same effect.

117. When considering the issue of documentation in the light of paragraph 370 of SMO and the roll-out of INID terminals, the judge's conclusion that CSA offices in the appellant's area would have an INID terminal which meant that CSID's cards would no longer be issued was a finding open to her. Thus in the alternative even if the appellant did have contact with someone in Iraq to assist in redocumentation, it would not be possible to secure a CSID or INID card by proxy to send the document to the appellant in the UK.

118. Furthermore, it was open to the judge to conclude on the evidence that the appellant would not return to Iraq voluntarily and thus his return would be to Baghdad. That is consistent with the CG decision and SMO. The position of the respondent was that for this appellant the only destination for an enforced return would be to Baghdad. As to obtaining a CSID from Baghdad, an individual returnee who is not from Baghdad, which is the position of this appellant, is not likely to be able to obtain a replacement document or to do so in a reasonable time. The central archive and the facilities for IDP's are not likely to provide assistance for an undocumented returnee. The appellant would not be able to board a domestic flight beyond Baghdad or to the IKR without either a CSID or INID or invalid passport. As he had no family to meet him in Baghdad and as he would have no documentation the appellant would be in essence stranded in Baghdad which would be in breach of his rights and article 3 /article 15 (b)(see conclusion at [118]).

119. As Mr Cole acknowledged the reference made at paragraph [119] referring to article 3 based on destitution is confusing. However the reasoning on the issue of family support in Iraq and when read alongside the issues relating to redocumentation, the conclusions reached by the FtTJ are clear and consistent with the CG decision where the respondent had conceded, "it remains the position that a person returning to Iraq without either family connections able to assist him, or the means to obtain a CSID, may be at risk of enduring conditions contrary to article 3 ECHR" (see paragraph 317 of SMO).The UT later stated "the CSID has been replaced with a new biometric Iraqi national identity card – the INID. As a general matter, it is necessary for an individual to have 1 of these 2 documents in

order to live and travel within Iraq without encountering treatment or conditions which are contrary to article 3 ECHR". There is no dispute that the previous and current CG decisions refer to the importance of being in possession such a document to enable its holder to access services, to obtain support and employment and to be able to find accommodation and therefore is essential to life in Iraq (see paragraph 337 of SMO). This was a point which Ms Young properly conceded in her oral submissions.

120. Consequently, notwithstanding the confused expression in paragraph 119, I accept the submission made by Mr Cole that it is clear from reading paragraphs [94 to 118] of the decision why the appeal was allowed on article 3 grounds, and as further explained at paragraph [139] that having accepted the appellant no longer had contact with his family or anyone in Iraq who could reasonably be able to assist the appellant in redocumentation, and having concluded that the appellant was not able to redocument himself from the UK or within a reasonable period upon arrival in Iraq that a forced return in the circumstances would breach the appellant's rights pursuant to article 3 ECHR.

121. For those reasons, there is no error of law in the FtTJ's decision in the way the grounds assert.

122. Having found no error of law in the FtTJ's approach to article 3 of the ECHR, as Mr Cole submitted, it is not necessary to consider the grounds which challenge the assessment made on article 8 of the ECHR as it is not material to the outcome.

123. However, for sake of completeness, I have considered the grounds of challenge on this issue. The grounds on behalf of the respondent assert that the FtTJ's reasoning that the appellant's deportation would result in undue harshness for the appellant's children did not establish that the high threshold was met.

124. Ms Young confirmed in her submissions that the respondent's position was that the judge had given inadequate reasons for reaching the conclusion that the high threshold of undue harshness had been met.

125. There is no dispute that the respondent accepted that the appellant had a genuine and subsisting relationship with his partner and also had a genuine and subsisting parental relationship with his 4 children all of whom lived with him and his partner. It was also accepted that all the children were British citizens and that it would be unduly harsh for them to live in Iraq. Thus the FtTJ's consideration concerned the "stay scenario."

126. The FtTJ's assessment is set out between paragraphs [120]-[135] of her decision.

127. Contrary to the grounds, the FtTJ was plainly aware of the relevant high threshold necessary to demonstrate undue harshness and at [122] cited the decision of MK (Sierra Leone) v SSHD [2015] UKUT 223 which stated that "unduly harsh does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather it poses a considerably more elevated threshold. "Harsh" in this context, denote something severe or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "unduly" raises an already elevated standard still higher."

128. The FtTJ's self-direction was consistent with the correct approach identified by the Supreme Court in HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22 which was to follow that guidance stated to be "authoritative" in KO (Nigeria) and in MK (Sierra Leone) and that it recognised that both the level of harshness which is "acceptable" or "justifiable" is elevated in the context of the public interest in the deportation of foreign criminals and that "unduly" raises that standard higher. It is then for the tribunal to make an evaluative judgement as to whether that elevated standard had been met on the facts and circumstances of the case before it (see paragraphs [41]-[45] of HA (Iraq)).

129. Having considered the decision I am satisfied that the FtTJ's analysis was consistent with that self-direction and that the FtTJ went on to conduct a fact specific and child focused analysis based on the evidence.

130. In undertaking that analysis the FtTJ had the advantage of an ISW report which the judge described as a "particularly well detailed" report that "appeared to draw together information from several sources to produce a well-rounded report" (at [123]). The FtTJ was entitled to rely upon the evidence contained in that report which set out the circumstances of the children and in particular the circumstances in which the 2 elder children had been placed with the appellant and his partner by the local authority as a result of their previous care experiences (at [124]) and that there were identifiable concerns about the children's ability to cope in the event of the appellant's deportation including the properly documented mental health of one of the children and the likely effect upon that child in the event of the appellant's removal from the UK. Also the report set out the evidence of the other children which was supportive of the effect upon the eldest child and that the appellant's deportation would be likely to have a significant impact on the children's welfare and emotional well-being (see [125], [130], [131],[133] and [134]).

131. The grounds make no reference to the contents of the ISW report or the FtTJ's reasoning set out at [135] where the FtTJ set out why the evidence demonstrated that the elevated threshold was met and that it would be unduly harsh for the children to remain in the UK without the appellant. The FtTJ identified that this was not a case where the

children would simply find it difficult to cope with the loss of their father with whom they had parental ties but that this was a case that went beyond that. The FtTJ made reference to the difficult and traumatic experiences relevant to the 2 elder children and the significance of the safety and stability in their current family unit which included the appellant. The FtTJ was entitled to place weight upon the particular concerns identified in relation to the eldest child who had mental health issues (detailed at [133]) and the consequent effect upon his physical, psychological and emotional well-being in the event of the appellant's removal.

132. The grounds assert that the judge failed to have adequate regard to the fact that the appellant needed care himself and thus the extent to which he was able to assist the care of the children not been adequately considered. However that submission as set out in the FtTJ's decision at paragraph [61] was addressed at paragraph [129]. It was open to the judge to find that on the particular facts and circumstances of this case and in the light of the ISW report, the relationship between the appellant and the children was somewhat different to what may be considered "as the norm" and whilst the appellant required his partner to assist him with his own care needs, it was the relationship and bond that the children had with the appellant which underlined the unduly harsh effect upon the children if the appellant were to be deported.

133. The other point raised in the grounds (at paragraph 2) which relates to paragraph [132] misreads the decision. At that paragraph, the FtTJ did not opine that the respondent's partner would be "unwilling" to care for all of the children because she was not the biological parent. What the judge had actually said was that the fact that the appellant's partner was not a blood relative of the children "calls into question what would happen in terms of their care of the appellant were removed in the UK." The FtTJ set out the circumstances in which the children were placed with the appellant and his partner, and such a concern was an entirely legitimate one. In any event it was not a point that was anyway central to the FtTJ's overall reasoning.

134. The last point made is that the judge failed to have regard to the assistance available to the appellant's children from public services in the UK. Ms Young did not seek to explain that point any further. The factual history in relation to the children already demonstrated that one of the children was receiving support from the local authority (at [125]) and it has not been demonstrated by the respondent that this undermined any of the FtTJ's assessment of the overall evidence relating to the circumstances of the children.

135. Therefore having considered the decision of the FtTJ, she correctly directed herself to the unduly harsh test and applied that elevated test to the evidence. Her analysis was consistent with that self-direction and her analysis and reasoning which adopted a child

centred and fact specific assessment was in accordance with the evidence before her.

136. The last issue raised in the grounds is set out at paragraph 15 – 17 where it is submitted that the judge failed to have adequate regard to the wider public interest which was not only concerned with the appellant's risk of reoffending. However as Mr Cole properly submits, the arguments are irrelevant. On any reading of the decision the FtTJ was plainly aware of the public interest in the deportation of foreign criminals however having found that the appellant met one of the statutory Exceptions (Exception 2 in Section 117C (5)) the public interest did not require the respondent's deportation.

137. I deal with one last matter raised in the submissions of the respondent. It was submitted that this was a "generous" decision and one which lacked adequate reasoning.

138. It is trite law that many judges will approach the same set of facts very differently. The mere fact that one judge adopts a relatively favourable interpretation of the evidence they have heard does not necessarily render that finding irrational, simply on the basis that other judges, even many other judges, may have approached the same question in a different manner.

139. Maintaining the distinction between errors of law and disagreements of fact is essential; it reflects the jurisdictional delimitation between the first-instance role of the FTT and the appellate role of the UT and reflects the institutional competence of the FTT as the primary fact-finding tribunal. The distinction, however, is often blurred, with unhelpful consequences. As Warby LJ put it in *AE (Iraq) v Secretary of State for the Home Department* [2021] EWCA Civ 948; [2021] Imm AR 1499 at [32]:

> "Commonly, the suggestion on appeal is that the FTT has misdirected itself in law. But it is not an error of law to make a finding of fact which the appellate tribunal might not make, or to draw an inference or reach a conclusion with which the UT disagrees. The temptation to dress up or re-package disagreement as a finding that there has been an error of law must be resisted."

140. I also remind myself of the observations of Floyd LJ in UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095 at paragraph 19:

> "19. I start with two preliminary observations about the nature of, and approach to, and appeal to the UT. First, the right of appeal to the UT is "on any point of law arising from a decision made by the [FTT) other than an excluded decision": Tribunal, Courts and Enforcement Act 2007 ("the 2007 Act"), section 11 (1) and (2). If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12 (1) and (2) of the 2007 Act. If there is no error of law in the FTT's decision, the decision will stand. Secondly, although "error of law" is widely

> defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in AH (Sudan) v SSHD at [30):
>
> > "Appellate courts should not rush to find such misdirection simply, because they might have reached a different conclusion on the facts or express themselves differently."

141. Ultimately the answer for each First-tier Judge to make is a value judgment and as set out in the decision of AA (Nigeria) [2020] EWCA Civ 1296 at [38]:

> "Different tribunals might [reach] a different conclusion, but it is inherent in the evaluative exercise involved in these fact sensitive decisions that there is a range of reasonable conclusions which a judge might reach."

142. Whilst Ms Young submitted that the decision was "overly generous," even if the decision could be characterised as a generous one, it has not been demonstrated by the respondent that on the particular factual circumstances of this appellant's case and on the evidence before the FtTJ that the decision was either inadequately reasoned by FtTJ Turner or that she failed to apply the correct legal principles in substance. In conclusion the decision Judge Turner reached was one that was reasonably open to her on her own assessment of the evidence before the FtT and that the grounds properly considered amount to no more than a disagreement with the conclusions reached by the FtTJ.

143. For those reasons, the decision of the FtTJ did not involve the making of error on a point of law so that the Upper Tribunal should set aside the decision. The decision of the FtTJ shall stand.

Notice of Decision

The decision of the First-tier Tribunal did not not involve the making of an error on a point of law and therefore the decision of the FtT shall stand.

Signed

Dated 31/ 8 /2022

Upper Tribunal Judge Reeds