IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006292

First-tier Tribunal No: PA/51704/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 1 October 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Mr Hawkar Muhammed
(ANONYMITY ORDER REVOKED)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr S. Khan, Counsel instructed by Rashid and Rashid Solicitors
For the Respondent: Ms A. Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 17 July 2023

DECISION AND REASONS

1. The appellant is a citizen of Iraq. He was born in 1993 and arrived in the United Kingdom as an unaccompanied asylum-seeking child in 2007 aged 14. The appellant presently faces deportation following his conviction and subsequent sentence of 26 months' imprisonment for the evasion of duty arising from selling counterfeit cigarettes. By a decision dated 13 June 2020, the Secretary of State refused a human rights and protection claim made by the appellant, against which the appellant now appeals to this tribunal.

2. The central issues in these proceedings are:

    a. Whether appellant will face Article 3 mistreatment upon his return to Iraq on account of not holding the correct civil status identity documentation,

namely a Civil Status Identity Card ("CSID") or an Immigration and Nationality Identity Card ("INID")?

b. Whether the public interest requires the appellant's deportation, in light of the public interest considerations in section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act")?

3. This appeal was originally heard by First-tier Tribunal Judge Farrelly ("Judge Farrelly") under section 82(1) of the 2002 Act. Judge Farrelly dismissed the appeal on protection grounds and allowed the appeal on human rights grounds. By a decision promulgated on 22 May 2023, I allowed the Secretary of State's appeal against Judge Farrelly's decision to allow the appeal on human rights grounds ("the Error of Law decision"; see the **Annex**), set the decision aside, and directed that the decision would be remade in the Upper Tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. The appellant did not cross-appeal against the protection claim findings reached by Judge Farrelly, which I preserved. The sole issues for redetermination are those set out above.

Anonymity

4. Judge Farrelly made an order for the appellant's anonymity. At paragraph 42 of the Error of Law decision, I indicated that I was minded to revoke the order on the basis that it was not necessary to maintain it. The parties were neutral at the resumed hearing in relation to this issue. I see no reason for the appellant to enjoy anonymity. I therefore revoke the order.

The appellant's case

5. The full factual background (including the appellant's asylum and immigration history) is set out in the Error of Law decision.

6. The appellant's case is that his deportation would be contrary to Articles 3 and 8 of the European Convention on Human Rights. He claims that having arrived in the UK as an unaccompanied child in 2007, he does not have a CSID document, nor any way of obtaining one. Accordingly he will be at risk of Article 3 mistreatment upon his return to Iraq, in particular on the journey from Baghdad, to where he will be returned (see para. 138 of the refusal letter), to the Iraqi Kurdistan Region ("the IKR"). His father is dead, and he is no longer in contact with his mother or uncle, with whom the appellant was found by First-tier Tribunal Judge A. D. Baker ("Judge Baker") in a decision promulgated on 20 September 2010 to be in contact with. His deportation would be disproportionate.

7. The respondent takes the opposite view on both issues, contending that the appellant has not demonstrated that he is at real risk of being unable to secure the appropriate internal documentation in Iraq, and that his deportation would be in the public interest.

Applicable law

8. The statutory ground of appeal is that the appellant's removal to Iraq would be unlawful under section 6 of the Human Rights Act 1998.

9. In relation to Article 3 ECHR (cruel, inhuman and degrading treatment), the appellant relies on the guidance contained in *SMO & KSP (Civil status documentation; article 15) Iraq CG* [2022] UKUT 110 (IAC). Para. 11 of the headnote states it is necessary to possess a CSID or INID in order to live and travel in Iraq without encountering Article 3 mistreatment. The headnote also

sets out considerations relevant to whether an undocumented prospective returnee would be able to obtain a replacement CSID from within the UK.

10. In relation to Article 8 ECHR (private and family life), section 117C of the 2002 Act contains a number of statutory considerations relevant to the public interest in the deportation of "foreign criminals" (see section 117D(2)). Relevant for present purposes is section 117C(6), which provides that the public interest does not require the deportation of a foreign criminal where there are "very compelling circumstances" over and above two statutory exceptions to deportation, contained in section 117C(4) and (5), concerning an individual's private and family life respectively. Further details are summarised at paras 30 and 31 of the Error of Law decision.

11. It is for the appellant to prove to the lower standard ("real risk") that he would be at risk of Article 3 mistreatment upon his return to Iraq. In relation to Article 8, it was common ground that the appellant's deportation to Iraq would engage his rights under Article 8 (1) ECHR, and it was therefore for the respondent to prove that any interference with those rights arising from his removal would be proportionate under Article 8(2). In practice, it is for the appellant to prove that the exceptions to his deportation under section 117 C of the 2002 Act are engaged, or that there are very compelling circumstances over and above the exceptions, to the balance of probabilities standard.

The hearing

12. The resumed hearing took place on a face to face basis at Field House. The appellant did not apply to rely on further evidence save for a printout of his GP Records, which I admitted.

13. The appellant, who was represented by counsel, did not give evidence. He did not give evidence before Judge Farrelly, primarily in reliance upon a report by Dr Asmathulla Hameed, a consultant psychiatrist, dated 16 August 2021 ("the Hameed report"). The report summarises the mental health conditions experienced by the appellant, including the enduring impact upon him of being attacked in 2009, and what he claimed to be the trauma arising from the events in Iraq from which he had claimed to have fled. The relevant para. states:

> "7.28 In my professional opinion, Mr Muhammad is not fit to give oral evidence in court. The court should bear in mind that Mr Muhammad might become distressed by the experience under questioning to the extent that the accuracy of his testimony may be affected by his current psychological state of mind. The cross questioning can make his past experiences fresh and this could be detrimental to his mental health."

14. In the error of law decision, I observed at para. 41 that my preliminary view was that there was no (contemporary) medical evidence suggesting that the appellant lacked the capacity to give evidence before the First-tier Tribunal, and that the Upper Tribunal would be able to make any reasonable adjustments necessary to facilitate him giving evidence as required. As I observed to Mr Khan at the resumed hearing, the Hameed report was almost two years old. There was no contemporary evidence. The concerns of Dr Hameed related primarily to the appellant's prospective distress arising from the experience of having to give evidence and be cross-examined, rather than his ability to understand and engage with the proceedings. To the extent the appellant would experience some distress from that process, I explained, the Upper Tribunal would be able to make any reasonable adjustments required to facilitate his evidence and ensure that

the experience was as harmonious as possible, consistent with the Joint Presidential Guidance Note No. 2 of 2010. Having taken instructions, Mr Khan said that the appellant would continue to decline to give evidence.

15. It was against that background that the hearing proceeded on submissions alone.

Findings of fact

16. I do not propose to repeat or summarise the entirety of the evidence and submissions I heard and considered but will do so to the extent necessary to reach and give reasons for my findings. I considered the entirety of the evidence, in the round, before reaching my findings.

17. By way of a preliminary observation, I assess the appellant's written evidence in light of the fact he has not been cross-examined in relation to it.

Appellant's ability to secure Iraqi documentation: family in Iraq

18. My findings under this heading will be structured as follows: first, I will make findings concerning whether the appellant remains in contact with his family in Iraq; secondly, I will address whether the appellant has any Iraqi identity documentation in the UK; thirdly, if not, I will consider the extent to which he may be able to obtain such documentation from within the UK, or within a reasonable time following his return to Baghdad.

19. The first issue is whether the appellant remains in contact with any of his family in Iraq. The starting point for my analysis on this issue are the findings reached by Judge Baker in 2010: see para. 32 ("he can return safely to his home where his mother and uncle live"). Those findings have not been successfully challenged and remain my starting point.

20. The appellant's written evidence is that he is not in touch with his family; he claims to have no contact with his family "at all" and that he would be unable to obtain any documentation. He also stated that he would not be able to obtain "anything" from the Iraqi embassy. I note that in his GP records he has reported to his doctor that he is not in contact with any of his family members in Iraq.

21. In my judgment, the appellant's written account is an insufficient basis to depart from Judge Baker's findings. While I accept that the passage of time has progressed considerably since those findings were reached, the appellant's written account (in relation to which he did not subject himself to cross examination) is light on detail. He did not explain what, if any, steps he had taken to contact his family had been. He did not address whether he had attempted to use any form of tracing service, nor any attempts he had made to contact his family through social media or other members of the Kurdish diaspora. The application to the Secretary of State which led to the decision under challenge was a fresh claim based on an arrest warrant the appellant purportedly obtained from Iraq. Significantly for present purposes, that demonstrates that as recently as 2015, on the appellant's own case, he was in contact with people in the Kurdish region of Iraq. That significant feature in his chronology is not addressed in the appellant's witness statement prepared for these proceedings.

22. I also take into account that the appellant has been convicted of a serious offence of dishonesty.

23. Drawing this analysis together, I find that the appellant's assertions concerning the total lack of contact with his family have not displaced the starting point

findings reached by Judge Baker. I accept that a considerable period of time has elapsed since then, but the appellant's written evidence (unsupported by his oral evidence and therefore untested in cross examination) is thin and does not address key considerations, nor the practical steps one would expect a person in the appellant's position to have taken in the event that he is genuinely no longer in contact with his family, such as setting out the steps he has taken to attempt to locate them or otherwise revive contact with them. I also note that the appellant has not provided the Secretary of State with any details concerning his prospective Civil Status Registry Office in Iraq (as to which, see para. 67 of *SMO*) to the Secretary of State. The picture that emerges is one of an appellant seeking to deflect scrutiny of his prospective circumstances in Iraq, rather than a credible account of an individual who has lost all contact with his remaining family in Iraq.

24. The appellant has not demonstrated that there is a real risk that he is no longer in contact with his mother and uncle in Iraq. I find that it is more likely than not that he remains in contact with them.

Iraqi documentation in the UK

25. I now turn to whether the appellant continues to hold Iraqi identity documentation in the UK. In my judgment, this is very unlikely. He arrived in the UK aged 14. Even if he left Iraq with his CSID, it would be wholly unrealistic to expect him to continue to be in possession of it some 16 years later.

26. I accept that there is a real risk that the appellant is not in possession of his existing CSID in the UK.

Appellant's prospects of obtaining documentation from Iraq

27. In order to be returned to Iraq, the appellant must either have his existing CSID sent to him in the UK by his remaining family members in Iraq or take steps to obtain a replacement document from within the UK.

28. It is very difficult on the evidence before me to make a positive finding concerning whether the appellant's family in Iraq still have a document would have been issued to him as a child 16 years ago in a country that has been marred by conflict ever since. I make no finding on this issue. I will assume for the purposes of the analysis that follows that the appellant's family do *not* hold his original CSID.

29. It will therefore be necessary for the appellant's family to obtain a replacement document for him in Iraq, or for the appellant to obtain his own document through Iraqi consular facilities in the UK. That will only be a possibility if the appellant's Civil Status Registry area in Iraq has not upgraded to INID terminals. The appellant has not provided any details concerning his home area in Iraq in order for the Secretary of State to undertake the necessary enquiries with the Iraqi authorities concerning whether the upgrade has taken place in the relevant civil status area. There are around 300 civil status offices in total: see para. 67 of *SMO*. Since as recently as 2015 the appellant has been able to secure what he claims to have been a genuine arrest warrant issued to him in Iraq, there is no reason to conclude that the information concerning his home area is not available to him. He has simply chosen not to provide that information to either the Secretary of State or the Upper Tribunal.

30. Since it is for the appellant to establish that he would be at real risk of not being able to redocument himself, I find that he has failed to establish that there is a real risk that his home area has upgraded to INID machines. He has simply

provided no evidence of this. Mere assertion is insufficient to meet even the lower standard applicable to protection claims. I find that he has not provided the details to the Secretary of State because he knows, through his family with whom he is in contact, that CSID terminals are still in use. It is more likely than not that he does not want to reveal the details of the civil status area to the Secretary of State because he knows that, by doing so, he will facilitate his return to Iraq.

31. It follows, therefore, that in principle the appellant's family will be able to obtain a replacement CSID for him from within Iraq, or that the appellant will be able to do so using Iraqi consular facilities in the United Kingdom. Central to whether either his family, all the appellant himself, will be able to do so is the question of whether the appellant is able to obtain the relevant volume and page number from the "family book" in Iraq.

32. I accept that it would be wholly unrealistic to expect the appellant to have left Iraq with details of his page and volume number committed to memory. He was only 14 at the time. He will therefore have had very few opportunities to memorise those details in the way that many Iraqis are required to do so when engaging with the bureaucracy of daily life. I accept that there is a real risk that the appellant cannot recall those details himself. However, the appellant is, pursuant to my findings above, in touch with his mother and his uncle. They will have the details and will be able to pass them on to him to enable him to obtain a replacement from the Iraqi embassy in the UK, or, through the assistance of his uncle in Iraq (bearing in mind the patrilineal nature of the system: *SMO*, para. 83), obtain a replacement for him by proxy. The document could then either be sent to the appellant in the UK, or arrangements could be made for him to be provided with the document a reasonable time after his arrival in Baghdad.

33. In conclusion, I reach the following findings:

    a. The appellant remains in contact with his mother and uncle.

    b. Even assuming that the appellant's original CSID document is no longer available in Iraq, there is no evidence that the appellant's area has upgraded to INID terminals.

    c. The appellant's Iraq-based family will be able to provide the relevant details from the Family Book in order to obtain a replacement by proxy from within Iraq, or to enable the appellant to obtain a replacement from Iraqi consular facilities in the UK.

    d. The appellant is not at a real risk of not being able to obtain a CSID document to facilitate the journey from Baghdad to the IKR.

34. The appeal cannot succeed on the basis of Article 3 on this account.

Section 117C of the 2002 Act: very compelling circumstances

35. Mr Khan very fairly accepted that the appellant could not meet either of the statutory exceptions to deportation, and that the appellant could only defeat the public interest in his deportation by demonstrating the presence of "very compelling circumstances" over and above the statutory exceptions deportation. I will perform a balance-sheet assessment, addressing the factors raised by Mr Khan on the appellant's behalf against those in favour of his deportation.

36. Factors militating in favour of the appellant's deportation include:

    a. The appellant is a foreign criminal, as defined, and the deportation of foreign criminals is in the public interest.

b. The more serious the offence committed by a foreign criminal, the greater is the public interest in the deportation of the criminal. The appellant was sentenced to 26 months' imprisonment for an offence described by the sentencing judge as having "huge socioeconomic implications", which he committed while on police bail while he was under investigation for the same offences.

c. The appellant does not satisfy either of the statutory exceptions to deportation. He has not lived lawfully in the UK for more than half of his life, and he will not (on my findings concerning the CSID issue) face very significant obstacles to his integration in Iraq. Although he has not lived in Iraq since his childhood, he will return to his mother and the family home.

d. There is no suggestion that the appellant enjoys family life with a qualifying child or partner.

e. The maintenance of effective immigration controls is in the public interest. The appellant does not meet any of the Immigration Rules.

f. The appellant does not pursue an Article 3 health claim.

g. While the appellant has held leave for part of his time residing in the UK, he has been without leave since 7 July 2010. His immigration status has been precarious, at best. His private life attracts little weight.

37. Factors militating against the appellant's deportation include:

a. The appellant pleaded guilty to his offence in the Crown Court. His sentence was reduced as a result and is therefore a less serious sentence than would otherwise have been the case. Although the offence is serious, there are other more serious offences. This was not an offence of violence or with a sexual motive. The appellant was not a ringleader.

b. The appellant has not committed further offences.

c. The appellant has lived in the UK for more than half of his life, albeit not lawfully for the entirety of that time. The entirety of his adult life has been spent in the UK.

d. The appellant's education has been entirely in the UK. Any formal skills gained will be for the UK labour market.

e. The appellant has developed a support network here. He has integrated into the community. There are numerous letters of support for him in glowing terms.

f. He experiences a range of mental health conditions, including PTSD. On any view he had a traumatic childhood, having arrived as an unaccompanied minor in 2007, and having sustained a horrific attack some two years later. His mental health conditions mean that adjusting back to life in Iraq will be difficult (although he will be aided by his mother and uncle).

g. The appellant speaks English.

38. In my judgment, the factors in favour of the appellant's deportation outweigh those militating against it. The appellant is a foreign criminal. The public interest in the deportation of foreign criminals is weighty. While I accept that the appellant

has resided in the United Kingdom for a lengthy period of time and that his return to Iraq will be difficult, he will be returning to his family members, and will be able to obtain the necessary documentation to enable him to live and travel within the country without encountering Article 3 mistreatment. The factors on the appellant's side, while weighty, are not capable, even taken cumulatively, outweigh the factors in the Secretary of State's side of the scales. His private life attracts little weight.

39. I therefore conclude that the public interest requires the appellant's deportation and that there are no very compelling circumstances over and above either of the statutory exceptions.

40. This appeal is dismissed.

Notice of Decision

The decision of Judge Farrelly involved the making of an error of law and is set aside. I re-make the decision, dismissing the appeal on human rights grounds.

I make no fee order.

Stephen H Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
18 September 2023

Annex – Error of Law decision

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006292

First-tier Tribunal No: PA/51704/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

The Secretary of State for the Home Department

Appellant

and

HM (Iraq)
~~**(ANONYMITY DIRECTION IN FORCE)**~~

Respondent

Representation:
For the Appellant: Ms J. Isherwood, Senior Home Office Presenting Officer
For the Respondent: Mr M. Moriarty, Counsel instructed by Rashid and Rashid Solicitors

Heard at Field House on 3 April 2023

~~**Order Regarding Anonymity**~~

~~**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.**~~

~~**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court**~~.

DECISION AND REASONS

1. By a decision and reasons promulgated on 27 June 2022, First-tier Tribunal Judge Farrelly ("Judge Farrelly") allowed an appeal brought by the respondent to these proceedings, HM, against a decision of the Secretary of State dated 13 June 2020 to refuse his fresh claim for asylum and a human rights claim. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

2. The Secretary of State now appeals to the Upper Tribunal with the permission of First-tier Tribunal Judge Adio.

3. For ease of reference, in this decision I will refer to the appellant before the First-tier Tribunal as "the appellant".

Factual background

4. The appellant is a citizen of Iraq from Kirkuk. He arrived in the United Kingdom in 2007 clandestinely and claimed asylum. He gave a date of birth in 1993, which was later accepted by the relevant local authority. His asylum claim was refused but he was granted leave as an unaccompanied minor. The appellant appealed against the refusal of his asylum claim to the First-tier Tribunal. The appeal was heard by First-tier Tribunal Judge Baker ("Judge Baker") and dismissed by a decision promulgated on 20 September 2010. Judge Baker did not accept the appellant's claim to be at risk from the authorities for offences he had not committed. He found (para. 32) that the appellant could return home to live with his mother and uncle.

5. The appellant made further submissions in 2012, which were refused in 2013 in circumstances that did not attract a right of appeal.

6. On 21 July 2017, the appellant again made further submissions. The thrust of the appellant's fresh claim was that he had procured purported arrest warrant documents issued against him in Iraq which, he said, demonstrated that he remained at risk from the authorities in Kirkuk. The arrest warrants threw Judge Baker's findings into sharp relief, he said. He also claimed to have lost contact with his family. He had tried to contact them through the Red Cross, but it could not assist due to the "situation in Kirkuk and Mosul." He had no ID documents and no way to obtain any.

7. Those submissions were refused as a fresh claim on 13 June 2020, and it was that decision that was under appeal before Judge Farrelly. The Secretary of State rejected the arrest warrants strand of the claim on credibility grounds, in light of Judge Baker's findings. As for his documentation, the appellant had an "established residency" in Kirkuk. His family members living there would be able to get the necessary documents to him upon his return to Baghdad to facilitate his onward travel to Kirkuk.

8. In the period between the appellant making further submissions in 2017 and their refusal in 2020, the appellant pleaded guilty to 9 counts on an indictment charging him with offences relating to selling counterfeit and unregulated cigarettes as genuine. On 27 September 2019 in the Crown Court at Gloucester, HHJ Cullum sentenced the appellant to 26 months' imprisonment.

9. As well as refusing the appellant's fresh claim for asylum on its merits, the Secretary of State's decision of 13 June 2020 included a decision to deport the appellant in respect of the above convictions.

10. The appellant did not give evidence before Judge Farrelly, because of "his mental state" (see para. 20). His written case before the judge was that the arrest warrants were genuine, and also that he had no Iraqi documentation, no CSID (Civil Status Identity Document), or *laissez passer* (see para. 21 of his fresh claim witness statement). There were no fingerprints in the system for him, since he came to the UK when he was very young. He had no contact with his family. He could not obtain documents from the Iraqi embassy.

11. The issue of the appellant's ability to secure the necessary documentation was identified on the Schedule of Issues in the Respondent's Review: see para. 3(iii). At para. 5, the review stated that there was no evidence that the appellant had attempted to redocument himself following Judge Baker's findings or made any attempts to re-establish contact with his family in Iraq.

The decision of Judge Farrelly

12. In his decision, Judge Farrelly dismissed the appeal insofar as it related to the arrest warrants and a challenge to the Secretary of State's decision to refuse the international protection element of the fresh claim (although, I observe, in his operative findings under the *Notice of Decision*, the judge merely stated that the appeal was "allowed", without specifying the basis, or that any part of the appeal had been dismissed).

13. At para. 33, the judge said that there were no features of the appellant's individual circumstances or mental health conditions which meant that Article 15(c) of the Qualification Directive would be engaged if he were to live in Kirkuk. At para. 34, the judge considered "reasonableness of return" in any event, observing that the:

> "…country information indicates the limitation on services in Iraq particularly since the decades long conflict. The appellant would also have very limited if any support mechanism on return."

14. As to the appellant's ability to secure documentation, the judge said this, at para. 36:

> "Documentation is crucial. The appellant has no documentation and claims to know no details of his documentation. I bear in mind his age when he left his home country. I also bear in mind his claim that he is not in contact with his family. On this basis, an absence of documentation means he cannot be returned and the evidence does not indicate to me he has the means of securing identification documents."

15. After summarising some of the conclusions concerning documentation in *SMO & KSP (Civil status documentation; article 15) Iraq CG* [2022] UKUT 110 (IAC), the judge concluded his analysis on this issue at para. 38:

> "Regarding documentation, former residents of the Kurdish region would be returned there and others would be returned Baghdad. The decision confirmed the importance of documentation for return. The decision considered the new biometric national identity card and indicated it was an essential document to live and travel was in Iraq. To obtain this individual must attend at the office. They all CSI D is [*sic*] remained available through contrary facilities but only for those who had registered. Obtaining documents were dependent upon knowledge of the entry in the family book."

16. The judge addressed the Article 8 limb of the appellant's appeal at paras 39 to 41. At para. 39, the judge said that he bore in mind "the public interest factors" in maintaining the deportation order against the appellant. He had had regard to para. 398 (presumably of the Immigration Rules) "and the presumption therein." He bore in mind the additional "consideration" set out in section 117C of the 2002 Act.

17. The judge's operative analysis was at paras 40 and 41. The appellant had spent most of his life in the UK, and in 2017 had provided a letter from someone at his former school. He had been separated from his family since his teenage years. There had been "some delay" on the part of the Secretary of State. The judge had regard to the "nature of the offences", the passage of time, and the absence of reoffending. He bore in mind the "possibility of rehabilitation". The judge concluded the appeal in these terms:

> "Looking at all matters in the round it is my conclusion that there are exceptional circumstances which would justify the revocation of the deportation order. Furthermore, in terms of his article 8 rights I find paragraph 276 ADE(vi) applies and there are very significant obstacles to his reintegration into Iraq."

Issues on appeal to the Upper Tribunal

18. The Secretary of State's grounds of appeal are listed under the rubric of "making a material misdirection/lack of adequate reasoning/failing to take into account or resolve conflicts of fact or opinion on a material matter" in relation to two key findings. The first challenge is to Judge Farrelly's findings that the appellant would not be able to obtain the necessary Iraqi documentation to enable him to travel from Baghdad to Kirkuk without being exposed to a real risk of serious harm. The second challenge is to the judge's decision to allow the appeal on Article 8 grounds.

19. The grounds contend that Judge Farrelly failed properly to direct himself concerning the import of Judge Baker's decision thereby failing to apply the guidance in *Devaseelan (Second Appeals - ECHR - Extra-Territorial Effect) Sri Lanka* * [2002] UKIAT 00702. The finding that the appellant would be unable to secure the necessary documentation was inadequately reasoned, not least in view of the minimal steps the appellant had taken to take responsibility for that issue. As to the appellant's mental health, there was no evidence that he had sought to engage with mental health services in the UK. Para. 276ADE(1)(vi) of the rules was incapable of being engaged as the proceedings concerned a deportation decision. The judge erred in the approach to delay. Ms Isherwood's submissions amplified the grounds of appeal.

20. For the appellant, Mr Moriarty submitted that Judge Farrelly plainly did have regard to Judge Baker's decision. He gave appropriate reasons for finding that the appellant would be unable to secure the necessary documentation, in light of the evidence before him at the time of the hearing. Mr Moriarty accepted that the judge erred by purporting to apply para. 276ADE(1)(vi), but any error was immaterial. The judge listed "exceptional circumstances" for the purposes of the Article 8 appeal at para. 40, and was entitled to reach the conclusion he reached, for the reasons he gave.

Judge Farrelly gave insufficient reasons concerning documentation

21. By way of a preliminary observation, in exercising its error of law jurisdiction, it is necessary for this appellate tribunal to exercise considerable restraint when

scrutinising the findings of fact reached by a first instance trial judge. A disagreement of fact is not an error of law. 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 [First-tier Tribunal] 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 [Upper Tribunal] disagrees. The temptation to dress up or re-package disagreement as a finding that there has been an error of law must be resisted."

22. It is well established that the conclusion that a judge has given insufficient reasons will not readily be drawn: see *South Buckinghamshire District Council v Porter (No 2)* [2004] UKHL 33, at para. 36. See also *English v Emery Reimbold & Strick Ltd. (Practice Note)* [2002] EWCA Civ 605 at, for example, para. 118:

> "…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."

23. Notwithstanding the restraint with which this tribunal should approach findings of fact reached by the First-tier Tribunal, I prefer Ms Isherwood's submissions concerning the documentation issue to those advanced by Mr Moriarty.

24. While it is well-established that this tribunal will not readily interfere with findings of fact reached by the First-tier Tribunal, this was not a finding that turned on an analysis of the appellant's oral evidence, since the appellant had not given evidence (as to which, see *MAH (Egypt) v Secretary of State for the Home Department* [2023] EWCA Civ 216 at para. 69).

25. In my judgment, the reader of Judge Farrelly's decision is not able to understand why the judge accepted the appellant's case concerning documentation. The decision is silent as to why he accepts the appellant's claim *not* to have any documentation and not to be in contact with his family. At para. 36, the judge simply stated that "the appellant has no documentation" and that he "is not in contact with his family". The appellant had asserted that he did not have the necessary internal Iraqi documentation (that is, a CSID card or an INID card), but it was his case to prove that he did not. Judge Baker had found in 2010 that the appellant *was* in contact with his mother and uncle and could return to live with them: para. 32. Whether the appellant had documentation or not, and whether he remained in contact with his family such that he could secure their assistance in the re-documentation process, was a disputed issue before the First-tier Tribunal, to be resolved in light of the existing findings of fact on the point: see para. 3(iii) of the Respondent's Review. It is nothing to the point, as submitted by Mr Moriarty, that the appellant's written evidence made similar assertions; what is key is knowing *why* the judge accepted his evidence, and reached those findings.

26. Rather giving reasons to explain why he had found in the appellant's favour on this point, the judge simply stated the conclusion that he had reached, without saying why he had reached it. The judge thereby failed to resolve the conflict of fact arising from the starting point of Judge Baker's decision and failed to give sufficient reasons for reaching that conclusion.

27. I therefore find that the judge had failed to give sufficient reasons for the findings at paras 34, 36 to 38 concerning the appellant's ability to redocument himself.

Deficient Article 8 analysis

28. I find that the judge's Article 8 analysis was deficient. First, Judge Farrelly was not addressing an appeal against a refusal to revoke a deportation order. The operative decision of the Secretary of State that was under appeal was the refusal of a human rights claim, made by the appellant in an attempt to dissuade the Secretary of State from *making* a deportation order. The question of revocation simply did not arise. In fairness to the judge, the parties appear incorrectly to have categorised the issue for the judge's consideration relating to the revocation of a deportation order (see para. 21 of the appellant's skeleton argument, para. 3(viii) of the Respondent's Review), and this may have caused the judge to focus more on the Immigration Rules than he otherwise would have done, at the expense of the 2002 Act, as I set out below.

29. Secondly, the judge did not direct himself concerning the operative provisions of the 2002 Act to which regard must be had when considering whether the deportation of a foreign criminal was in the public interest. Rather than adopting the structured approach required by section 117C of the 2002 Act, Judge Farrelly referred to whether there were "exceptional circumstances which would justify the revocation of the deportation order". "Exceptional circumstances" is the test from the Immigration Rules, rather than from section 117C(6), and the judge's paraphrase, as I have already set out, incorrectly concerns the refusal to revoke a deportation order. It is generally unnecessary to refer to the Immigration Rules in a deportation case. The rules address the Secretary of State's assessment of a decision to deport an individual, whereas Parliament has enacted primary legislation to make provision to govern a court or tribunal's assessment of proportionality in the context of an appeal against the refusal of a human rights claim: see *CI (Nigeria) v Secretary of State for the Home Department* [2019] EWCA Civ 2027 at paras 20 and 21. For the reasons I set out below, the judge's analysis omitted key considerations required pursuant to the structured approach governed by section 117C.

30. As a foreign criminal sentenced to less than four years' imprisonment (see section 117D(2)), the appellant's deportation would be in the public interest unless he was able to establish that exception 1 or 2 applied, or that there were "very compelling circumstances over and above" the exceptions: see section 117C(3) to (6). The assessment of whether there were "very compelling circumstances" over and above the exceptions must be informed by an analysis of the extent to which the appellant meets the substance of the different limbs of each exception, even if, on the facts of the case, it would not be possible to meet all limbs. In turn, that analysis calibrates the extent to which there are "very compelling circumstances over and above" the exceptions. The judge did not perform that analysis, with the consequence that he gave insufficient reasons for allowing the appeal.

31. Exception 2 was not relevant on the facts of this case as the appellant does not have a partner or any children, but Exception 1 features relevant considerations. Section 117C(4) provides:

> "(4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,

> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported."

32. As to sub-paragraph (a), plainly the appellant has not been lawfully resident for most of his life. He has had some lawful residence but has resided here unlawfully for most of his residence.

33. As to sub-paragraph (b), the extent to which the appellant is socially and culturally integrated was a relevant consideration to which Judge Farrelly did not have express regard. He referred to a letter from 2017, some five years before the hearing, but did not make any findings on the point. The appellant had pleaded guilty to a number of criminal offences, including offences that he had committed while under police investigation for offences of the same nature. While the commission of offences is not determinative of a lack of integration on the part of a foreign criminal (for otherwise such analysis would always be redundant, since all foreign criminals have, by definition, committed criminal offences), the fact that the appellant had proceeded to commit further offences of the same sort as those for which he was initially investigated by the police, during the currency of a live police investigation into the same, was a factor of relevance to which the judge should have had regard, but did not.

34. As to sub-paragraph (c), it was necessary for the judge to address whether the appellant would face very significant obstacles to his integration in Iraq. Judge Farrelly appears to have been persuaded that the appellant *would* face such very significant obstacles, pursuant to his finding that the appellant satisfied para. 276ADE(1)(vi) of the Immigration Rules. That is because para. 276ADE(1)(vi) requires an analysis of whether an applicant would face "very significant obstacles" to their integration, which is the same test as may be found at section 117C(4)(c).

35. Putting to one side the fact that para. 276ADE(1)(vi) was not capable of being engaged in the case of a foreign criminal due to the suitability requirements in the Immigration Rules, Judge Farrelly did not say *why* the appellant would face very significant obstacles to his integration in Iraq in any event. Nor did he direct himself as to what the concept means. The reader of his decision is left unclear as to why he reached that conclusion. At para. 34, Judge Farrelly appeared to ascribe significance to the appellant's post-traumatic stress disorder in the context of the "reasonableness of return", when analysing the protection limb of the appellant's case. It is not clear why the judge addressed the reasonableness of the appellant's return at that juncture, since in the preceding paragraph he had found that the appellant's mental health characteristics and personal history would not place him at risk for the purposes of Article 15(c) of the Qualification Directive. The question of the reasonableness of return thus fell away. Similar observations apply in relation to the judge's findings at para. 35 that the appellant "would have very limited if any support mechanisms *on return*".

36. Judge Farrelly may also have based the "very significant obstacles" finding on his (unreasoned) findings that the appellant had lost contact with his family and would not be able to secure the necessary documentation on his return. If so, the very significant obstacles findings were built on the foundation of those earlier, unreasoned findings, and would themselves be insufficiently reasoned.

37. It is difficult to see how the remaining reasons given by the judge at para. 40 for finding that there were "exceptional circumstances which would justify the

revocation of the deportation order" are capable of supporting a finding under section 117C(6), in light of above weaknesses in the judge's decision. The judge's finding that there was "some delay" on the part of the Secretary of State in considering the further submissions made by the appellant does not withstand scrutiny; the further submissions were made in June 2017. The appellant's offending conduct began in November 2017, and continued while the police investigation was ongoing. He was sentenced on 27 September 2019, and the refusal decision was dated 13 June 2020. That is a not a culpable delay. On any view, and it was not rationally open to the judge to conclude that it was, still less that it diminished the public interest in the appellant's deportation. The absence of reoffending was, in principle, a relevant factor but, in isolation, and without being addressed against the background of the relevant factors under section 117C of the 2002 Act, it could not play a decisive role in the public interest assessment.

38. I therefore conclude that the judge erred in law.

Setting aside the decision

39. The above errors of law go to the heart of the operative bases upon which the judge appears to have allowed the appeal. I allow the appeal and set aside the decision of the judge. There was no challenge to the judge's reasons rejecting the protection limb of the appellant's case, which I preserve. Having regard to para. 7.2 of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, I consider that the nature and extent of judicial fact-finding required is not such as to merit remitting this appeal to the First-tier Tribunal. Having regard to the overriding objective, in particular the need to avoid delay, I consider that it is appropriate to rehear the appeal in the Upper Tribunal, acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

40. The appellant, if so advised, may wish to rely on additional evidence at the resumed hearing before the tribunal, in accordance with the directions set out below.

41. It will be a matter for the appellant to decide whether to give evidence. I observe that there was no suggestion in the Crown Court materials that the appellant was not fit to plead, nor that there was any medical evidence suggesting that he lacked the capacity to give evidence before the First-tier Tribunal. The Upper Tribunal will, of course, make any reasonable adjustments necessary to facilitate the appellant giving evidence, as required.

42. Judge Farrelly made an anonymity order. My preliminary view is that it is not necessary to maintain that order, in light of the unchallenged findings concerning the appellant's protection claim. For the time being, I maintain the order, and invite the submissions of the parties on this issue at the resumed hearing.

Notice of Decision

The decision of Judge Farrelly involved the making of an error of law and is set aside, subject to the findings of fact set out at para. 39 being preserved.

[Case management directions omitted.]

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

11 April 2023