IN THE UPPER TRIBUNAL

EXTEMPORE JUDGMENT GIVEN FOLLOWING HEARING

JR/5371/2016

Field House,
Breams Buildings
London
EC4A 1WR

23 January 2017

THE QUEEN
(ON THE APPLICATION OF AAK)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE
UPPER TRIBUNAL JUDGE HANSON

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Mr R Khubber of Counsel, instructed by Turpin Miller Solicitors appeared on behalf of the Applicant.

Mr Z Malik, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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JUDGE HANSON: The claim for judicial review was issued on 13 May 2016. It challenged the impugned decision which is a refusal

by the Secretary of State to consider submissions that have been made on the applicant's behalf by his solicitors, Turpin Miller, in a letter of 29 December 2015 as amounting to a fresh claim as that term is understood by reference to paragraph 353 of the Immigration Rules. The date of the impugned decision is 16 February 2016.

2. The applicant challenged that decision on four pleaded grounds. These are repeated in the skeleton argument that has been submitted by Mr Khubber on behalf of the applicant but referring to paragraph 4.1 of the grounds for submission pleaded. It is asserted that the essential flaws with the Home Office decision under challenge are that it

   (i) fails to apply anxious/adequate scrutiny to

   (ii) the question of internal relocation

   (iii) in light of the Secretary of State's acceptance that the applicant cannot be returned to Mosul because to do so would breach Article 15(c) of the Qualification Directive with

   (iv) the need to appreciate that the question of internal relocation is whether it would be unduly harsh in the applicant's particular circumstances.

3. Permission was granted by my colleague, Upper Tribunal Judge Canavan, in an order sealed on 20 July 2016 but made on 14 July 2016 for the following reasons:

   "1. The applicant seeks to challenge the respondent's decision of 16/02/16 to refuse to treat further submissions as a fresh protection claim.

   2. It is at least arguable that the respondent did not give the level of anxious scrutiny required to the question of whether it would be unduly harsh for the

applicant to relocate to Baghdad in circumstances where the last known location of his family members was in the contested area of Mosul. It is arguable that the respondent failed to have regard to some material factors that might be relevant to the assessment of internal relocation as outlined in **AA (Iraq)**."

4. The starting point in any case of this nature, as the Tribunal were reminded by Mr Malik, is in fact the submissions that were made to the Secretary of State set out in the letter of 29 December 2015. In relation to the issue of internal relocation those submissions are in the following terms:

> "It is important to remember that, having established a real risk of serious harm in his home area of Mosul, the test is now one of undue hardship in relation to internal relocation. Undue hardship does not equate to fear of persecution and involves a case-sensitive consideration of the effect of the proposed relocation on the individual concerned.
>
> In the applicant's case we draw the Secretary of State's attention to the following points which we believe, taken cumulatively, would make it unduly harsh to expect him to relocate to Baghdad.
>
> 1. The applicant has been outside of Iraq for eleven years.
>
> 2. Prior to leaving Iraq, he had lived in Mosul for all of his life. He has never lived in Baghdad and has no family and no friends in Baghdad. He has no-one in Baghdad to whom he could turn to for support and no sponsor to assist with obtaining accommodation.
>
> 3. The applicant has no family outside Iraq who could provide financial support to him if he returned."

5. The decision maker clearly started with those submissions and thereafter looked very carefully at the applicant's own position. That is set out at the top of page 4 of the refusal letter and I will read it verbatim as it is a useful summary of the applicant's circumstances which led to the position that he finds himself in today. It is as follows.

> "You claim to have arrived in the United Kingdom in January 2004 clandestinely, and when discovered you claimed asylum on 21 January 2004 under the name AMA, a Syrian national. Your asylum claim was refused on 9 March 2004 because you had previously claimed asylum in Germany using another identity, that of HH, an Iraqi national on 26 March 2003. You then left the UK and returned to the UK from Sweden on 3 May 2007 and claimed asylum. Your asylum claim was refused on 1 June 2007. You returned to Sweden and claimed asylum there on 22 August 2008. You then returned to the UK on 2 December 2008 and claimed asylum. Your asylum claim was refused on 29 January 2009. You appealed this decision which was dismissed on 18 March 2009, and you became appeal rights exhausted on 20 May 2009. You presented further submissions on 8 May 2009 which were refused on 17 February 2010. You then presented further submissions on 16 June 2010 which were refused on 24 September 2010. You then presented further submissions on 27 October 2014 which were refused on 27 February 2015. You lodged further submissions on 26 January 2016 that are the subject of this decision."

6. The decision maker went on:

> "Below is a summary of your further submissions.
>
> 1. You claim that you may not be returned because of the ongoing and severe security threat in Iraq and that the indiscriminate violence there would be a breach of the

threshold of Article 15(c) of the Qualification Directive.

2. You claim that you are from Mosul, which is under ISIL control and therefore you qualify for international and humanitarian protection."

7. That chronology is set out in greater detail in a document headed "Chronology for Hearing Monday 23 January 2017" which has been prepared by Mr Khubber on the applicant's behalf. I have not referred to it in the same detail. It is an extensive document but I do not feel that I need to refer to the matters in the accuracy in which they are recorded there, as the summary that I have referred to does not require me to mention anything in any greater detail. There is no factual dispute between the parties in relation to the chronology of events or indeed the relevant law that this Tribunal must apply.

8. The decision maker was clearly aware not only of those facts that I have referred to but also the relevant case law in relation to whether an internal flight or internal relocation is appropriate or reasonable or unduly harsh in the circumstances of the case and that relating to whether an individual is capable of or can be returned to Iraq set out in detail by the Upper Tribunal in the country guidance case of **AA (Article 15(c)) (Rev 1) Iraq CG [2015] UKUT 544**.

9. There is within the bundle, and I say this in passing and no more, a document showing a grant of permission to appeal by the Court of Appeal in relation to the Tribunal's findings in **AA** but in relation to the document I make the following observations.

10. Firstly ground 3, which challenged the finding in **AA** that a Kurd could return to Iraq, which, it was suggested in the grounds, was an irrational finding or not one in accordance

with that evidence, was rejected by the Court of Appeal and permission not granted. The issue on which permission was granted has not been shown to have any material impact upon the decision in this case. It is also of relevance at this stage, obviously not knowing what the Court of Appeal may eventually decide, that the country guidance case of **AA** is still applicable law.

11. The Court of Appeal did not grant any form of injunctive relief staying the effect of **AA** pending the outcome of their decision and for that reason this Tribunal has looked at the matter in relation to **AA** as indeed the decision maker was arguably entitled to do. I made that point in passing. It has not been extended by Mr Khubber before the Tribunal but it is a matter that he does refer to in his skeleton argument and the relevant document is contained within the bundle.

12. In terms of the fresh claim there are two elements to a fresh claim decision that is being challenged that this Tribunal has to consider. Again, within the authorities bundle we have the lead decision of **WM (DRC) v Secretary of State [2006] EWCA Civ 1495** and subsequent authorities, the gist of which has been that the findings of Buxton J in **WM** remains good law and on the whole should be followed.

13. That set out a twofold test the first part of which is whether in challenging a fresh claim decision the applicant had demonstrated that arguably the Secretary of State did not undertake the obligations imposed upon her under the Rules as encapsulated in Buxton J's judgment, namely to consider the information made available with the required degree of anxious scrutiny.

14. The second element of the test is whether there is a realistic prospect of a First-tier Judge applying the rule of anxious scrutiny thinking the applicant would be exposed to a real risk of harm or persecution on return or that there would be a

breach of a protected right under the European Convention on Human Rights or an unlawful decision contrary to the Immigration Rules.

15. As stated, there was no dispute in relation to the law and Mr Malik whilst submitting that the decision was within the range of those that the decision maker was reasonably entitled to make on the basis of the evidence, did also include the important caveat “provided the appropriate required degree of anxious scrutiny had been exercised”. If the required degree had not been exercised, then it may cast doubt upon the sustainability of the decision that has been made.

16. It does no harm at this stage to remind ourselves, as I have done during my preparation for this matter and also during the short break that the parties were given, of the relevant law in relation to both the position of returnees to Iraq and also the law relating to internal relocation. These are the cases that were considered by the decision maker. I do not propose to make any reference to cases such as **Elgafaji** or any of the cases relating to Article 15(c) as it was conceded by the decision maker that as the applicant’s home point of residence is Mosul, which is in a situation of crisis at the moment, if I can use that as a general term, the applicant could not be returned without a breach of his Article 15(c) rights. That is therefore is not a live issue so far as this decision is concerned.

17. Starting with **AA**, **AA** provided some useful guidance both in terms of the country conditions but also in relation to the individual areas to which a person might be returned and also the factors that a Tribunal, because obviously their decision was directed at the Tribunal but also within that that I include the decision maker, should consider when assessing whether return was reasonable in all the circumstances.

18. The first thing that was held in **AA** was that the return of a former resident of the Kurdish Regional Area, IKR it was referred to, would be to the IKR and all other Iraqis would be to Baghdad. The decision maker was clearly aware of that and if one reads the decision letter it is quite clear that what was envisaged is a direct return from the United Kingdom to Baghdad.

19. **AA** also found that no Iraqi national will be returnable to Baghdad if not in possession of one of the requisite documents, that being defined as a current or expired Iraqi passport or a laissez passer document.

20. In this case it is accepted that the applicant has in his possession both an expired Iraqi passport, the number of which is included on page 7 of the refusal letter, together with a national ID card the serial number of which is again referred to on page 7 of the refusal letter.

21. When considering therefore whether return was feasible on the basis of the documentation the conclusion by the decision maker that it was in all the circumstances is a decision that has been arrived at considering the relevant parts of **AA** and the available information with the required degree of anxious scrutiny and no arguable basis for allowing the applicant to succeed in relation to that matter is made out. To be fair to Mr Khubber, following an earlier indication, the issue of feasibility of return and documentation was not a matter which I considered to be his strongest point in relation to his challenge to the decision.

22. In relation to documentation where return is feasible, **AA** also went on to discuss at some length the status of the Civil Status Identity Document, the CSID, and the methods by which that could be obtained. It was found that where the individual’s return to Iraq is found by the Tribunal to be feasible it would generally be necessary to decide whether

that individual has a CSID or would 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 the applicant shows there are no family or other members likely to be able to provide means of support, the person is in general likely to face a real risk of destitution, amounting to serious harm, if, by the time any funds provided to that person by the Secretary of State or her agents to assist that person's return have been exhausted, it is reasonably likely that the applicant will still have no CSID.

23. The decision maker again considered this matter on page 7 by reference to the appropriate background information and the fact that it states that a CSID may be obtained via the Iraqi Embassy in London or via a power of attorney in Iraq. There is reference to the applicant's statement in his asylum claim that he had a mother, sister and five children in Iraq, in Mosul, but it then goes on that he claimed to have family members who would be able to vouch for his identity in order to prepare the laissez passer or CSID.

24. We touch at this stage upon the submission made by Mr Khubber, which is quite important and almost a cornerstone to the submissions that he has made in relation to internal flight and other points, that the decision maker does not appear to have considered to any extent at all how family members in Mosul, which at the date of decision, which is the point at which this matter is being considered, was under the control of IS, who, it is known, are in the practice of shooting anybody or torturing them in indescribable manners if they thought they were trying to flee that area, how such people would be able to provide any sort of assistance to the applicant in relation to providing a power of attorney or vouching to the authorities in relation to his identity. That

is not a matter in relation to returnability but rather the obtaining of a CSID once he returns to Iraq.

25. The difficulty in relation to the obtaining of that document was one recognised by the Tribunal in **AA** when looking at the expert evidence. They do not make any clear findings in relation to how an individual who relies upon an application made to an office created outside their own residential area for the purposes of obtaining CSID would fare. Before the decision maker there was information to show that the applicant had the required identity documents to enable the respondent return him, to show that there had been established in Baghdad a Civil Status Affairs Office for those from the contested areas including Mosul, Anbar and Salah Al-din, indicating that the applicant had a place of reference. It was not established on the basis of the documents that were available that the applicant would not be able to acquire a CSID, per se, and in that respect I did not find that any error in the process taken by the decision maker in relation to the documentation has been made out.

26. **AA**, however, also went on to give advice on the position in relation to a returnee to the Kurdish Region. Now, this is of some importance as it was accepted in **AA** that where an individual could or may experience difficulties in areas such as Baghdad then there may be if they are of Kurdish ethnicity an alternative internal flight option to the Kurdish zone.

27. In relation to Baghdad, returning to that before looking at relocation, I make the following comments, again, referring to **AA**. In that case it was held it would not be unreasonable or unduly harsh for a person from a contested area to relocate to Baghdad City. So as a general proposition the comment by the decision maker in the refusal letter that that was a viable option per se is not infected by any arguable legal error.

28. **AA** went on then to:

> "In assessing whether it would be unreasonable or unduly harsh for an Iraqi national to relocate to Baghdad, the following factors are, however, likely to be relevant",

and this moves into the area that, Mr Khubber submitted, had not been adequately considered by the decision maker. They are firstly:

> "(a) Whether the applicant has a CSID or will be able to obtain one."

I have referred to that issue previously prior to moving on to this section of the decision.

> "(b) Whether the applicant can speak Arabic."

This is important as those who cannot are less likely to find employment. The information before the decision maker was that the applicant spoke a little Arabic. There is no more information available to me to what extent that term is meant to incorporate by saying "a little Arabic".

> "(c) Whether the applicant has family members or friends in Baghdad able to accommodate him."

That is a matter that I shall refer to shortly.

> "(d) Whether the applicant is a lone female."

That does not apply.

> "(e) Whether the applicant can find a sponsor to access a hotel room or rent accommodation."

The applicant claims he has no family and knew nobody within Baghdad. Therefore, the information before the decision maker suggested there was no sponsor available.

> "(f) Whether the applicant is from a minority community."

That is not a reference to his ethnicity as a Kurd. It is a reference to his religion. The applicant is a Muslim. The two predominant Muslim groups in Iraq generally and in Baghdad are the Shia or Sunni of which the applicant falls within one such group. It is not established he is from a minority community such as Christian, Yazidi or any of the other religions in Iraq.

> "(g) Whether there is support available for the applicant bearing in mind there is some evidence that returned failed asylum seekers are provided with the support generally given to IDPs."

In relation to that, the decision maker was of the opinion that such support could be provided to family members, which is, again, a matter I shall refer to shortly.

29. It is not disputed before me that the applicant would receive some support and, again, the country guidance looked at in **AA** indicated that that would be given to internally displaced person in relation to which the UNHCR and the various humanitarian groups in Iraq speak of considerable pressure being placed upon those resources. There are within the documents that might have been available to the decision maker examples of financial hardship and issues with regard to food and accommodation experienced by some IDPs but that is not information that was put to the decision maker in the submissions made on the applicant's behalf.

30. In relation to relocation to the Kurdish area, **AA** found that the Kurdish Area is virtually violence-free. There was no Article 15(c) risk to an ordinary civilian in that area. A Kurd who does not originate from the Kurdish zone can obtain entry for ten days as a visitor and then renew this entry permission for a further ten days. If the Kurd finds employment he can remain longer although he will need to register with the authorities and provide details of the

employer. There was no evidence that the authorities in the Kurdish zone proactively remove Kurds from their area whose permits have come to an end. None of that is contested in terms of the submissions that have been made to this Tribunal.

31. What the Tribunal in **AA** also say, however, is whether a Kurd, if returned to Baghdad, can reasonably be expected to avoid any potential undue harshness in that city by travelling to the Kurdish zone, will be fact-sensitive and is likely to involve an assessment of (a) the practicality of travel from Baghdad to the Kurdish zone (such as to Irbil by air); (b) the likelihood of the Kurd securing employment in the Kurdish zone; and (c) the availability of assistance from family and friends in the Kurdish zone.

32. **AA** was a case in which the issue of internal relocation was very important as indeed it is in this case. The applicant has been found to be a person who lacks credibility, who did not tell the truth in relation to his asylum claim and in relation to whom Professor John Ritson gave very clear and sustainable reasons for rejecting the credibility of his claim in 2009.

33. I do, however, accept Mr Khubber's point that there has been a material change in the circumstances in Iraq since 2009. It is also the case that the decision maker, did not find that the claim did not satisfy the fresh claims test because the applicant had been found to lack credibility. It is a conclusion based upon a finding that he could not realistically succeed, even applying the required degree of anxious scrutiny, on the basis of the circumstances that existed at the date that the further submissions were made.

34. Internal relocation is of course an important aspect for it is established law, repeated in cases such as **AMM and others [2011] UKUT 445,** that Article 8(1) of the Qualification Directive provided that the member state may determine that a

person is not in need of international protection if there is a part of the country of origin in which there is no well-founded fear of being persecuted or of suffering a real risk of serious harm and the applicant can reasonably be expected to stay in that part of the country. Article 8(3) of the Qualification Directive states that Article 8(1) applies notwithstanding technical obstacles to return to the country of origin. If one looks at that earlier case law and **AA** we have this repeated theme running through as to whether a person can reasonably be expected to stay in the part of the country in relation to which it is found there was a viable internal relocation option.

35. The leading case with regard to internal relocation is, however, that of the House of Lords in **Secretary of State for the Home Department v AH (Sudan) [2007] UKHL 49** in which the House of Lords pointed out that the test to determine whether internal relocation was available was that set out in **Januzi v Secretary of State [2006] UKHL 5** in that the decision maker should decide whether taking into account all relevant circumstances pertaining to the claimant and his or her country it would be reasonable to expect the claimant to relocate or whether it would be unduly harsh to expect him or her to do so. The House of Lords in **AH** stated the test was one of great generality. In applying the test enquiry had to be directed to the situation of the particular claimant. Very little was excluded from consideration other than the standard of rights protection which a claimant would enjoy in the country where refuge was sought.

36. Baroness Hale said that all the circumstances of the case had to be assessed holistically with specific reference to personal circumstances including past persecution or fear thereof, psychological or health conditions, family and social situation and survival capacities in the context of the conditions in the place of relocation including the basic

rights, security and socio-economic conditions and access to health care facilities, all with a view to determine the impact on the claimant of settling in the proposed place of internal relocation and whether the claimant could live a relatively normal life without undue hardship.

37. The House of Lords said that it was not a correct application of the test to only focus on the comparison between conditions in the claimant's home country as a whole and those prevailing proposed area of relocation nor was it correct to only compare conditions in the place of habitual residence from which a claimant had fled and those in the safe haven.

38. In relation to this matter it is important that we do not lose sight of the fact that when considering internal relocation those earlier decisions were as binding upon the decision maker as the country guidance case of **AA**. If one now turns to look at the criticisms that have been made of the decision it was simply, but accurately, put by Mr Khubber in his submissions that although the decision maker was aware of the decision in **AA** the decision maker in arriving at the impugned decision did not focus upon the practicalities of return as he or she was required to do so on the basis of the decision of the Upper Tribunal and, indeed, as the decision maker was required to do based upon the guidance provided by the House of Lords in **AH (Sudan)**.

39. The location of the applicant's family is of some significance in relation to the point made by Mr Khubber. Mr Malik in his submissions took me to page 8 of the refusal letter, page 99h of the applicant's bundle, and a particular paragraph in that in which the decision maker made the following statement:

> "In your case however as noted above you are a Kurd (who are not considered to be at risk of harm in non-contested areas), and that you also have your parents, two brothers and a sister remaining there. Whereas it is acknowledged

that your parents and siblings were living in Mosul when you left (screening interview dated 13 January 2009) you have not provided any evidence that would suggest that this is no longer the case. Therefore, it is considered that you do have close family remaining in Iraq who would be able to assist you. Furthermore, you are a single healthy young man with no medical issues and the fact that you have been able to travel and live abroad in three countries (UK, Germany, Netherlands and Sweden) demonstrates your resourcefulness. The country guidance report also states that the onus is on the individual to demonstrate why such assistance is not available, and that redocumentation, whilst important, is not in itself a reason for international protection."

40. The first observation in relation to that is even though the applicant may clearly be a resourceful individual the fact he lived in the United Kingdom, Germany, Netherlands and Sweden is arguably irrelevant when considering any risk on return or reasonableness of return and internal relocation within Iraq where it is the culture and conditions in Iraq that prevail.

41. The second point is that discussed with Mr Malik during his submissions in that it is not at first flush clear what the decision maker was actually trying to state or intending to say in relation to the whereabouts of the family. The use of a double negative is possibly the problem that is caused in correctly interpreting that statement and it has to be interpreted, I think, in light of the wording used that what the decision maker is concluding is that no information had been provided to show that the circumstances of the family had changed, i.e. to show that it was no longer the case that the family were still living in Mosul as they indeed were when the applicant completed the screening interview in 2009. This is of some importance and supports the submissions made by Mr Khubber for the following reasons, namely that **AA** did identify

that the availability of family support for an individual returned to Baghdad could be of some significance and needed to be properly examined and in relation to return to the Kurdish zone the availability of support from family members within the Kurdish zone to an individual when looking at the reasonableness of relocation there is also a significant factor.

42. The decision maker appears to have concluded that the family were still in Mosul, yet somehow also to have concluded that the family could provide the required degree of assistance as identified in **AA** that may well make internal relocation to Baghdad and the Kurdish zone reasonable and sustainable.

43. There is an arguable conflict within those findings, and I accept the submission of Mr Khubber that the decision maker does not appear to have applied the required degree of anxious scrutiny to the facts of the case that were known on. The information before the decision maker clearly included not only the initial letter of further submissions but also other information including the screening interview of 2009 and other paperwork that had been considered in relation to this matter.

44. The decision maker on page 9 accepts, as stated, that Mosul is a city to which the applicant cannot be returned as it would breach Article 15(c) as it is clearly an area in relation to which there was at the time of the decision, and indeed at today's date although that is not the relevant date, a place where the requirements of Article 15(c) are satisfied.

45. The second element of the failure by the decision maker to examine matters with the required degree of anxious scrutiny is also demonstrated by the paragraph on page 9 below the acceptance that return to Mosul would breach Article 15(c) where the decision maker makes the following statement:

> "However, it is considered that as an ordinary Kurdish civilian who has close family residing in Iraq, as well as being a civilian, with no adverse profile you may return to the KRG (via Baghdad Airport), and that in accordance with **AA Iraq** that in returning you to KRG, your rights would not be breached under Article 15(c)."

46. Whilst it is correct that there is no evidence that returning the applicant to the Kurdish zone would lead to a breach under Article 15(c) there is no further mention or appropriate analysis within the decision of the reasonableness, or viability, as the terminology is used in **AA**, of the proposed method of return. To return an individual by internal flight it would have been known to the decision maker that the first thing that would have been required would have been a valid Iraqi passport. The applicant had an expired passport and the decision maker may have been entitled to conclude that such could have been renewed.

47. The second point is an individual would have to have the financial means to be able to afford such a flight. In this respect there is an interrelationship between the resources that the decision maker concluded would be available to assist the applicant on return, which places an emphasis upon the availability of family support, and the situation of the family which was not adequately considered by the decision maker in arriving at the decision.

48. Returning to the twofold test, has the applicant demonstrated that the Secretary of State did not undertake the obligations imposed upon her as encapsulated in the judgment of Buxton J in **WM (DRC) v Secretary of State**, the correct answer is, in my opinion, yes. The applicant has demonstrated that the required degree of anxious scrutiny required by the country guidance case and earlier authorities relating to the reasonableness of internal flight were not adequately

considered with the required degree of anxious scrutiny as a reading of the decision letter clearly demonstrates. In relation to whether there are realistic prospects of a First-tier Judge applying the rules of anxious scrutiny him or herself thinking the applicant would be exposed to a real risk of harm or persecution on return and that there would be a breach of a protected right and European Convention rights or an unlawful decision contrary to the Immigration Rules, on the basis of the approach taken by the decision maker in assessing the merits of the claim it could not be said at this stage that no realistic prospect does not exist.

49. Therefore, under both of the heads set down by Buxton J in **WM (DRC)** I find that the applicant has proved his case. The decision I make is to quash the Secretary of State's decision of 16 February 2016.

Application for Permission to appeal to the Court of Appeal

50. I will refuse permission to appeal to the Court of Appeal of the Tribunal's own motion on the basis there is no realistic prospect of success. There is no arguable reason for that court to interfere with this decision on the basis of the information available and the content of the decision letter.

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