



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00675/2017

THE IMMIGRATION ACTS

Heard at Bradford
On 17th July 2018

Decision & Reasons Promulgated
On 09th August 2018

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

MK

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Diwyncz Senior Presenting Officer
For the Respondent: Mr Karnik, Counsel instructed on behalf of the Appellant

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the decision of the First-tier Tribunal (Judge Robson) promulgated on the 3rd October 2017 in which the Tribunal allowed the appeal of MK against the decision of the Secretary of State to refuse his protection and human rights claim in the context of the Respondent having made a deportation order against him under Section 32(5) (of the UK Borders Act 2007).
2. I make a direction regarding anonymity under Rule 14 of the Tribunal Procedure (Upper Tribunal Rules) Rules 2008. Unless and until a court directs otherwise the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly refer to him or members of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

3. Although the Secretary of State is the Appellant before the Tribunal, I will for ease of reference refer to him as the Respondent as he was the Respondent in the First-tier Tribunal. Similarly I will refer to MK as the Appellant as he was the Appellant before the First-tier Tribunal.

Background

4. The background to the appeal is set out in the papers and the determination of the First-tier Tribunal and also in the decision letter of the Secretary of State dated 10th January 2017. The Appellant is a national of Iraq. He entered the United Kingdom in 2004 and made a claim for asylum. The basis of his claim to asylum was that he had had a problem with his father because he had wanted him to marry his cousin but had refused and therefore he was at risk from his father. He could not return to his home town of Erbil because his father would find him and kill him and could not move anywhere else in Kurdistan (see paragraph 27 of decision of Judge Andrews). The Appellant therefore left Iraq. His claim for asylum was refused and came before the Tribunal on 20 September 2004. In a decision set out in the Respondent's bundle, the judge accepted the account given as set out above and this formed the factual basis for the determination. The judge found that the claim did not engage one of the five reasons under the Refugee Convention nor did it cross the threshold to be a breach of Article 2 or Article 3 on the basis that there was sufficiency of protection in Kurdistan or in the alternative it would not be unreasonable or unduly harsh to expect the Appellant to locate to a different part of Iraq. Thus the appeal was dismissed. Permission to appeal was refused and he became appeal rights exhausted in January 2005.
5. On the 20 February 2008 and 8 March 2010 further submissions were made on the basis of Article 8. In 2009 he was married to Y in an Islamic ceremony the parties having known each other since 2006. She had previously been married and had a number of children from that earlier relationship. On 25 August 2010 he was granted discretionary leave on the basis of his Islamic marriage to a British citizen and birth of a child until August 2013. Between 2010 and August 2013 the Appellant travelled to Iraq for periods of time.
6. On 23 August 2013 made an application for extension of discretionary leave and this was granted, valid until the 18th of February 2017.
7. He has committed criminal offences whilst in the United Kingdom. In 2016 at the magistrates court he was convicted of failing to provide a specimen for analysis (driving or attempting to drive) which he received a community order and later in 2016 at the same magistrates court was convicted of further driving offences (driving without due care and attention) for which he received no separate penalty and his driving licence was endorsed.
8. On 29 July 2016 at the Crown Court he was convicted of dangerous driving to which he was sentenced to 14 months imprisonment, driving while disqualified from which he was sentenced to 3 months imprisonment to be served consecutively, and of using a vehicle without insurance for which he received no separate penalty. In addition he was disqualified from driving for three years. His total sentence was one of 17 months imprisonment.

9. On 22 August 2016 he was served with a stage I decision to deport notice and following this in September 2016 his legal representatives made submissions on his behalf raising Articles 3 and 8 of the ECHR. In a decision letter of 10 January 2017 the Respondent made a decision to refuse a protection and human rights claim.
10. Thus the appeal came before the First-tier Tribunal on the 11th September 2017. In a determination promulgated on 3rd October 2017, the First-tier Tribunal allowed his appeal on all grounds (Article 15 (c) and Article 8).

The Appeal before the Upper Tribunal:

11. The Secretary of State sought to appeal that decision and permission was granted by FtT Judge Martins on the 25th October 2017 for the following reasons: -

“The grounds assert that the judge failed to take into account the decision in AA (Iraq) v SSHD [2017] EWCA Civ 994, in which amended country guidance is provided, showing that the Tribunal is incorrect when concluding that the inability to currently remove the Appellant, creates a risk to the Appellant under Article 15 C on return to his home area Erbil. As there are findings that the Appellant is not at risk in his home area, there is no requirement to him to relocate elsewhere in Iraq. Further it is noted that the amended guidance of the Court of Appeal is to the effect that lack of documentation, cannot create any risk to the Appellant on the basis of Article 15 C, unless there is a risk to the Appellant on return to Iraq.

It is further submitted that the judge failed to make any findings, in respect of the Appellant’s ability to obtain a new passport. It is submitted that the judge failed to consider the Appellant’s Article 8 claim, with reference to the requirements of paragraph 399 of the Immigration Rules and section 117C of the NIA Act 2002. There is also no finding reasoning that the Appellant’s deportation would be unduly harsh. The assertion the grounds are evident in the face of the decision. They disclose an arguable error of law. An arguable error of law is shown.”

12. At the hearing before the Upper Tribunal I heard submissions from each of the advocates, Mr Diwncyz on behalf of the Respondent and Mr Karnik on behalf of the Appellant who also had provided a Rule 24 response. It is not necessary to set out the submissions of each of the parties as they are set out in the record of proceedings and I will set out the relevant aspects of those submissions when dealing with the grounds advanced on behalf of the parties and my consideration of those issues.

Article 8:

13. I shall begin with the grounds advanced on behalf of the Respondent that concerns the judge’s assessment of the Article 8 claim.
14. It is submitted on behalf of the Respondent that the judge failed to consider the Appellant’s Article 8 claim with reference to the requirements of paragraph 399 of the Immigration Rules section 117C of the Nationality, Immigration and Asylum Act 2002. In particular, as the Appellant was a foreign criminal who had been sentenced to a period of imprisonment of 17 months, he was required to demonstrate that his deportation would result in “unduly harsh” outcomes for his partner and children.
15. When applied to the determination, the judge failed to provide any findings or reasoning to reach a decision that the Appellants deportation would be unduly

harsh. Indeed in the oral submissions made it was submitted that there had been no proper consideration of the public interest when reaching the decision that there was a disproportionate interference with the Appellant's wife's and child human rights (see paragraph 76 of the determination).

16. Mr Karnik in his skeleton argument and his oral submissions argued that contrary to the grounds of appeal, the judge did make reference to the correct legal framework having referred to it at [67] and that he had also considered the factors at [74] and had applied the test at [76] as to whether the decision was disproportionate (applying the decision in Hesham Ali [2016] 1 WLR 4799).
17. He submitted that the judge had found he had no ties to Iraq and that his wife's ties were in the UK and that they had a British child. Where it was accepted that return was not feasible and that his sentence of 17 months imprisonment fell to the "lower end of the bracket covered by the Immigration Rules" the decision could not be called perverse. In his oral submissions he made reference to the evidence given by the probation officer as to his positive behaviour in prison and that when putting the proportionality balance, those factors demonstrated that the decision could not properly be said to a perverse conclusion on the evidence that was before the judge.
18. I have carefully considered the competing submissions made by the advocates and have done so in the light of the evidence before the FtTJ and the determination.
19. There can be no dispute as to the applicable legal framework that the judge was required to apply. For the avoidance of doubt I set it out below.

The legal framework

20. The relevant statutory background is set out as follows:

A362. Where Article 8 is raised the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met ...

...

Deportation and Article 8

A398. These rules apply where:

...

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

...

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months...

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –
- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
 - (i) the child is a British Citizen; or
 - (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
 - (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
 - (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
 - (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and
 - (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and
 - (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and
 - (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported."

21. On 28th July 2014 the Immigration Act 2014 ("the 2014 Act") came into force. It inserted a new part 5A into the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Sections 117A and 117D of the 2002 Act provide in relevant part:

22. Part 5A provides in relevant part as follows:

"PART 5A

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or Tribunal is required to determine whether a decision made under the Immigration Acts –

- (a) breaches a person's right to respect for private and family life under Article 8, and
- (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or Tribunal must (in particular) have regard –

- (a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception E1 or Exception E2 applies.

- (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.
- (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
- (7) The considerations in sub-Sections (1) to (6) are to be taken into account where a court or Tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this part

- (1) in this Part -
- “Article 8” means Article 8 of the European Convention on Human Rights:
- “qualifying child” means a person who is under the age of 18 and who -
- (a) is a British citizen, or
 - (b) has lived in the United Kingdom for a continuous period of seven years or more:
- “qualifying partner” means a partner who -
- (a) is a British citizen, or
 - (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 – see Sections 33(2A) of that Act).
- (2) In this Part, “foreign criminal” means a person -
- (a) who is not a British citizen,
 - (b) who has been convicted in the United Kingdom of an offence, and
 - (c) who -
 - (i) has been sentenced to a period of imprisonment of at least twelve months,
 - (ii) has been convicted of an offence that has caused serious harm, or
 - (iii) is a persistent offender.

23. In essence, the central issue to be determined by the First-tier Tribunal was whether or not it would be “unduly harsh” for the Appellant’s former partner and children to live in Iraq or whether or not it would be “unduly harsh” for his former partner and child to remain in the UK without MK, who the Respondent sought to be deported. Thus the judge was required to consider what is meant by “unduly harsh” within the context of the law.
24. The correct approach relating to what is meant by “unduly harsh” within the context of the legislation is set out in the following paragraphs from the judgment of Laws LJ, with whom Vos and Hamblen LJ agreed, in **MM (Uganda) v the SSHD** [2016] EWCA Civ 450:
- “[22] I turn to the interpretation of the phrase ‘unduly harsh’. Plainly it means the same in Section 117C (5) as in Rule 399. ‘Unduly harsh’ is an ordinary English expression. As so often, its meaning is coloured by its context. Authorities hardly needed for such a proposition but it is anyway provided, for example by **VIA Rail Calendar** [2000] 193 DLR (4th) 357 at paragraphs [35] to [37].
- [23] The context in these cases invites emphasis on two factors, (1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with Article 8 rights. In my judgment, with respect, the approach of the Upper Tribunal in **MAB** ignores this combination of factors. The first of them, the public interest in the removal of foreign criminals, is expressly vouched by parliament in Section 117C (1). Section 117C (2) then provides (I repeat the provision for convenience):
- ‘The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.’
- [24] This steered the Tribunals and the court towards proportionate assessment of the criminal’s deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show the effect on his child or partner will be unduly harsh. Any other approach in my judgment dislocates the ‘unduly harsh’ provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation in the particular case. But in that case the term ‘unduly’ is mistaken for ‘excessive’ which imports a different idea. What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances could certainly include the criminal’s immigration and criminal history.”
25. This decision was followed by the Court of Appeal in **R (MA (Pakistan)) v SSHD** although Elias LJ with whom King LJ and Sir Stephen Richards agreed, expressed some doubts about the introduction of the public interest into the test of undue harshness.
26. It is therefore clear from the decision in **MM (Uganda)** that it is not appropriate to consider the question of “unduly harsh” solely from the perspective of the impact which deportation would be likely to have upon the children or partner involved.

27. When applied to the factual circumstances of the Appellant, he fell within the definition of a “foreign criminal” who had been sentenced to a period of imprisonment of 17 months and thus the issue was whether he fell within Exceptions 1 and 2 (see Section 117C (5) and paragraph 399(a) or (b)) and if so, whether his Article 8 claim succeeded. This is in line with the decision of the Supreme Court in **Hesham Ali (Iraq) v the SSHD [2016] UKSC 60** at [38] where Lord Reed said this:-

“[38] The implication of the new Rules is Rules 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under Article 8 by countervailing factors. Cases not covered by those Rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between twelve months and four years but whose private or family life does not meet the requirements of Rules 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that it can be outweighed, applying a proportionality test, by very compelling circumstances; in other words, by a very strong claim indeed, as Laws LJ put it in **SS (Nigeria)**. The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by parliament and the Secretary of State. The Strasbourg jurisprudence indicates relevant factors to consider, and Rules 399 and 399A provide an indication of the sort of matters which the Secretary of State regards as very compelling. As explained at paragraph [26] above, they can include factors bearing on the weight of the public interest in the deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. ...”.

28. As to the Appellant circumstances, it should have been recognised that by reason of his sentence of 17 months imprisonment he fell into the category described as “medium offender” and to properly identify that consideration should be given as to whether he fell within Exception 1 or 2 of S117 (5) C of the 2002 Act, and if he did, the appeal succeeded. If not, the next stage was to consider whether there were very compelling circumstances over above those which are set out in Exceptions 1 and 2.
29. I now consider the determination of the FtTJ. He set out the Respondent’s position which was recorded in the decision letter at [22] in relation to the children and at [23] the judge recorded the Respondent’s position in respect of the Appellant’s partner. It was noted that “she had said in a witness statement that the parties relationship began in 2006, at a time when the Appellant had no lawful right in the country.... The relationship was not formed whilst the Appellant was in the United Kingdom lawfully whilst there had been a letter in support, there was no evidence of cohabitation or financial support. Overall it was not accepted that the Appellant met the requirements of the exception to deportation on the basis of family life with a partner.”
30. The judge’s findings on the issue were set out at paragraphs [55 - 57] as follows:
- “55. I next consider the question of the relationship of the Appellant to his wife. It is quite clear that both the Appellant and his wife were aware of the concerns of the Respondent about the lack of evidence of cohabitation. Indeed, the reasons

for refusal letter pointed to the lack of evidence, particularly before the incarceration of the Appellant. The only evidence, it was agreed, had been produced was a letter from the NHS and one water rates account.

56. Of significance is the relationship of the Appellant, and indeed his wife, to the wife's family. In a witness statement she said that she had been disowned by her parents and immediate family including her. Brothers and sisters because of the marriage to the Appellant.... The Appellant was asked about the relationship and, as far as new, the situation got better and, indeed he said that they lived in xxxxx and he had been there many times. The wife said in her evidence in chief that things were improved between herself and her parents she had started talking to her mother, contact by phone. When it was put to her that in fact a husband said that he had been to see her parents at their home in xxxxxx, she agreed that yes there had been a change in they had gone recently. I do not find it credible that there should have been such a change in the wife's evidence and I find that much of the evidence has been tailored for the purposes of this case. Certainly as far as the current situation is concerned, there is no evidence, has been mentioned by the Respondent in his letter, of any cohabitation, nor indeed, any evidence of any financial support the Appellant might have given to the wife, although I note in the wife's letter that the Appellant used to work in a xxxx, then worked in a shop before his imprisonment and with that money used to provide for her and her family. There is, however, no evidence of financial support after his release from incarceration.

57. The Respondent did, however except that there was a relationship between the Appellant and his child and the young stepchild, and I have noted the letters in support of the Appellant furnished by three of the children, letters of 28 August 2016 and which, undoubtedly, the Respondent must apply some weight."

31. He returned to the issue of Article 8 at [66] and the submission that the offence that he had committed was at the "lower end of the scale". The judge set out the sentencing remarks of the Crown Court judge in which he had described the offence. The judge did observe that the trial judge had accepted there were some mitigating factors which the judge said he had borne in mind.
32. He then set out at [67] the Appellant's reliance on Article 8 and paragraph 399 of the Immigration Rules. The judge cited paragraph 399 (a) and some of subparagraph (b) however he did not cite the entirety of that subsection which related to a genuine subsisting relationship with a partner as set out earlier in this determination.
33. At [68]-[70] the judge made reference to the Appellant's child and stepchild neither of whom would have an experience of living in Iraq and that it appeared to be accepted that the Appellant did enjoy a good relationship with the children and that they were "British citizens". The judge also referred to the Appellant's wife of having no experience of living in Iraq at [69] and at [71] he again reiterated that the Appellant's child never travelled to Iraq and that there was no evidence to contradict the claim that both of the Appellant's parents had died and he had no remaining ties in Iraq.
34. The judge found that the children's best interests "will be best promoted by remaining with their mother" at [72] but there was no finding of a similar nature by reference to the Appellant.

35. In respect of the Appellant's wife at [73] he made reference to the "adverse findings" he had made about their relationship that stated that "I do place some weight on the fact that she did attend the Tribunal on behalf the husband and I find that all her ties were with the United Kingdom. That she travelled to Iraq many years ago was the one purpose only and that, which I accept, was for the Appellant's mother, who was ailing in health, to see her grandchild. The situation has, however, changed in Iraq since then."
36. The judge then concluded as follows:-
- "74. I have looked at all the factors in the case have taken into account the decision in Ogundimu (Article 8 – new rules) Nigeria [2013] UK duty and have taken into account the best interests, particularly of the Appellant's own child, as a primary consideration.
75. I also accept, having taken into account letters before me that the Appellant does have some relationship with his other stepchildren certainly one of whom is written in support of the Appellant.
76. Taking into account all the facts before me I then consider the position of Article 8 in the context of Razgar [2004) DHL and find that the decision of the Respondent is a disproportionate interference with the Appellant, his wife and his child's human rights.
77. In summary therefore I conclude that Article 8 of the ECHR will be breached were he to be deported and, further his removal would result in a breach of Article 15 (c) of the Qualification Directive."
37. It is plain from reading the determination that the judge did not have in mind the correct legal framework. Whilst I would accept that it is not necessary to set out at length the case law and any extensive legal framework, any decision must properly apply the correct legal test that is applicable to the facts.
38. As set out in the decision of the Court of Appeal in NA (Nigeria) v the SSHD [2017] EWCA Civ 10 at paragraph [27]:-
- "[27] Decisions of Tribunals should not become formulaic and rarely benefit from copious citation of authority. Arguments that reduce to the proposition that the First-tier Tribunal has failed to mention dicta from a series of cases in the Court of Appeal or elsewhere will rarely prosper. Similarly, as Lord Hoffmann said in Piglowska v Piglowska [1999] 1 WLR 1360, 'reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account.' He added that an 'appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself.' Moreover, some principles are so firmly embedded in judicial thinking that they do not need to be recited. For example, it would be surprising to see in every civil judgment a paragraph dealing with the burden and standard of proof, or in every running down action a treatise, however short, on the law of negligence. That said, the reader of any judicial decision must be reassured from its content that the court or Tribunal has applied the correct legal test to any question it is deciding."

39. Contrary to the submission of Mr Karnik, it is plain from that paragraphs cited above that that whilst the judge had made a reference to paragraph 399(a) and a partial reference to 399(b) he did not carry out any assessment or analysis of whether in fact the Appellant could satisfy them. It has to be shown that it would be unduly harsh for the child to both live in the country that it is proposed to return the Appellant to, and for it to be unduly harsh for the child to remain in the United Kingdom without the Appellant. In relation to a partner the Respondent took the view that it has to be shown that the relationship was formed to time when the Appellant was in this country lawfully and the immigration status was not precarious; that it would be unduly harsh that partner to live in the country to which deportation is proposed because of compelling circumstances over and above those described in paragraph EX 2 of Appendix FM to the Immigration Rules; and that it would be unduly harsh for that partner to remain in the United Kingdom without the Appellant.
40. The judge made no reference to the decision in MM Uganda and what was meant by “unduly harsh” in section 117C (2) by way of form and more importantly in substance. Whilst it is arguable that he reached a finding that the children had never been to Iraq and the Appellant’s partner (although he did not accept that they were in a cohabiting relationship and had made no findings that their relationship was formed at a time when the Appellant was in the UK lawfully) had all her ties to the UK, he did not consider the other limb which was whether it was unduly harsh for the children to remain in the UK without the Appellant. There had been no assessment of the best interests of the children in the context of the Appellant’s relationship with them nor had there been any assessment of whether it would be “unduly harsh” for the children to remain in the UK without the Appellant and in the context of the public interest as required. At its highest he made a finding that he enjoyed a good relationship with the children (see [70]) but there was no consideration of whether any separation would be “unduly harsh.”
41. I also remind myself of what was said in the decision of SSHD v AJ (Zimbabwe) [2016] EWCA Civ 1012 at [17] where it was stated:
- “17 ... In many, if not most cases where this Exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child that relationship to continue. If that were enough to render deportation a disproportionate interference of family life, it would drain the rule of any practical significance. It would mean the deportation would constitute a disproportionate interference with private life in the ordinary run of cases where children are adversely affected and the carefully framed conditions in rule 399(a) would be largely otiose”.
42. Whilst the court was dealing with the old rules, it seems to me that those observations are still applicable.
43. As the grounds of the Respondent set out, the decision displays a lack of reasoning with regard to the requirements of paragraph 399 and section 117C of the 2007 Act and there is no reason provided as to whether his deportation would be “unduly harsh” in the light of the circumstances in relation to the Appellant’s children nor had there been any proper consideration of the public interest in this context. I cannot find as Mr Karnik submits that his fleeting reference at [67] properly addresses the issues and the substance of those issues that required determination.

44. Consequently I am satisfied that the judge did not take into account the correct legislative background and that the conclusions that were reached by the First-tier Tribunal do demonstrate a legal error of materiality.
45. However, if the judges' conclusions on the protection claim aspect of the appeal are free from any legal error then any error of law as has been found in the preceding paragraphs would be immaterial to the outcome as he would be entitled to succeed on that basis alone.
46. I therefore turn to that aspect of the appeal and the grounds advanced on behalf of the Respondent in the context of the determination of the FtT Judge.

The protection claim:

47. The determination records the issues at [28]; it was agreed that there was no asylum claim advanced on behalf the Appellant and that his only claim related to humanitarian protection, Article 3 and Article 15 (c) and Article 8.
48. The judge set out his findings at paragraphs 51 – 75 of the determination. As to the Appellant's factual claim, he stated that he took as his starting point the previous asylum and humanitarian "appeal" which had previously been dismissed. At [53] the judge considered his recent claim that he feared a revenge attack upon him by the family of the murderer of his relative whose body had repatriated to Iraq. The judge at [53 – 54] rejected that claim noting that the Appellant had returned to Iraq on three occasions; the last occasion from 29 March to 5 August 2013 and that if he was genuinely in fear he would not have stayed for five months. Furthermore [54] the next-of-kin consultation form did not refer to the Appellant thus he placed no weight on that document.
49. A further finding that he made at [58] was as follows:-

"58. It is the case at the Appellant did have a passport, since I have seen evidence of the same and, indeed, his passport enabled him to travel to Iraq previously. The Appellant had said that he had lost his passport during removal from his previous home to his present home and therefore has no identity document himself."
50. The judge then turned to the issue of return to Iraq and/or relocation at paragraphs [59 – 65]. He took into account that the Appellant had been in Iraq in 2013 (as evidenced by his passport) but had not returned since that time. At paragraph [60] the judge made reference to the guidance in AA (Iraq) v SSHD [2017] EWCA Civ paragraph 40 in which reference was made to decision-makers "must take decisions on entitlement protection within a reasonable period of time and must not decline to address a material element of a claim such as this... Hence it will be wrong indefinitely to postpone the enquiry." After quoting that paragraph, he stated "I therefore bear in mind the acceptance by the Respondent that return is currently not feasible". He had earlier set out at [40] the following "I note that it was agreed by the presenting officer that return to Iraq was currently not feasible."
51. At [61] he made reference to the argument that Diyala, Kirkuk, and Salah al -Din no longer met the threshold of Article 15 (c) and that the security situation had changed the contested areas and that it had been argued that he could relocate and return to

Erbil and then regularise his position (in light of the IDI internal flight (and technical obstacles) 24th of December 2014" pre-clearance is necessary."

52. The judge then stated at [62] that he accepted the submission that whilst the Appellant did have a passport previously, it had now expired and had been lost. Thus he stated "I find that return would not be possible at the present time." At [63] he further stated "there is also the question of a reasonable period of time, a matter I have referred to above. As I have said above, return is not feasible to Erbil at the current time and delay is certainly a factor which weighs in favour of the Appellant."
53. At [64] he sets out that it been argued on behalf of the Appellant that he could not settle lawfully and permanently in the IKR and cited part of the IDI dated August 2016; 8.1.4 relating to IDP's and then at [65] he referred himself to the decision of the Upper Tribunal in AA (Iraq) and concludes as follows:
- "65. I have then been referred to AA (Article 15 (c) rev 1 CG [2015] UK UT544 where it is clear that entry into the IKR was only viable for a person who originates in the IK are and has been pre-cleared, as has been referred to in paragraph 17 of that decision. I therefore look at the decision in the light of AA Iraq [2017] at paragraph 40, to which I have made reference above. Not only is return not reasonable currently, it is not clear how long a formal decision by the Respondent could be delayed: certainly, delays not approved of by the Court of Appeal. Overall I consider therefore that Article 15 (c) will be breached."
54. The grounds advanced on behalf of the Secretary of State submit that paragraph [65] as recorded above fails to take into account the guidance given in AA (Iraq) v SSHD [2017] EWCA Civ 944 in which amended country guidance was provided. The Court of Appeal reaffirmed the guidance provided by the Upper Tribunal at paragraph 18 of the annex stating "the IKR is virtually violence free. There is no Article 15 (c) risk to an ordinary civilian in the IKR. The grounds and refer to the judge being incorrect when concluding that the inability to currently remove the Appellant created a risk for him on return to his home area because the findings of fact at [53] and [50] in the determination were to the effect that he was not at risk of his home area. Therefore there was no requirement to relocate.
55. The grounds further assert by reference to note 7 of the amended guidance provided by the Court of Appeal that the lack of documentation cannot create any risk to the Appellant on the basis of Article 15 (c) unless there is a risk to the Appellant on return to Iraq.
56. It is further asserted that the judge had failed to make any findings in respect of the Appellant's ability to obtain a new passport, having accepted that he previously held a passport in 2013 or whether the Appellant has done anything to obtain preclearance the authorities and the IKR. It is therefore submitted that the findings in respect of Article 15(c) on return to Erbil are flawed.
57. Mr Diwnytc in his oral submissions made reference to the issue of where the Appellant had resided in Iraq. The Respondent's decision letter was based on his residence in Erbil. His passport gave the place of birth as Erbil and whilst the determination at [34] stated that he used to live in Erbil but had moved to Kirkuk and Counsel's note that he had "moved to Kirkuk when he was very young" was not

consistent with the previous determination in 2004 at paragraph 27 where he was still in Erbil. He submitted that the judge had not made a finding as to fact where the Appellant was living.

58. Mr Karnik, Counsel and behalf of the Appellant submits that the decision contains no error of law. In his oral submissions he stated that the reasoning given by the judge may not have been in the clearest terms but that it was open to the judge to find that it would be a breach of Article 15 (c) to return him to Iraq.
59. He submitted that the judge began by noting that it was agreed by the presenting officer the return to Iraq was “currently not feasible” (see [40] and [60]). He made reference to previous Counsel’s note in which he recalled that had been the position and that it was based on [170] of AA (Iraq) CG [2015]. As there was an acceptance that return was not feasible based on AA (Iraq) [2015] and in particular paragraph [170] of that decision he was entitled to allow the appeal under Article 15 (c).
60. When asked to explain the context in which the judge found that return was not feasible, Mr Karnik submitted that the context was that set out in [170] of the UT ‘s decision AA (Iraq) [2015]. As he did not have a passport then he could not be returned. As he was someone who had been in the UK since 2004 and is of Kurdish ethnicity and had no family in Iraq he would be at risk of being destitute. He would not be able to obtain a CS ID. Consequently, he submitted here is an undocumented Kurdish man who did not live in Erbil but Kirkuk.
61. Thus he submitted the judge did not find that his return to Erbil would breach Article 15 (c) but that he found it [62] that return would not be possible. Therefore his finding that overall he considered that Article 15 (c) was breached was a finding arrived at applying the circumstances of the Appellant. As the Appellant’s home area was Kirkuk, it was therefore an area where an Article 15 (c) risk remained. Therefore following the logic of the country guidance without pre-clearance his return would be to Baghdad and therefore would fall within the conditions would breach Article 15 in Baghdad as a result of violence and/or destitution.
62. I have considered care the submissions made by each of the advocates. The issue raised by Mr Karnik relates to that of feasibility of return. The judge recorded [40] that “I note it was agreed by the presenting officer at the return to Iraq was not currently feasible.” There is a similar reference to that at [60]. However in the body of the determination, the judge makes no reference to the basis upon which that concession, if it was a concession, was made or in the light of what particular factors or by reliance on the amended country guidance reflected in the decision of the Court of Appeal in AA (Iraq) (2017).
63. The grounds relied on by the Secretary of State make reference to the FtTJ’s failure to make findings in respect of his ability to obtain documentation and in particular a passport and therefore expressly makes reference to the feasibility of return. However Mr Karnik submits as the Respondent made a concession at [40] the return was currently not feasible, that ground must fail. He relies upon a note from counsel that states that he recalls the Secretary of State presenting officer accepted return to Iraq was currently not feasible. The presenting officer’s note obtained on behalf of the Secretary of State stated that he had no recollection of the hearing itself but that “I

relied on the refusal letter 10th of January 2017 where it page 6 (Annex K6 of the Home Office bundle) a full consideration of feasibility is carried out, with reference to the existence of an expired passport which can be used to procure a CS ID. This is what I relied upon hence no concession was made on this point.”

64. As I have stated the judge makes no reference to the basis upon which he considered the issue of feasibility of return particularly in light of the decision letter which did set out and seek to apply the issues identified in the country guidance. When asked to explain how it was the judge reached that conclusion, Mr Karnik submitted that the concession was made in light of paragraph 170 of AA (Iraqi) 2015] and that the judge specifically found at [62] return could not be possible.
65. However it is important to place that finding in the context of paragraph 170 and his later finding at paragraph [63]. The judge appears to be premising his finding (that return was not possible at the present time) on the basis that the Appellant has no documentation of any kind and therefore there was no prospect in a reasonable time of being removed. At [62-63] he gave the reasons as follows: -
- “62. I accept the submission that whilst the Appellant did have a passport previously, that is now expired and, further has been lost. Thus, I find that return would not be possible at the present time.
63. There is also the question of a reasonable period of time, a matter I have referred to above. As I have said above, return is not feasible to Erbil at the current time and delay is certainly a factor which would weigh in favour of the Appellant.”
66. That, in my judgement is inconsistent with the submission made that the judge had considered the possibility of return in accordance with paragraph [170] of AA (Iraq) [2015] because that paragraph expressly makes reference to the evidence of Dr Fatah who had made reference to a “expired or current Iraqi passport” or a “photocopy of the previous Iraqi passport and a police report noting that it had been lost or stolen...” The Tribunal went on to state “if the position is that the secretary of state can feasibly remove an Iraqi national, then she will be expected to tell the Tribunal whether and if so what documentation has led the Iraqi authorities to issue the national with the passport or laissez passer (or signal their intention to do so). The Tribunal will need to know, in particular, whether the person concerned has a CSID. It is only where return is feasible but the individual concerned does not have a CSID the consequences of not having one come into play.”
67. Therefore contrary to the submission made by Mr Karnik paragraph [170] expressly makes reference to someone who had a photo copy of a previous Iraqi passport. Mr Diwncyz, on behalf of the Secretary of State referred to his file and was able to identify a copy of the passport which was issued in Baghdad on the xxx 2007 and after the Appellant had entered the United Kingdom and was also able to identify that it had been used to enter Erbil on a number of occasions between 2010 - 2013; the latest being March - August 2013.
68. As paragraph 170 states, the secretary of state would be expected to tell the Tribunal whether and if so on what documentation would lead the Iraqi authorities to issue a passport or laissez passer or signal their intention to do so. The decision letter set out that process relying on the Appellant having the available (see K6 of the

Respondent's bundle). Therefore the judge did not consider paragraph 170 of AA (Iraq) in the context of his findings at [62 or 63] as submitted on behalf of the Appellant.

69. Furthermore I do not consider that his finding at [65] did take into account the Appellant's circumstances. He stated there;

"65. I then have been referred to AA (Article 15 (c) rev1) GC[2015] UK UT544, where it is clear that entry into the IKR was only viable for a person who originates from the IKR and has been pre-cleared, as has been referred to in paragraph 17 that decision. I therefore look at the decision in the light of AA (Iraq) [2017] at paragraph 40, to which I've made reference above. Not only is return not reasonable currently, it is not clear how long a formal decision by the Respondent could be delayed: certainly, delay is not approved by the Court of Appeal. Overall, I consider therefore that Article 15 (c) will be breached."

70. The judge again makes reference to the delay of a formal decision and it was on this basis that he found that Article 15 (c) "will be breached". That again is erroneous as it failed to take into account that the Appellant did have access to documentation referred to in paragraph 170.
71. There was also no reference in the determination as to the amended CG set out in AA (Iraq) [2017] and the only reference that was made related to paragraph 40 where the Court of Appeal made reference to decision-makers making decisions on entitlement to protection within a reasonable period of time (see determination at [60] and again at [40]). The guidance, which is reproduced below, recognises that a full factual analysis is necessary to properly consider whether return can be undertaken and in the context of access to documentation, including a CSID, whether return is feasible or not. There was no discussion or analysis in that context or findings of fact necessary to begin that analysis. There was no reference at all to the possibility or otherwise of obtaining a CSID.
72. The guidance in AA (Iraq) CG was amended by the Court of Appeal in AA (Iraq) v SSHD [2017] EWCA Civ 944. It reads:

B. DOCUMENTATION AND FEASIBILITY OF RETURN (EXCLUDING IKR)

5. Return of former residents of the Iraqi Kurdish Region (IKR) will be to the IKR and all other Iraqis will be to Baghdad. The Iraqi authorities will allow an Iraqi national (P) in the United Kingdom to enter Iraq only if P is in possession of a current or expired Iraqi passport relating to P, or a laissez passer.

6. No Iraqi national will be returnable to Baghdad if not in possession of one of these documents.

7. In the light of the Court of Appeal's judgment in HF (Iraq) and Others v Secretary of State for the Home Department [2013] EWCA Civ 1276, an international protection claim made by P cannot succeed by reference to any alleged risk of harm arising from an absence of a current or expired Iraqi passport or a laissez passer, if the Tribunal finds that P's return is not currently feasible on account of a lack of any of those documents.

8. Where P is returned to Iraq on a laissez passer or expired passport, P will be at no risk of serious harm at the point of return by reason of not having a current passport.

C. The CSID

9. Regardless of the feasibility of P's return, it will be necessary to decide whether P has a CSID, or will be able to obtain one, reasonably soon after arrival in Iraq. A CSID is generally required in order for an Iraqi to access financial assistance from the authorities; employment; education; housing; and medical treatment. If P shows there are no family or other members likely to be able to provide means of support, P is in general likely to face a real risk of destitution, amounting to serious harm, if, by the time any funds provided to P by the Secretary of State or her agents to assist P's return have been exhausted, it is reasonably likely that P will still have no CSID.

10. Where return is feasible but P does not have a CSID, P should as a general matter be able to obtain one from the Civil Status Affairs Office for P's home Governorate, using an Iraqi passport (whether current or expired), if P has one. If P does not have such a passport, P's ability to obtain a CSID may depend on whether P knows the page and volume number of the book holding P's information (and that of P's family). P's ability to persuade the officials that P is the person named on the relevant page is likely to depend on whether P has family members or other individuals who are prepared to vouch for P.

11. P's ability to obtain a CSID is likely to be severely hampered if P is unable to go to the Civil Status Affairs Office of P's Governorate because it is in an area where Article 15(c) serious harm is occurring. As a result of the violence, alternative CSA Offices for Mosul, Anbar and Saluhaddin have been established in Baghdad and Kerbala. The evidence does not demonstrate that the "Central Archive", which exists in Baghdad, is in practice able to provide CSIDs to those in need of them. There is, however, a National Status Court in Baghdad, to which P could apply for formal recognition of identity. The precise operation of this court is, however, unclear.

73. Internal relocation within Iraq (other than the IKR). In AA (Article 15(c)) Iraq CG [2015] UKUT 544 (IAC) (unchanged by the Court of Appeal) it was held that (i) As a general matter, it will not be unreasonable or unduly harsh for a person from a contested area to relocate to Baghdad City or (subject to comments in this case on humanitarian protection and areas of the country where there is an internal armed conflict) the Baghdad Belts; (ii) In assessing whether it would be unreasonable/unduly harsh for and Iraqi national (P) to relocate to Baghdad, the following factors are, however, likely to be relevant: (a) whether P has a CSID or will be able to obtain one; (b) whether P can speak Arabic (those who cannot are less likely to find employment); (c) whether P has family members or friends in Baghdad able to accommodate him; (d) whether P is a lone female (women face greater difficulties than men in finding employment); (e) whether P can find a sponsor to access a hotel room or rent accommodation; (f) whether P is from a minority community; (g) whether there is support available for P bearing in mind there is some evidence that returned failed asylum seekers are provided with the support generally given to IDPs. (iii) there is not a real risk of an ordinary civilian travelling from Baghdad airport to the southern governorates, suffering serious harm en route to such governorates so as engage Article 15(c).

74. The Iraqi Kurdish Region; In AA (unchanged by the Court of Appeal) it was held that (i) the Respondent will only return an Iraqi national (P) to the IKR if P originates from the IKR and P's identity has been "pre-cleared" with the IKR authorities. The authorities in the IKR do not require P to have an expired or current passport, or laissez passer; (ii) the IKR is virtually violence free. There is no Article 15(c) risk to an ordinary civilian in the IKR; (iii) A Kurd (K) who does not originate from the IKR can obtain entry for 10 days as a visitor and then renew this entry permission for a further 10 days. If K finds employment, K can remain for longer, although K will need to register with the authorities and provide details of the employer. There is no evidence that the IKR authorities pro-actively remove Kurds from the IKR whose permits have come to an end; (iv) whether K, if returned to Baghdad, can reasonably be expected to avoid any potential undue harshness in that city by travelling to the IKR, will be fact sensitive; and is likely to involve an assessment of (a) the practicality of travel from Baghdad to the IKR (such as to Irbil by air - there is not a real risk of an ordinary civilian travelling from Baghdad airport to the southern governorates, suffering serious harm en route to such governorates so as engage Article 15(c).); (b) the likelihood of K's securing employment in the IKR; and (c) the availability of assistance from family and friends in the IKR; (v) As a general matter, a non-Kurd who is at real risk in a home area in Iraq is unlikely to be able to relocate to the IKR.
75. Whilst Mr Karnik submits that the Appellant's evidence was not disputed that his home area was in Kirkuk citing paragraph [34], in fact that paragraph is simply a recital of the Appellant's evidence. Nowhere in the decision letter is it accepted that he was born in Erbil but lived in Kirkuk. Indeed the opposite is set out in the decision letter. Furthermore as Mr Diwnicyz submits there were no findings of fact as to when he left Erbil to live in Kirkuk or at what date. The previous findings made by the judge in 2004 clearly stated that he lived in Erbil. Therefore the recollection of Counsel that he had moved to Kirkuk when he was very young and lived there prior to leaving Iraq was not consistent with the decision of the judge in 2004. If his evidence was different to that set out in the decision of Judge Andrews, then fresh findings were necessary. As they were no findings as to his ability to obtain any form of documentary evidence based on the fact that he did have access to a certified photo copy of his passport held by the Respondent, and no findings either which were fundamental to his claim as to the place of his residence, there was a lacuna in the evidence which was not resolved and was necessary to begin with as a starting point for any assessment of return irrespective of any concession made. The terms of which were not explained or set against the context of the amended CG.
76. The judge did not believe his account of the circumstances of his return to Iraq [see paragraphs 53 - 44 of the determination) and whilst the judge recorded [71] "there is no evidence to contradict the claim by the Appellant both his parents have died and he has no remaining ties in Iraq" no findings are made as to the whereabouts of other family members, including his uncle who was referred to in 2004 and the circumstances of the visits made to Iraq between 2010 - 2013 and any other extended family or friends in light of that factual background who may be able to offer assistance.
77. I am therefore satisfied that the judge did err in law in reaching his decision on Article 15(c). Whilst Mr Karnik submits the judge could have better expressed the

determination (see paragraph 10 of his skeleton argument) and that as he has no CSID the Appellant should succeed in his claim, I do not consider that that changes the position. There were fundamental issues that required findings of fact as set out above, which were necessary before carrying out the analysis referred to in AA (Iraq) as amended by the Court of Appeal and also made clear in the new country guidance case of AAH (Iraqi Kurds-internal relocation) Iraq CG [2018] UKUT 00212. The difficulty with the decision is that the judge did not begin his assessment by properly taking into account the documentation that he did have access to and making findings of fact relevant to past and present history in the context of any ability to return to Iraq. Furthermore, Mr Diwncyz has located in the bundle of documents that was before the FtTJ a document that he states has the appearance of being a CSID. The Appellant for his part states that it is possibly an ID card. The document has not been translated and will require further consideration at a further hearing.

78. I am therefore satisfied that the decision of the FtTJ discloses the making of an error on a point of law and shall be set aside. As to the remaking of the decision, I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal. That reads as follows:-

"[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

- (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
- (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal."

79. Given the nature of the errors of law in both parts of the determination it will be necessary to hear further evidence and make the necessary further findings of fact. Therefore I am satisfied that the appeal should be remitted to the First-tier Tribunal and that this is the correct course to adopt. Accordingly, and in the interests of a fair and just disposal of the Appellant's claim, I am satisfied that it is appropriate to remit the appeal to the First-tier Tribunal for re-hearing before a different Judge.

Notice of Decision

The decision of the First-tier Tribunal does demonstrate the making of an error on a point of law. Thus the decision of the First-tier Tribunal is set aside. It is remitted to the First-tier Tribunal for a hearing.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 1/8/2018

Upper Tribunal Judge Reeds