IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003778

First- tier Tribunal No: PA/04231/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:

27th October 2023

Before

UPPER TRIBUNAL JUDGE REEDS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

K (Afghanistan)
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr A. McVeety, Senior Presenting Officer
For the Respondent : Mr G. Brown, Counsel instructed on behalf of the respondent.

Heard at (IAC) on 12 July 2023

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against the determination of the First-tier Tribunal(Judge Austin) promulgated on 6 April 2022. By its decision, the Tribunal allowed the appellant's appeal against the Secretary of State's decision dated 10 August 2020 to refuse his protection and human rights claim in the context of the decision made to deport him from the United Kingdom.

2. Although the appellant in these proceedings is the Secretary of State, for convenience I will refer to the Secretary of State for the Home Department as the respondent and to the appellant before the FtT as "the appellant," thus reflecting their positions before the First-tier Tribunal.

3. Rule 14: 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. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. The reasons for the order are set out at the end of the decision.

4. The factual background can be summarised as follows.

5. The appellant is a national of Afghanistan who claimed that he first arrived in the UK on 4 September 2004, illegally. The appellant appears to have been in the UK ever since that time. A year after his arrival, the appellant claimed asylum. On 2001 the appellant made an application for a asylum which was refused and certified with the subsequent appeal against the decision being dismissed. He became appeal rights exhausted on 30 July 2001. A later application in August 2001 under the Human Rights Act 1998 was refused.

6. The appellant applied for leave to remain in the UK on 2 February 2004 on the basis of his marriage to a British citizen. The application was refused on 17 February 2006, but in March 2008 the case was reviewed and on 10 March 2008 the appellant was granted a period of discretionary leave to remain until 9 March 2011.

7. On 10 October 2008, the appellant was granted Transfer of Conditions of his leave to his newly issued Afghan passport. A further grant of leave to remain on the basis of private life under Article 8 was granted in 2014, lasting until 9 September 2017.

8. In February 2017 before the Crown Court, the appellant was sentenced after a trial for 2 sexual offences which he was convicted by a jury. The total sentence was one of 6 ½ years immediate imprisonment. He remains on the Sex Offender's Register for life.

9. As a result of his criminal offending, the appellant on 21 December 2017 was served with a Notice of liability to deportation decision and in the absence of any response the respondent served a decision to maintain the deportation order on 1 February 2018. On 7 January 2019, the appellant's solicitors made representations in writing, but due to an administrative error they were not received, and removal directions were set for 26 November 2019.

10. On 22 November 2019, the appellant's solicitors challenged the respondent's failure to consider the representations of 7 January 2019. As a result the removal directions were deferred, and the respondent issued a response on 29 November 2019.

11. On 6 December 2019, the appellant was served with a Section 72 letter inviting him to rebut the presumption that he had been convicted of a particularly serious crime and that he constituted a danger to the community. At the time of the decision under appeal there had been no response.

12. The appellant underwent screening and asylum interviews on 7 and 8 July 2020, respectively. The basis of his protection claim was that he feared a return to Afghanistan on the basis that he would suffer at the hands of the Taliban and be subject to harsh and dangerous security situation in that country.

13. On 10 August 2020, the respondent refused the appellant's claim for protection and human rights claim. That decision formed the subject of the appeal before FtTJ Austin in March 2022. As noted by the FtTJ at paragraphs 40 and 59, the country situation in Afghanistan had changed markedly since the date of the decision letter under appeal.

14. FtTJ Austin set out the respondent's decision between paragraphs 39 – 44 of his decision. In the decision letter, in the summary of findings of fact, the respondent rejected that the appellant would be at risk of suffering harm at the hands of the Taliban, and rejected the assertion that there was a harsh and dangerous security situation in Afghanistan (again the FtTJ recorded that he kept in mind that the decision letter was dated 20 August 2020 and there was no dispute that situation in Afghanistan had changed markedly since the date of that decision which formed the basis of the appeal).

15. The respondent noted that the appellant had been notified of the intention to deport on 1 February 2018 but did not make an asylum claim until 7 January 2019 and section 8 of the 2004 Act was applied by the respondent who made adverse findings against the appellant's credibility due to the lateness of his claim. The respondent considered that the appellant was a healthy male, had skills learned in Pakistan and in the UK and that he had shown resilience in coming to the UK where he did not speak the language, and in assimilating himself, learning the language and working and running a business. He had a wife and foster father in Pakistan who could provide a support network.

16. Additionally it was not accepted that the appellant had a genuine subject to fear a return to Afghanistan.

17. As a result of his criminal conviction, where he was sentenced to lengthy term of imprisonment for sexual offences the appellant was excluded from humanitarian protection under the provisions of paragraph 339D(iii) of the Immigration Rules. The appellant did not qualify for discretionary leave and return to Afghanistan was not shown to amount to a breach of the appellant's Article 8 ECHR rights.

18. The respondent concluded that the public interest required the deportation of the appellant unless there were very compelling circumstances, over and above the exception to deportation described in paragraphs 399 and 399A of the Immigration Rules, which did not apply. Furthermore there were no exceptional circumstances and that the appellant had been convicted of serious offences which merited a significant custodial sentence and that the appellant had no legal basis to remain in the UK since 9 September 2017.

19. The appeal came before the FtTJ Austin on 1 March 2022. In a decision promulgated on 6 April 2022 the appellant's appeal was allowed. The FtTJ set out the issues that it was agreed by the parties he was determine at paragraph 28, which were as follows:

    (a) Whether the section 72 NIAA certificate has been rebutted by the appellant on the evidence?

    (b) Whether on return to Afghanistan the appellant faced Article 2 or 3 risk?

    (c) Whether the appellant should be excluded from humanitarian protection?

    (d) Whether there are very compelling circumstances which would justify the appellant remaining on Article 8 private life grounds?

20. In respect of the last issue identified, (d) the FtTJ set out at paragraph 65 that there had been no Article 8 private life argument placed before him or pursued in submissions and that the judge discerned no basis for such consideration. Whilst the appellant had obtained leave to remain in the UK on the basis of a relationship with a partner until 2017, there was no mention made before the Judge Austin of any ongoing relationship with any partner or children.

21. FtT Judge Austin set out a summary of the appellant's protection and human rights claim. The appellant claims have been born in Afghanistan and was then taken to Pakistan as an infant by a family friend and remained in Pakistan until travelling to the UK on 4 September 2000 when he unsuccessfully claimed asylum. He therefore spent his childhood and young adult hood in Pakistan and arrived in the UK at the age of 23. The appellant is now 45 years of age. The appellant, in his claim had made no reference to any wife or children and that he is unaware of any family members still living Afghanistan and that he had lost touch with them. In an earlier claim he had said he had 6 siblings that they had all been killed when he was living in Pakistan. It was noted that the claim was wholly rejected when he appealed against his initial asylum decision where he claimed there was a tribal dispute involving his family in Afghanistan, and that rival tribe members had come to look them in Pakistan, intending to harm him.

22. The appellant's claim was that he would be a likely target for the Taliban if returned there. He had not lived there since he was an infant, he had no family or social network there, he is westernised, he does not speak the language, and is westernised person and would be considered to be a spy and dangerous and thus be targeted. Furthermore, he has a serious sexual offence conviction which was widely reported in the press and online, and his criminal background would be easily discovered by the Taliban and the response would be to kill him as a punishment for his actions. He therefore claimed that he is a refugee from Afghanistan, would be entitled to humanitarian protection in the alternative, and also that return would lead to a real risk of breach of Articles 2 and 3 of the Convention, as he would be targeted and killed by the Taliban.

23. In the respondent's case was set out between paragraphs 39 – 44 of the decision and as summarised above.

24. In essence, the core of the appeal was that there was a reasonable likelihood that he would be exposed to serious harm or ill treatment on return as a result of his offences becoming known and for being deemed a "westernised person" returning after many years. He will be considered to have transgressed social mores by the Taliban and he would be killed or subjected to Article 3 ill-treatment. He had been absent from Afghanistan for 45 years, he did not speak any of the languages spoken in that country, and as a result there were a number of factors likely to lead to enquiries being made against his background and his criminal history was a matter of Internet record. Therefore there was a risk of Article 3 ill-treatment to the appellant if returned to Afghanistan and that the Taliban had acted ruthlessly since taking over that country and that the real risk to the appellant had thus been identified.

25. FtT Judge Austin set out his assessment and findings of fact between paragraphs 52 – 65.

26. It is right to observe that at paragraph 52 the Judge Austin set out the facts which were agreed between the parties. It was now agreed that the appellant was a national of Afghanistan and that his deportation would be to that country. It was further agreed that the appellant did not speak any language used in Afghanistan and had not lived there for over 40 years. It was further agreed that the appellant was a "westernised person."

27. In relation to issue (a) and the section 72 certificate, the FtTJ set out his assessment between paragraphs 53 – 57 and did so by reference to the commission of serious sexual offences against a child, for which the appellant was sentenced to a term of 6 ½ years immediate imprisonment.

28. Whilst it had been argued on the appellant's behalf that the acts which led to the convictions were in criminal terms "historical offences," Judge Austin rejected that argument finding that they should have no less significance for the purposes of the certification. The judge did not consider that he had shown contrition and that the presumption under subsection (6) applied in his case and it had not been rebutted. Thus the judge found that he had been convicted of a particularly serious crime and that he remained a danger to the public and that there was a strong public interest in his deportation. For those reasons, the judge concluded that the appellant was excluded from the status of refugee and for the same reasons was not entitled to humanitarian protection.

29. Between paragraphs 58 – 65 Judge Austin set out his analysis and assessment of issue (b) which was whether on return to Afghanistan the appellant faced a real risk of Article 2 or 3 ill-treatment.

30. In the FtTJ's analysis of the country materials, he considered the current situation as at the date of the hearing in Afghanistan and particularly in the context of the country situation which had changed considerably since the original decision was made in 2020. The respondent as a result had revised the Home Office guidance and the relevant guidance that was before the FtT was the CPIN Afghanistan: fear of the Taliban.

31. The FtTJ's assessment began with the agreed facts that the appellant was a national Afghanistan, and his deportation would be to that country. That the appellant did not speak any language used in Afghanistan and had not lived there for over 40 years and is a "westernised person" as set out at paragraph 52. The basis for that finding was that he would be considered to be "westernised" in the eyes of the current Afghan regime in the light of the substantial period of his adult life in the UK, nor was he able to speak the local language and having no family or social connections (paragraph 62).

32. As to the criminal convictions, the judge found on the facts that such offending would be considered to have been a breach of Sharia Law if it became known to those in authority who may have dealings with him and that in light of the evidence before the tribunal any brief research into his background would reveal his past to those in authority. The FtTJ took into account the country materials and the evidence of human rights abuses and ill-treatment against those "deemed to have transgressed cultural religious mores, which may include those perceived as westernised", and concluded that given the current situation in Afghanistan where despite assurances, the Taliban had committed random acts of violence and killing where they considered persons were a threat or where they encountered persons who were considered to have transgressed their code, the FtTJ found that the appellant would likely to fall into that category as the appellant was a "westernised person" and that the appellant would not be able to disguise his personal characteristics to avoid attracting attention and the subsequent real risk of ill-treatment on return to Afghanistan.

33. The FtTJ concluded that whilst it was an "unattractive argument for a person who has committed serious sexual offences in the UK and would normally face deportation on the basis of the public interest, the return to Afghanistan in the current conditions would represent a risk of a breach of his Article 2 and 3 rights and therefore the appeal was allowed.

34. The respondent sought permission to appeal the decision of FtTJ Austin.

35. FtTJ Loke on 17 May 2022 refused permission to appeal but on renewal was granted by Upper Tribunal Judge Allen on 28 September 2022 stating:

"on balance I consider that the grounds identify arguable points of challenge to the judge's decision."

36. Before the Upper Tribunal Mr McVeety appeared on behalf of the respondent and Mr Brown of Counsel, who had appeared before the FtTJ, appeared on behalf of the appellant. I am grateful to both advocates for their clear submissions.

37. Mr McVeety relied upon the written grounds of challenge at paragraphs 5-7 where it was submitted that Judge Austin had found that the appellant would be at risk from the Taliban because he is westernised (see paragraph 26) and this was on the basis that the appellant would be at risk of being considered to have transgressed social mores rather than on the basis of his criminal convictions (paragraph 64). It is submitted that the FtTJ failed to give reasons as to how the Taliban would be aware of his presence in Afghanistan, or why they would identify him as someone to be investigated such that they would become aware of his criminal convictions.

38. At paragraph 6 of the grounds, it was submitted that at paragraph 60 of the decision the FtTJ found that the appellant's offending would be found to be in breach of Sharia law, however there was no evidence that the Taliban would be aware of his criminal history in the UK such that he would be at risk.

39. Paragraph 7 of the grounds submitted that the judge had also found that the appellant had no family or friends in Afghanistan who would be able to assist him to integrate into life there. However, the judge failed to consider that the appellant was of working age and had failed to give any reasons as to why the appellant would have failed to retain a cultural nexus to Afghanistan.

40. In his oral submissions Mr McVeety confirmed that the case advanced on behalf the respondent against the decision of the FtTJ was a "reasons challenge" as can be seen from paragraph 5 of the grounds where it was asserted that the FtTJ failed to give reasons as to how the Taliban would become aware of his presence in Afghanistan that they would be able to identify him and to look into his past and identify the convictions. He submitted that the judge did not give adequate reasons other than speculation.

41. As regards paragraph 7, he submitted the judge failed to highlight any vulnerabilities on the appellant's behalf as to why he could not return.

42. In respect of the written grounds between paragraphs 8 – 11 which referred to the general security situation in Afghanistan, Mr McVeety confirmed that those grounds were not relied upon before the Upper Tribunal. Both advocates agreed that this had not been a "live issue" before the FtTJ, and it had not been argued that the appellant could rely solely on the basis of his presence in Afghanistan. Furthermore both advocates agreed that in light of the FtTJ having upheld the section 72 certificate the appellant was excluded from humanitarian protection. Mr McVeety confirmed that those paragraphs in the grounds were therefore in error and he did not seek to rely upon them.

43. There was no rule 24 response on behalf of the appellant however Mr Brown, Counsel who had acted on behalf of the appellant before Judge Austin provided his oral submissions. They can be summarised as follows. There was no error of law in the FtTJ's reasoning or consideration of the evidence, and the conclusion reached that the appellant would be at real risk of facing ill-treatment contrary to Articles 2 and 3 of the Convention was based on the factual narrative of his convictions, that he had not lived in Afghanistan for 40 years, it was the accepted position that he was westernised and that he would be deported to

Afghanistan. He submitted that nowhere in the grounds were those factors set out nor did it explain why there would be no enquiry as to the reasons for his deportation given his absence of 40 years or why he was westernised person.

44. He submitted that in terms of the challenge advanced by the respondent, the FtTJ's findings had been set out at paragraph 52, and which were agreed facts before the tribunal, namely that the appellant was a national of Afghanistan, that he would be deported to that country, it was a country that he had not lived in for 40 years and that he was a westernised person who did not speak any of the languages. It was therefore against that background that the judge assessed the risk on return.

45. Mr Brown submitted that Judge Austin assessed the nature of the offences at paragraphs 53 and 54 and went on to consider the background material that was before the tribunal and from paragraphs 61 onwards gave his reasons for reaching his decision.

46. Mr Brown submitted that the Judge Austin gave adequate and sustainable reasons as to why the appellant would be at risk on return to Afghanistan between paragraphs 61 – 65 of the decision. At paragraph 64, the FtTJ considered that the respondent did not address the risks to the appellant which largely had arisen since the decision had been reached. He would have no family or support network and would have no knowledge of any locally spoken language and limited awareness of the social and cultural mores that applied, due to his lack of familiarity with Afghanistan. The judge found on the fact that he was unlikely to find work easily and would be unable to assimilate himself quietly into Afghan society. Against that background, and in the light of the country material including the respondent's own CPIN, the judge found that the Taliban, despite assurances were committing random acts of violence and killing where they considered persons who are a threat are found, or where they encounter persons who are considered to have transgressed their code. The judge found that the appellant was westernised person and that this would be something he would be ill-equipped to disguise to avoid attracting attention. The judge had also found that he had no family or social connections in Afghanistan, it had been accepted by the respondent that he was a person who had spent almost the entirety of his life in Pakistan and that the criminal offending and that he was accused of further serious offences linked to a disappearance of a young person meant that "any brief research and his background will reveal a past which is recorded online and would exacerbate his position as being known as a serious criminal" (at paragraph 61).

47. Mr Brown pointed to paragraph 65 that whilst this was an unattractive argument, return the appellant under the current conditions in Afghanistan would represent a real risk of a breach of his article 2 and 3 rights under the Convention.

48. Mr Brown referred to the material that was before the FtTJ when reaching an analysis of the evidence which included the appellant's skeleton argument, documents within the appellant's bundle referring to his conviction and also the CPIN. Mr Brown directed the tribunal to the relevant paragraphs of the CPIN which supported the FtTJ's decision.

49. Mr Brown submitted that in terms of the evidence, the history of the appellant suggested that there would be due enquiry into his background and therefore the risk must be assessed on the public profile of the appellant and that there was material which was publicly available which had been set out at pages 107 – 112 of the appellant's bundle which related to the offence. The FtTJ accepted that due to the public profile of the appellant the Afghan authorities would take an adverse view of him. The judge took into account the documents

and material between pages 114 – 119 of the appellant's bundle which were examples of other UT decisions decided in relation to other appellants and whilst they were not determinative they formed part of the background material.

50. Mr Brown submitted that whilst the grounds suggested that there was nothing to support the fact that the appellant would be asked about his history, given the 40 years outside of Afghanistan and on the accepted agreed facts that he did not speak the language and that he was westernised the answer to the question as to how they would know about him is that on return he would be asked about his background. If he were to lie, on the material available on the Internet it would make his background clearly known. The respondent does not deal with this in the grounds of challenge however the judge properly considered that issue.

51. In summary Mr Brown submitted that in light of the accepted facts and his ensuing analysis of the evidence Judge Austin had been entitled to reach the conclusion he did and that he had given adequate reasons for his decision and that he had assessed the case in the light of the background country evidence. The judge found that the risk arose in light of the Taliban and how they treated transgressions of social mores, and this was a decision Judge Austin was entitled to reach. As the grounds did not identify any arguable error of law the decision should stand.

52. Mr McVeety did not wish to make any further reply.

53. At the conclusion of the hearing I reserved my decision.

54. For the purposes of this appeal, the relevant legal framework concerns Articles 2and 3 and Part 5A of the NIA Act 2002 and, principally, as it applies in deportation cases. A "foreign criminal" for the purposes of these appeals is a person who is not a British citizen, is convicted in the UK of an offence, and who is sentenced to a period of imprisonment of at least 12 months - see section 32(1) of the UK Borders Act 2007 ("the 2007 Act"). There is no dispute that the appellant falls within the definition of a "foreign criminal." His appeal was advanced on the basis that return to Afghanistan would result in a breach of Articles 2 and 3 of the ECHR.

Discussion:

55. The challenge to the decision of FtT Judge Austin advanced on behalf of the respondent is in essence limited to the two paragraphs Mr McVeety has relied upon in his submissions (those which are set out at paragraphs 5 and 6 of the written grounds and as summarised earlier). There has been no amendment sought of the grounds in order to rely upon new grounds or to expand on the grounds as they stand prior to the hearing nor any sought at the hearing itself.

56. Mr McVeety, in his submissions stated that the grounds advanced on behalf of the respondent amounted to a "reasons challenge " and that the error of law that is asserted is the failure to provide reasons as to how the Taliban would be aware of the presence of the appellant in Afghanistan or why they would identify him as someone to be investigated such that they would become aware of his criminal convictions (paragraph 5) and paragraph 6 of the grounds refers the assertion that there was no evidence that the Taliban would be aware of his criminal history in the UK such that he would be at risk.

57. When considering the nature of the challenge brought and it being identified as a "reasons challenge" based on the narrow ground as identified above it is necessary to set out the well-established legal principles that this tribunal should apply.

58. As recognised in HA (Iraq) at paragraph 72, it is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal and in this appeal the decision of FtT Judge Austin. In particular:

(i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently - see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.

(ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account - see *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.

(iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out - see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope.

59. In approaching submissions reliant upon inadequate reasoning, it is helpful to bear firmly in mind the observations of Lord Brown of Eaton under Heywood in South Bucks County Council v Porter [2004] UKHL 33; [2004] 1 WLR 1953. Whilst it is a case about the duty to give reasons in the decisions of planning inspectors, it provides appropriate legal parameters for decisions in the FTT. Lord Brown's observations were as follows:

"36. The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the "principal controversial issues", disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in dispute, not to every material consideration...Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision."

60. These observations in the context of public law decision-making are consonant with the authorities in relation to the requirement for reasons in civil court judgments: see for instance Simetra Global Assets Limited v Ikon Finance Ltd & Others [2019] EWCA Civ 1413 at [39-47].

61. Indeed, many of the relevant cases were reviewed in Simetra Global Assets Ltd v Ikon Finance Ltd [2019] EWCA Civ 1413, [2019] 4 WLR 112 by Males LJ (with whom Peter Jackson and McCombe LJJ agreed) at [39]-[47]. The key points for present purposes that come out of that review are as follows:

a. A failure to give reasons may be a ground of appeal in itself even where the conclusion reached is one that would have been open to the judge on the evidence;

b. The extent of the duty to give reasons, or rather the reach of what is required to fulfil it, depends on the nature of the case. Nonetheless, a judgment needs to make clear not only to the parties but to an appellate court the judge's reasons for his conclusions on the critical issues;

c. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained, but the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained;

d. A judge should deal with apparently compelling evidence, where it exists, which is contrary to the conclusion which he proposes to reach and explain why he does not accept it.

62. It is not the role of this Tribunal, or any appellate Tribunal to allow an appeal merely because a different conclusion might have been reached or the reasoning might have been expressed differently. It is well established that tribunals may reach different conclusions on the same case without illegality or irrationality. As Carnwath LJ said in Mukarkar v SSHD [2006] EWCA Civ 1045 at [40], "The mere fact that one tribunal has reached what may seem an unusually generous view of a particular case does not mean that it has made an error of law."

63. In relation to "reasons challenges" appellate judicial restraint is also justified. It should not be assumed too readily that the tribunal misdirected itself just because not every step in its reason is fully set out: Jones v First-tier Tribunal [2013] UKSC 19, [2013] 2 AC 48 at [25] (Lord Hope). A judge's reasons should be read, unless he has demonstrated to the contrary, on the assumption that he knew how he should perform his functions and which matters he should take into account: Piglowska v Piglowski [1999] UKHL 27, [1999] 1 WLR 1360 (HL), 1372 (Lord Hoffmann).

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

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

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

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

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

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

67. Turning to the grounds and having applied those well-established legal principles to the decision reached by FtT Judge Austin, it has not been established by the respondent that the Judge failed to give reasons (or adequate reasons) for reaching his overall decision. In summary, the FtTJ gave adequate and sustainable evidence-based reasons taking into account what has been described as the "agreed facts", the country background evidence relevant to Afghanistan and the evidence contained in the bundle to reach his conclusion that on the evidence before him there was a real risk that the authorities, in this case the Taliban, would become aware of his criminal convictions and that based on his particular factual circumstances, which the judge plainly engaged with and analysed, was such as to demonstrate that they would lead to the appellant being at a real risk of ill-treatment on return. That analysis and reasoning is plainly set out between paragraphs 58 – 65 of his decision.

68. As Mr Brown pointed out, there were a number of agreed facts before the FtTJ which were set out at paragraph 52. There was no dispute before Judge Austin that the appellant was a national of Afghanistan and that his return, or his deportation would be to that country. It was a further agreed fact that the appellant spoke none of the languages used in Afghanistan and that he had not lived there for over 40 years. It was also agreed that the appellant is a "westernised person."

69. In his analysis of the evidence the FtTJ explained the basis upon which the parties had agreed that the appellant was "westernised" or would be considered to be westernised in the eyes of the current regime and that this was because "the appellant had spent a substantial period of his adult life in the UK, not being able to speak the local languages and having no family or social connections" (see paragraph 62).

70. Thus the FtTJ undertook an assessment of the personal background of the appellant. The relevant factors can be summarised as follows:

    (1) the appellant speaks none of the languages used in Afghanistan (para 52).

    (2) He is not lived there for over 40 years (para 52)

    (3) He is a westernised person and will be considered to be so in the eyes of the current Afghan regime having spent a substantial period of his adult life in the UK, not being able to speak the local languages, having no family or any social connections (para 62),

    (4) in the light of his length of absence Afghanistan (over 40 years) he has limited awareness of the social and cultural mores and due to his lack of familiarity with Afghanistan (paragraph 64),

(5) he would be unlikely to find work easily and would be unable to assimilate himself quietly into Afghan society (para 64)

(6) he has no family or social connections in Afghanistan.

(7) In addition to those agreed facts at paragraph 52, the FtTJ found on the evidence, which is not challenging the grounds and that it had been previously accepted that he was a person who spent almost the entirety of his life in Pakistan or in the UK (see paragraph 61).

71. Having identified those particular individual characteristics of the appellant, Judge Austin undertook an analysis of whether there was a real risk of ill-treatment to the appellant on return to Afghanistan and the Judge undertook that risk assessment in the light of the background country evidence.

72. There was no dispute that since the decision letter was issued there had been a marked and significant change in the country circumstances in Afghanistan. That was plainly referred to and recognised by the FtTJ at paragraph 58 of the decision and no criticism is advanced against the judge taking this into account. Having considered the background material and that set out in the respondent's CPIN: Afghanistan: fear of the Taliban, Judge Austin found that the Taliban governed the entire country of Afghanistan (see paragraph 59) and therefore were in de facto control and in place of the "authorities".

73. The challenge advanced by the respondent is that Judge Austin failed to give reasons as to how the Taliban would be aware of the appellant's presence in Afghanistan and why they would be aware of his criminal convictions. However on any reading of the decision, Judge Austin plainly addressed this question giving his reasons between paragraphs 60 – 65 at the decision.

74. At paragraph 60, the FtTJ took into account the nature of the offending which were serious sexual offences and found that such offending would be considered as having been a breach of Sharia Law. The respondent does not seek to challenge that finding but asserts there was no evidence that it would become known to the authorities.

75. In the light of those findings of fact concerning the appellant's personal characteristics summarised earlier which were reasonably open to the FtTJ to make on the evidence before him, the FtTJ considered the issue of risk on return and did so by reference to the country materials, and the evidence.

76. Contrary to the grounds Judge Austin gave adequate and sustainable evidence-based reasons for reaching the conclusion that the appellant's criminal offending and the fact that he was accused of further serious offences linked to a disappearance of a young person, would become known to the authorities or those in de facto control of Afghanistan, namely the Taliban.

77. In the Judge's analysis, which was open to the Judge to make on the evidence, he found that any brief research into his background would reveal such a criminal past which is recorded online and would exacerbate his position as being a known serious criminal (see paragraph 61). As Mr Brown, Counsel behalf of the appellant pointed out there was evidence in the appellant's bundle showing newspaper articles and printouts concerning the details of the criminal offending accompanied by the appellant's name and a clear identifiable picture all accessible on the Internet.

78. In his decision Judge Austin gave his reasons as to why he assessed there was a reasonable likelihood or real risk that the authorities would carry out an investigation of the appellant's background based on his personal characteristics including his westernisation and the factors summarised by the judge which were those particular and individualised to this appellant and it was open to Judge Austin in the light of those findings to reach the conclusion that the appellant would attract the attention of the Taliban.

79. It has not been suggested on behalf of the respondent that the appellant can or should lie about his background or circumstances. The correct approach ass identified in Judge Austin's analysis was to assess whether there would be likely enquiries made or questions asked in the light of this appellant's particular background and how such a person would respond without being required to lie. In some cases or in the light of their personal circumstances such information may lead to a real risk of ill-treatment in other cases it may not. That is because a fact sensitive approach applies. Judge Austin identified a number of characteristics of this appellant which the Judge assessed would likely cause enquires to be about him or characteristics that would bring him to the attention of the Taliban such as those based on his "westernisation," his lack of links to Afghanistan and the fact that he had been out of that country for 40 years and was unable to speak any of the languages of Afghanistan. Judge Austin did not consider those particular characteristics on their own but did so in the light of the country materials and the respondent's CPIN as recorded in the decision at paragraphs 58, 63 and 64. Mr Brown pointed to the evidence contained at paragraph 6.9.13 of the CPIN citing evidence from EASO report and an interview with a Taliban spokesperson who, when asked whether Afghan asylum seekers from Germany or Austria with rejected claims and who had possibly also committed crimes would be accepted back into the country, the spokesperson replied that they would be accepted and presented to a court to decide how to proceed. On the appellant's factual background he fell into the category of a returnee in general but also one who had committed crimes and therefore there was evidence in support of the reasons given by the FtTJ that his background and convictions would become known; the FtTJ having assessed the evidence and having found they would likely be viewed as contrary to Sharia law/ transgression of their cultural mores.

80. At paragraph 63 the FtTJ set out paragraph 2.4.4 of the CPIN;

"there are reports of human rights abuses, including targeted killings, torture, threats and intimidation, against civilians associated with, or perceived to have supported, the former government or international community, former members of the security forces (which may depend on their previous role), women (particularly in the public sphere), LGBTQI+ persons, ethnic and religious minorities, journalists, human rights defenders, members of the judiciary, persons deemed to have transgressed cultural or religious mores (which may include those perceived as "westernised"), and persons deemed to have resisted or opposed the Taleban."

81. Judge Austin further found at paragraph [64] that in accordance with the country materials, that Afghanistan was in a state of flux and where despite assurances, the Taliban were committing random acts of violence and killing where they considered persons who are a threat are found, or where they encountered persons who are considered to have transgressed their code.

82. In this context there is no error of law in Judge Austin's decision when he gave evidence-based reasons for reaching the conclusion that the appellant would be at a real risk of serious harm on the basis of the appellant as a westernised person who would be deemed to have

transgressed cultural or religious mores and that the appellant in light of his individual background, "would be ill-equipped to disguise to avoid attracting attention."

83. Returning to the grounds of challenge, they are limited to a "reasons of challenge" and it is not suggested or otherwise advanced on behalf of the respondent that the FtTJ failed to take into account any relevant material or evidence nor do the grounds challenge the assessment of risk. Therefore based on the narrow grounds which have been advanced, in conclusion and when analysed in the context of the reasons given by the Judge Austin, the grounds do not establish that the decision of the Judge involved the making of an error of law.

84. The grounds as they are amount to no more than a disagreement with the decision. As often observed, it might be said that a different judge may have reached a different conclusion on the particular facts however, it is not an error of law to make findings of fact which the appellate tribunal might not make or reach a conclusion with which the Upper Tribunal may disagree. The temptation to repackage disagreement as a finding that there has been an error of law should be resisted as Baroness Hale set out in The Secretary of State for the Home Department v AH (Sudan) UKHL 49 at paragraph 30:

"appellate courts should not rush to find such misdirection simply because they might have reached a different conclusion on the facts or express themselves differently."

85. This is an error of law jurisdiction and as Floyd LJ set out in UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095 at paragraph 19, " .. Although "error of law" is widely defined, it is not the case that the Upper Tribunal is entitled to remake the decision of the FtT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter."

86. In conclusion and when addressing the submissions in the grounds that there was a failure to give reasons, that is plainly not the case in the light of the decision when read as a whole. As to the adequacy of reasons, the purpose of the duty to give reasons, is in part, to enable the losing party to know why he or she has lost. It is clear from the observation made at paragraph 65 that Judge Austin considered the case on behalf of the appellant to amount to an "unattractive argument from a person who had committed serious sexual offences" however Judge Austin set out his reasoning for reaching his overall decision taking into account the evidence including the country background materials and reaching a conclusion that was reasonably open to him.

87. Consequently for those reasons the respondent has not established that the FtTJ's decision involved the making of an error on a point of law therefore the decision shall stand.

Anonymity:

88. FtT Judge Austin made an anonymity direction on the basis that the appeal concerned a claim based on protection issues. Following this, both parties were asked to provide their written submissions as to whether the direction should be continued. Both parties submitted short written submissions.

89. The starting point for consideration is that of open justice and that the general principle is that an anonymity order should only be made to the extent the law requires it or it is found necessary to do so.

90. The respondent submits that it is the offences are likely to have been well-publicised and in the absence of any indication that reporting restrictions were issued, the details of the offending can be assumed to be public knowledge.

91. As set out at paragraph 25 of the Presidential Guidance Note 2002; Anonymity orders and Hearings in private, "the fact that someone has committed a criminal offence will not justify the making of an anonymity order, even if it is known that such a person has children who may be more readily identified if the details of the person are known." In this appeal the appellant has committed serious offences and he is the subject of deportation proceedings. Therefore the scales are weighted in favour of open justice.

92. On the other side, and as identified by Judge Austin and as set out in the appellant's submissions, Articles 2 and 3 of the ECHR may be engaged where real risk of serious harm or ill-treatment may arise should a person's identity become known in connection with the proceedings and that with regard to Afghanistan such a risk it is said would arise in his name being further publicised (see guidance at paragraph 27).

93. Neither party was able to provide the UT with any information as to whether reporting restrictions been issued, and it remains unclear whether the publication of his name would lead to the disclosure or identification or unnecessarily speculation of the identification of the victim (see paragraph 26 of the guidance).

94. Having weighed up the competing interests as identified (as regards Articles 2, 3 and 8) and the need to safeguard the rights of the victim, against the need for open justice, the former competing interests outweigh the latter and therefore the anonymity direction made by Judge Austin shall remain in force.

Notice of Decision:

95. The decision of the FtTJ did not involve the making of a material error of law and the decision of the FtT shall stand.

Upper Tribunal Judge Reeds
Upper Tribunal Judge Reeds

16 October 2023