Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: LP/00190/2021
(PA 518342021)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 October 2021 and 4 April 2022	**On 15 June 2022**

Before

UPPER TRIBUNAL JUDGE LANE
UPPER RIBUNAL JUDGE RIMINGTON

Between

MAT

Appellant
(ANONYMITY DIRECTION MADE)

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Chirico and Ms Cronin (21 October 2021), instructed by Charles Douglas, solicitors
For the Respondent: Mr Harland, instructed by Government Legal Department

DECISION AND REASONS

1. The appellant is a male citizen of the W who was born in 2011[1]. He appealed to the First-tier Tribunal against a decision of the Secretary of State dated 12 March 2021 refusing his claim for international protection and his human rights claim. The First-tier Tribunal, in a decision dated 23 June 2021, dismissed his appeal on asylum and Article 3 ECHR grounds but allowed the appeal on Article 8 ECHR grounds. The appellant now appeals to the Upper Tribunal against the asylum and Article 3 ECHR decision. The respondent cross-appeals against the Article 8 ECHR decision. Permissions to appeal and cross appeal were granted by First-tier Tribunal Judge Parkes by decisions dated 22 August 2021 and 20 September 2021 respectively.

2. The appellant was born in the United Kingdom. He has spent time living lawfully in the United Kingdom and in W. He is currently living in the United Kingdom with his sister (Y, also a minor) and has leave to remain as the dependent of a Tier 1 (Investor) (his father) until 30 January 2023.

3. The appellant claimed asylum on 17 August 2020 immediately following the Court of Appeal's refusal to grant permission to A to challenge the return order of Cobb J (see below). The appellant claims that he is at real risk of being ill-treated on return to W by his mother and her associates. As regards Article 8 ECHR, the appellant does not claim to satisfy the provisions of the Immigration Rules but asserts that his removal would lead to unjustifiably harsh consequences and therefore a disproportionate interference with his enjoyment of his family and private life in the United Kingdom.

The proceedings in the High Court and the Upper Tribunal

4. There have been protracted and complex proceedings concerning the appellant in the family courts of W and England and Wales. Those proceedings are detailed at [6-35] of the judgment of MacDonald J handed down on 14 January 2022 (see below). We do not propose to repeat that litigation history in full here but will refer to those applications and orders which are relevant to the determination of the appeals before us.

5. On 25 March 2020, the appellant's mother made an application in the United Kingdom under the Child Abduction and Custody Act 1985 (incorporating the Hague Convention on the Civil Aspects of International Child Abduction 1980) and, in the alternative, under the court's inherent jurisdiction. That application related only to the appellant and not to Y. By a judgment handed down on 16 July 2020, Cobb J sitting in the High Court (Family Division) ordered that the appellant should be returned to W to live with his mother.

6. Following the asylum claim made by the appellant on 17 August 2020, A applied for a stay of execution of the return order of 16 July 2020. On 6 August 2020, Moor J granted a stay.

[1] For ease of reference, we have used the same system adopted by the First-tier Tribunal for anonymising the individuals involved in this appeal and the appellant's country of nationality.

7. On 16 July 2021, District Judge Jenkins, sitting in the Family Court, made orders for the registration of order of a District Court in W dated 27 August 2020 under the Hague Convention. The order of the court in W had provided for the appellant to live with his mother in W and for Y to live with her father in the United Kingdom. On 23 July 2021, the appellant's father applied to the High court (i) to set aside the return order of Cobb J and (ii) to appeal the orders of District Judge Jenkins. Both applications were listed before MacDonald J and heard on 16-18 November 2021.

8. On 14 January 2022, MacDonald J handed down his judgment. He set aside the return order of Cobb J and allowed the appeal against the orders of District Judge Jenkins. He declined to make a return order [118].

9. The initial hearing in the Upper Tribunal took place at Field House on 27 October 2021. At the end of the hearing, we gave directions for the filing and service of written submissions. Having received the submissions, we were made aware by counsel that a judgment by MacDonald J on the applications made by A would soon be forthcoming and we therefore decided to postpone promulgating our decision on the appeal until after the High Court had handed down its judgment.

10. We received a copy of the judgment of MacDonald J in February 2022. Given that the court had reversed the earlier return order of Cobb J, we considered that we should reconvene the initial hearing to hear further submissions from counsel. We did not consider that the judgment was likely to have any direct bearing on the matter of error of law but did consider that, given that part of the respondent's case in respect of Article 8 was that the First-tier Tribunal had erred by reaching a decision which contradicted the return order made in the High Court, the judgment could possibly influence the future conduct of the parties in the appeal. The reconvened hearing took place at Field House on 4 April 2022. Following that hearing, we have been made aware that, on 12 April 2022, the Court of Appeal (Moylan LJ) refused permission to the mother to appeal the High Court's order allowing the appeal against the District Judge's orders.

Article 8 ECHR: the Secretary of State's appeal

11. At the reconvened initial hearing, Mr Harland, who appeared for the Secretary of State, told us that the Secretary of State sought to withdraw the appeal against the First-tier Tribunal's decision to allow the appellant's appeal on Article 8 ECHR grounds. We asked both counsel if it would assist if, in any event, we were to offer guidance on the interface between appeals in the IAC and applications to the High Court under the Hague Convention. Our suggestion was declined. We consented to the Secretary of State's application to withdraw pursuant to The Tribunal Procedure (Upper Tribunal) Rules 2008, paragraph 17(2).

The appellant's appeal: Asylum and Article 3 ECHR

12. The only issue which remains to be determined is whether the First-tier Tribunal erred in law by dismissing the appellant's appeal on asylum and Article 3 ECHR grounds. We have the detailed skeleton arguments of both parties and have had regard also to the oral submissions of Mr Chirico, Ms Cronin and Mr Harland. We are grateful to them all for the assistance which they have provided to the Tribunal.

13. The First-tier Tribunal's lengthy and detailed findings regarding asylum are summarised in its decision at [131-132]:

> 131. We conclude by summarising our findings:
>
> (i) We accept that the appellant's claim engages a Convention reason, namely his membership of a particular social group both on the grounds of his minority and his membership of his father's family.
>
> (ii) We do not accept that the appellant is at real risk of persecution in W solely based on his minority.
>
> (iii) We accept that the treatment the appellant fears is capable of amounting to persecution and/or serious harm.
>
> (iv) We do not accept that the treatment the appellant has already experienced in fact amounts to persecution because there is no causal link between the harm and the Convention reason, and we do not accept that the appellant is at real risk of persecution or serious harm from his mother acting alone.
>
> (v) We accept the general plausibility of some of the claims of the appellant's father including:
>
> - that AB has links to the President of W and that BC is linked to AB;
>
> - that there is corruption at the highest level in W and that those close to the President of W are involved in schemes to consolidate and preserve their wealth and influence;
>
> - that the appellant's father was asked to participate in a scheme through his bank to launder money from Z to circumvent international sanctions; and
>
> - that those who sought to involve the appellant's father in money laundering would seek to punish him for his refusal to become involved.
>
> (vi) We do not accept:
>
> - that the appellant's mother has close links to AB, BC, and CD as claimed;
>
> - that AB, BC, and CD have used the appellant's mother as a means of getting to the appellant's father or that there is a real risk they will do so in the future;
>
> - that the courts or the police in W have been influenced either by the appellant's mother alone or by her together with her claimed associates.
>
> (vii) We do not accept that there is a causal link between the future persecution/serious harm feared and the Convention reason and we do

> not accept that the appellant is at real risk of persecution or serious harm from his mother acting in concert with others.
>
> (viii) There is sufficiency of protection.
>
> (ix) Given the appellant's minority, internal relocation does not arise.
>
> 132. For all of these reasons we find that the appellant does not have a well-founded fear of persecution for a Convention reason.

The appellant's Grounds of Appeal

14. The appellant advances seven grounds of appeal in respect of asylum and Article 3 ECHR:

Ground 1*: The FTT materially erred in its approach to the evidence of the Appellant child himself, by*

(i) acting unfairly in rejecting the evidence contained in MAT's written note without raising it with the witnesses who had given evidence about the note;

(ii) in any event giving no or inadequate reasons for rejecting the evidence contained in that note; and

(iii) failing to have regard to relevant considerations when assessing the statements which A had previously made to social workers about his treatment when in the care of his mother.

At [138], the First-tier Tribunal found:

> 138. While we accept that there is some evidence of physical violence towards [Y], the evidence of the same treatment towards the appellant is very limited and appears only in the later evidence, including the letter to the court in W which is dated 1 August 2020. This is more than two years after the appellant last saw his mother. We are of the view that the earlier evidence such as the first report of [the independent social worker] is more likely to be reliable. The Family Court considered that it appeared the appellant had been influenced by his father and Y since being separated from his mother and it is for this reason that we consider the earlier evidence is more reliable. We do not suggest that the appellant is not telling the truth, but we are not satisfied that his evidence is wholly his own in the letter of August 2020.

The appellant submits that this finding is 'unreasonable and arrived at unfairly.' He complains that the Tribunal failed to hear evidence from Y and her father about the 1 August 2020 letter and wrongly gave more weight to evidence (which had not mentioned physical violence) pre-dating the letter. He argues that (i) he was older and emotionally more mature by August 2020 as is evidenced by his handwriting in August 2020, and that fact should have given weight to the evidence; (ii) the complaints in the letter are 'manifestly those of a child' and (iii) at the time of the earlier evidence, the appellant had suffered a speech impediment affecting his ability to express himself clearly and had been 'silent and sad.'

15. The letter of 1 August 2020 appears in the appellant's bundle before the First-tier Tribunal at [A135- A159, including the English translation]. It is clear that most of the letter has been written by Y; indeed, Y explains in the letter that the appellant can only write in the language of W using capital letters. The appellant writes that his mother 'always screams at me and beats me.'

16. We do not find that Ground 1 has merit. First, it was for the appellant and his advisers to decide what oral evidence should be given to the First-tier Tribunal and concerning which issues. The Tribunal's observation regarding the weight attaching to the various items evidence advanced by the appellant is an obvious one and should have been addressed by the appellant's representatives at the hearing. It was not a matter raised for the first time by the Tribunal or without notice to the parties. Secondly, the First-tier Tribunal was well aware from the documentary evidence (i) that the appellant had matured by August 2020; (ii) that the language used in the letter was that of a child and (iii) the methods adopted by the social worker to elicit evidence from the appellant. It did not have to refer specifically to those matters when making its findings. Further, the use of 'childish' language does not preclude the possibility that the appellant was helped to compose the letter. Thirdly, the weight attaching to particular items of evidence is a matter for the Tribunal. The Tribunal did not, as the grounds suggest, completely reject the letter ('*We do not suggest that the appellant is not telling the truth…*') but attached weight to it in in the context of the entirety of the evidence as it was required to do. The fact that the independent social worker may be 'very used to looking out for coaching' did not prevent the Tribunal, which was able to consider the entirety of the evidence which the independent social worker had not, from concluding that the appellant's evidence may have been influenced by others. That was a finding manifestly available to it on the evidence and properly and adequately reasoned.

Ground 2: *The FTT materially erred in its approach to the question whether MAT's feared persecution was for a Convention reason by:*

(i) conflating the separate questions of the persecutory harm feared with the Convention reason for it and, consequently, failing to direct itself correctly in accordance with guidance relating to the persecutory character of acts against children;

(ii) misdirecting itself in law as to whether the Convention reason was required to be the sole reason (rather than one effective reason) for the feared persecution;

(iii) failing to have regard to the fact that A feared persecution as a child.

17. The appellant relies on Paragraph 339K of HC 395 (as amended):

> 339K. The fact that a person has already been subject to persecution or serious harm, or to direct threats of such persecution or such harm, will be regarded as a serious indication of the person's well-founded fear of

> persecution or real risk of suffering serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated.

18. The appellant argues that the First-tier Tribunal conflated the separate issues of persecution and causation. At [75], the First-tier Tribunal found that:

> 75. We find based on the evidence before us that there is a real risk the appellant will be subjected to some of the treatment which he and Y outline and which is recorded in the evidence before us, which includes belittling and verbal and emotional abuse. We are satisfied that this is capable of amounting to persecution taking into account the guidance referred to at paragraph 33 of the skeleton argument on behalf of the appellant. We therefore move on to consider whether in fact it does amount to persecution in the present case.

At [131(iv)] (see 13 above), the Tribunal found no 'no causal link between the [past] harm [suffered by the appellant] and the Convention reason.' The appellant complains that the First-tier Tribunal erred by 'omitting any serious consideration' of the constituent elements of the definition of persecution and by ignoring the mandatory aspect of Paragraph 339K ('*The fact that a person has already been subject to persecution or serious harm ... , will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of suffering serious harm.'* [our emphasis]).

19. The First-tier Tribunal was careful to record the appellant's case as it had been put before it. At [76], the Tribunal records that 'the appellant's claim in this regard [asylum] is two-fold: that the appellant's mother will persecute him for her own ends, motivated by revenge and financial reasons; and that she will persecute him in order to assist others interested in having his father return to W for political/financial reasons.' Having referred to the evidence which clearly showed that the mother's behaviour towards the children had existed from the outset and pre-dated the separation of the parents, the Tribunal concluded at [81]:

> 81. We accept that Y's evidence indicates that things deteriorated after their parents separated, but the consistent pattern of treatment by their mother many years before the separation means that we do not accept to the lower standard that the appellant has made out a causal link between his fear and the Convention reason. In other words, the appellant's mother treated her children in this way because of her own inadequacies as a parent and not because they are their father's children. We do not accept to the lower standard that this amounts to persecution for a Convention reason.

20. In so far as the appellant submits that the First-tier Tribunal failed to address paragraph 339K, that is plainly not the case. We find that, at [78], the Tribunal clearly had paragraph 339K in mind when it observed:

> 78. Although the appellant claims that there is past persecution, which is a strong indication of a risk of future persecution, we do not accept that this is the case. The evidence shows that the appellant's mother subjected him

and Y to the type of treatment he fears long before her relationship with his father broke down.

The Tribunal's disagreement with the appellant's submission is not that paragraph 339K is wrong but rather that, for the reasons given, it has limited application on the particular facts in this appeal. The Tribunal has here articulated its opinion, which is repeated elsewhere in the decision, that there has been no past persecution of the appellant but rather poor parenting by the mother. On the evidence, the finding was plainly available to the Tribunal and the appellant does no more than seek to disagree with it.

21. The First-tier Tribunal's conclusion, that the appellant had not in the past suffered harm which should be categorised as persecutory and that any fear he may have of future such harm is not objectively well-founded, has been supported by cogent reasoning. We can find no good reason to interfere the conclusion. The Tribunal did not reject the argument that bullying parental conduct could amount to persecution ('We are satisfied that this is capable of amounting to persecution taking into account the guidance referred to at paragraph 33 of the skeleton argument on behalf of the appellant.' See [75] quoted above). The problem for the appellant is that the Tribunal did not find that the treatment in this case did as a matter of fact amount to persecution. That finding, as Mr Harland submitted, not only disposes of Ground 2 (i) but also Ground 2 (ii); its finding that none of the treatment, even in part, which the appellant had or is likely to encounter at the hands of the mother or her associates amounts to persecution for a Convention reason renders that part of Ground 2 without merit.

22. Finally, at Ground 2 (iii), the appellant submits that the First-tier Tribunal failed to have regard to the fact that the appellant 'feared persecution as a child'. However, at [72], the First-tier Tribunal clearly recorded the fact that the appellant's youth differentiated his experience from that of his older siblings either because was old enough to cope with the mother's conduct or because they were themselves 'allegedly involved in the plot…' We are satisfied that the Tribunal has had in mind throughout its analysis the particular characteristics of the appellant.

Ground 3*: In determining whether the threshold of persecution/serious harm was met, the FTT erred by:*

(i) failing to have regard to the specific and unchallenged evidence of MAT's sister Y as to the level of harm which A had previously suffered and which he feared;

(ii) failing to direct itself in accordance with relevant guidance and law on the question whether emotional or psychological treatment may, separately or cumulatively, amount to persecution or inhuman/degrading treatment; and/or

(iii) failing to have regard to or give any or adequate reasons for rejecting, the evidence about emotional or psychological harm; and/or

(iv) reaching a conclusion (that the emotional abuse which MAT had suffered did not cross the relevant threshold of severity) which was perverse.

23. Regarding Article 3 ECHR, both parties agree that the First-tier Tribunal directed itself appropriately at [134] (and see Grounds at [36):

> 134. While it must be demonstrated to the lower standard, i.e., a 'real risk', the level of harm feared must nevertheless reach a certain degree of severity. The assessment of the minimum level of severity is relative. The scope of article 3 is not limited to acts of physical ill-treatment; it also covers the infliction of psychological suffering. Treatment can be qualified as degrading when it arouses in its victims feelings of fear, anguish, and inferiority capable of humiliating and debasing them. It depends on all the circumstances of the case such as the duration of the treatment, its physical and mental effects and in some cases, the gender, age, and state of health of the victim. Further factors include the purpose for which the treatment was inflicted together with the intention or motivation behind it, as well as its context, such as an atmosphere of heightened tension and emotions and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with article 3. However, the absence of such a purpose cannot conclusively rule out a finding of a violation of article 3.

We note here that the Tribunal acknowledged that the infliction of emotional suffering may satisfy the threshold criteria for both Article 3 ECHR and the Refugee Convention. In essence, the appellant argues that the Tribunal failed to give adequate reasons for finding that the conduct of the mother did not cross the Article 3 ECHR/humanitarian protection threshold.

24. We find that the Tribunal did give adequate reasons for its finding and that the finding was not, in the light of all the evidence before the Tribunal, neither perverse nor irrational. At [136], the Tribunal found:

> 136. We have reviewed the evidence including that which was before the Family Court as well as the additional evidence relied on in the appellant's immigration matter. The evidence before us is that the appellant's mother has at times neglected the appellant and has subjected him to verbal abuse likely to belittle or degrade him. We accept that this is the case. We accept that the nature of some the treatment the appellant endured such as the belittlement and verbal abuse is capable of causing emotional harm. We do not accept that he has been subjected to physical abuse for the reasons that follow.

In reaching that finding, the Tribunal noted the High Court had not found evidence of physical harm although the Tribunal did not fall into error by equating the Hague Convention and Article 3 ECHR tests ('The High Court was considering whether there was a grave risk of physical or psychological harm or otherwise an intolerable situation pursuant to article

13(b) of the Hague Convention. The burden was on the appellant's father to demonstrate this and the applicable standard was the balance of probabilities. This is of course a higher standard than that applicable when assessing article 3 of the EHCR.' [148]). We find the approach of the First-tier Tribunal towards the Cobb J's judgment and the manner in which it factored that judgment to its own analysis was entirely appropriate and free of legal error, either as pleaded or at all.

25. Further, we note that the Tribunal gave cogent reasons for finding, *inter alia,* that the appellant's own evidence of physical violence was unreliable, that the there had been no neglect of the appellant and that there exists no real risk of future neglect given that the mother left caring duties to a paid nanny. On the evidence the finding that, whilst emotional abuse can cross the Article 3 ECHR threshold, it did not in this instance was not perverse; and perversity itself has a very high threshold. The sound findings of fact made by the Tribunal did not compel the conclusion that the threshold had been crossed. A careful reading of the decision overall demonstrates the Tribunal was well aware of , referenced and considered the evidence of the sister Y. We also reject the submission that the evidence of Y was so compelling that the Tribunal was obliged to accept all of her evidence and, having done so, to conclude that the appellant had suffered and was at real risk of Article 3 ECHR harm. At [144-145] the Tribunal said this concerning Y's evidence:

> 144. We find that there is evidence that the appellant's mother was more likely to mistreat Y than the appellant. This comes from Y's own evidence which is that their mother mistreated the appellant less than her. Although Y believes that their mother is likely to mistreat the appellant more now that he is older, this is speculative, and her evidence is coloured by what was clearly a very damaged (and is now completely broken down) relationship with her mother. We accept that she genuinely holds these beliefs and concerns for the appellant and give them some weight, but we must consider all of the available evidence.
>
> 145. There is some evidence that Y's gender may have influenced her mother's behaviour towards her, particularly regarding issues relating to her appearance.

We have already explained why we consider that the Tribunal did not err in its treatment of all the evidence (including Y's) concerning past physical harm. As regards Y's comments regarding future risk to the appellant, we again find that the Tribunal cogently reached findings available to it. The Tribunal noted that 'Y's own evidence which is that their mother mistreated the appellant less than her.' [144]. The Tribunal noted (rightly, in our view) that Y's comments on the future risk to the appellant amounted to speculation and gave its own reasons (including the fact that Y's gender may have exposed her to more abusive comments from her mother (particularly regarding issues relating to her appearance' [145]) whilst disagreeing (as it was entitled to do) with Y's opinion that abuse would get worse as the appellant got older. At [146], the Tribunal found:

> 146. The appellant is older now and more mature and we find that some of the treatment he complained of would not now be as distressing to him. For

> example, being shouted at for eating too many sweets and other relatively minor things, such as playing video games or with a mobile phone. We consider that this is much more likely to be distressing to a six-year-old than to a very nearly ten-year-old who is better able to understand that parents make decisions about such matters and why.

That was a finding available to the Tribunal having considered the evidence of Y in the context of all the evidence, as it was required to do.

26. We find also that there is no legal error in the Tribunal's assessment of the evidence of the appellant's stutter. The grounds seek (without any obvious basis) to link the appellant's stutter to abuse which he allegedly received from the mother. The Tribunal was manifestly entitled to find that:

> … [A stutter] is also a part of normal speech development in some children. We are not aware that the appellant underwent any assessment to determine the cause of his stutter. Similarly, we are unable to know whether the improvement in the appellant's stutter is as a result of a reduction in emotional distress or the natural resolution as part of his speech development. [147]

27. We also note the Tribunal's remarks at [150]:

> 150. While we were asked to find that the order made on 12 August 2020 would essentially mean that the appellant is required to return directly to his mother on return to W, we do not agree that this necessarily follows. It does not appear there has been any exploration of whether the appellant's mother would agree to put in place the protective measures she proposed in the Hague Convention proceedings.

That observation was, in our opinion, wholly valid in the context of the assessment of the appeal on Article 3 ECHR grounds. At [19], the Tribunal recorded that 'the decision to make an order under the Hague Convention was made based on certain undertakings given by the appellant's mother that she would not seek to have him returned immediately to her care and that arrangements could be made for him to stay with a family member while his future was determined.' That issue remained unexplored in the submissions before us.

28. We are satisfied, therefore, that the First-tier Tribunal did not err in law in determining whether the threshold for persecution/serious harm had been crossed. The Tribunal considered all the relevant evidence and reached findings which were available to it. We address below with the submissions which the parties advanced before us on 4 April 2022 following the final order of the High Court.

Ground 4: *The FTT materially erred in its approach, separately and cumulatively, to the three core pieces of evidence specifically relied upon (in ASA paras 24-25) as showing the politically-motivated corruption of MAT's W family proceedings by:*

(i) failing to have regard to, make any findings at all about, or in the alternative give any reasons for rejecting, the whistle-blower evidence of witness EF;

(ii) failing to make any findings at all about the evidence given by witness GH about a whistle-blower statement made directly to her, and or giving no or inadequate reasons for rejecting that evidence or failing to have regard to it;

(iii) failing to make any findings at all about the evidence given by MAT's father about whistle-blower evidence given to him by a named friend and colleague and/or giving no or inadequate reasons for rejecting that evidence or failing to have regard to it.

29. At [96-99], the First-tier Tribunal found:

> 96. The appellant's father claims that the government of W sought to launder money from Z through the bank of which he is one of the owners to circumvent international sanctions. The means by which this was proposed to him was through two prominent businesspeople (AB and BC) and BC's daughter CD. AB is claimed to have close links to the President of W.
>
> 97. We accept that AB has close links to the President of W as claimed. We also accept that BC has links with AB as claimed. The existence of these links is supported by the publicly available background evidence and the report of KL. It also appears that the claim that AB became a shareholder in the appellant's father's bank is supported by background evidence as referred to and referenced by KL in his initial report. We note the oral evidence of the appellant's father that AB is no longer a shareholder in the bank but do not consider anything turns on this.
>
> 98. KL cites evidence in relation to the involvement of the State in strategic sectors of the economy in W. The evidence cited also refers to the extent of cronyism between the President and his close allies and gives examples of the State seizing assets. In addition, KL also cites the President's use of a bank built and run by some of his closest friends and colleagues. This all supports the assertion that those involved in this case are motivated by financial gain. It appears clear from the information and evidence available to us that the appellant's father is a man of substantial means. This was not disputed by the respondent, save that Ms Barrow challenged the appellant's father about his claimed lack of income from his businesses in W. The appellant's father gave reasons as to why his businesses were not providing him with an income at the present time and stated that he is able to live on previously earned income. The claims made by the appellant's father relate to his assets and not his income in any event, and even if we were not to accept his evidence about a lack of current income from his businesses, it would not in our view be material. We accept to the lower standard that the assets of the appellant's father are significant, according to him in the region of £100 million. It is therefore plausible that he may be targeted in relation to his assets in the way in which he claims.
>
> 99. We accept that there is evidence that W has supported Z in defiance of international sanctions in the ways described in KL's report. AB was a shareholder of the appellant's father's bank and given his links to the

> President of W we find that it is plausible his bank may have been a target for a money laundering scheme as claimed.

30. The Tribunal accepted that the contents of the court documents from W were not in dispute [107]. The application's skeleton argument states [55] that 'the disputed question is whether, at some stage in those [court] proceedings, they were corrupted in favour of MAT's mother. The core issue which required determination was whether, at some point before 12 August 2020, the [Y] family court proceedings had begun to be corrupted by outside influence.' At [131], the Tribunal concluded that 'the courts or the police in W have [not] been influenced either by the appellant's mother alone or by her together with her claimed associates … We do not accept that there is a causal link between the future persecution/serious harm feared and the Convention reason and we do not accept that the appellant is at real risk of persecution or serious harm from his mother acting in concert with others.'

31. First, the appellant contests the Secretary of State's submission that the appellant's representative had accepted the 'principle' that 'the Tribunal was entitled to give less weight to a witness who was not produced to give evidence.' He argues that he never made any such concession and, if he had done so inadvertently, he seeks to withdraw it. The appellant accepts that the fact a witness did not attend court for cross examination is capable of affecting weight but that there is no rule that it will 'inevitably do so.'

32. Witness EF is a lawyer working in W. He has stated in writing that the 'Chairman of the … Court (Judge HI) had said to him at a private social event in celebration of the "Day of the Investigative Officer of the [W]" on 24 July 2020, that: "very important people [had] asked [the court] to quickly return the son to his mother"; "refusals [were] not accepted"; he [the Chairman of the City Court] had "already given his word"; and that the "commands were given from very high level", hinting that he was "talking about the Presidential administration.'

33. The First-tier Tribunal did not make any findings as to the weight to be attached to the evidence of EF. It did record Mr Chirico's submissions regarding EF's evidence at [62]: 'GH was clear about what she was assuming, and we should accept her evidence as reliable. Certain aspects of her evidence were not challenged. Her evidence is corroborated by that of EF. EF explains why he is reluctant for his identity to be revealed. The appellant's father was not cross-examined about his conversations with EF.'

34. The Secretary of State submits that the evidence of EF, being essentially hearsay 'could be given little weight in any event.' (skeleton argument, [34]).

35. We find that the First-tier Tribunal did not err in respect of its treatment of the evidence of EF such that its decision should be set aside. Whilst it

would perhaps have been helpful if the Tribunal had made findings in respect of the evidence of each witness, it was not required to address in detail every item of documentary evidence, as the appellant himself acknowledges (skeleton argument, [50(ii)]. We are satisfied that the Tribunal considered the evidence of EF in the context of all the evidence as it was required to do and, indeed, expressly recorded that it would. At [85-86], the Tribunal stated:

> 85. The evidence in support of the claims made by the appellant's father can be broadly divided into four types:
>
> - Witness statements of individuals in W.
> - Background evidence from publicly available media sources.
> - Background evidence from international organisations.
> - The expert reports of KL.
>
> 86. The fact that some of the evidence does not fall into these four types is not an indication that we have not considered it, and where such evidence is relevant to our findings, we have referred to it below. [our emphasis]

It is, in our opinion, of no material consequence whether the appellant inadvertently made or seeks to withdraw any concession on this point. Weight was a matter for the Tribunal as both parties acknowledge and factors properly influencing weight include the fact that evidence is hearsay and has not been tested by cross examination. The Tribunal was fully aware that EF was a 'whistle-blower' and that he claimed to fear giving oral evidence [appellant's skeleton argument. 58]. It did not need to record those matters in its decision. Moreover, there is nothing so compelling in the untested, hearsay evidence of EF that should inevitably have compelled the Tribunal to accept the submission that the court proceedings had been 'corrupted in favour of [the appellant's] mother.' We are satisfied that the Tribunal considered EF's evidence in the context of all the evidence and was entitled to conclude that it should not alter, let alone, reverse its findings.

36. The appellant's skeleton argument [58(vii)] complains that the appellant's father (who did give evidence before the First-tier Tribunal) could have been cross examined about the circumstances in which he had obtained the evidence of GH and EF. In our opinion, the probative weakness of hearsay testimony, which would not be tested by cross examination, should have been evident to the appellant's advisers; it is surprising that they did not seek to address the matter with the appellant's father in examination in chief. It was not for the respondent to shore up weaknesses in the appellant's case.

37. The witness GH is also a lawyer working in W. She attended before the First-tier Tribunal and was cross examined. At [88], the First-tier Tribunal found:

> 88. Although we accept that GH is a qualified lawyer practising in W and that she has knowledge of the practice and procedures within W's legal system, we do not accept that she is an independent or objective witness.

> She is retained by the appellant's father and represents him in his legal matters, not limited solely to family matters. Her evidence is in our view coloured by her representation of the appellant's father. It was apparent from her evidence that the interpretation she gave to various events and decisions of the court in W occurred to her only some time after the events and not at the time they were happening. The weight we attach to her evidence is limited accordingly.

The appellant seeks to distinguish those parts of GH's evidence which record her opinions from those which deal with facts. The appellant's skeleton argument at [64] states:

> 64. Specifically, as the ASA made clear, the single most important part of GH's evidence is her direct, factual account of a conversation she had with a court whistle-blower on 20 July 2020 [AB A168-172 paras. 29-40]. The whistle-blower, IJ (first name given in Annex 1 to the Determination), is a worker at the office of the Chancery (i.e. the clerks' office) of the … District Court, and a former law student [AB A159 para. 31]. In circumstances which are set out in detail in GH's statement, IJ informed her that "the chairman of the court of appeal [Judge HI] [..] asked for [the family court case] to be heard urgently and determined in [A's mother's] favour. […] You should not hope for an outcome in your favour as it seems your opponent has a high-level patron" [AB A161-162 para. 38].

The appellant submits that the First-tier Tribunal materially erred in law by failing to make findings regarding this 'single most important part of GH's evidence', her account of her conversation with 'whistle-blower, IJ'.

38. The Tribunal considered the evidence of GH in considerable detail at [111-118]. We refer again to the Tribunal self-direction at [86] (see [35] above). We are satisfied that the Tribunal did not ignore or fail to consider any part of the evidence of GH; rather, it has, entirely reasonably, concentrated on those parts of GH's evidence 'relevant to' its findings. We also find that the reasons given by the First-tier Tribunal at [88] for attaching limited weight to GH's evidence apply equally to factual account as to her opinions.

39. At [122-124], the First-tier Tribunal gave cogent and clear reasons for finding that, had any corrupt practice been perpetrated by judges in W in relation to the family proceedings, it had not been for the purpose of persecuting the appellant:

> 122. That such powerful people as the President of W and his associates including AB would rely on such an indirect, flawed, and uncertain way of trying to persuade the appellant's father to return to W is not credible to the lower standard; even in light of our acceptance that elements of the appellant's father's claims are plausible. In reaching this conclusion we have been mindful of the need to set aside our own perceptions or assumptions about what may be credible or plausible within our own sphere of knowledge.
>
> 123. Such a plot relies on too many factors over which it is not possible for the appellant's mother or her claimed associates to have any control. For example, it would depend on the appellant's mother (or someone such as a nanny acting on her behalf) ill-treating the appellant such that the

> appellant's father would be sufficiently concerned about his welfare to return to W because it is not asserted that any of the appellant's mother's associates (i.e., AB, BC, or CD) will harm the appellant directly. There is no suggestion in the evidence before us that the appellant's mother has deliberately set out to harm the appellant. We accept that she has behaved in a way that is capable of causing harm, but we do not accept that this was her intention and as set out above, we do not accept that there is a causal link between the treatment and the Convention reason.
>
> 124. Another example is the court proceedings in this country. There is no suggestion that the appellant's mother or those allegedly supporting her have any ability to influence proceedings in the United Kingdom. Moreover, despite the claims made, we have found that the proceedings in the courts in W and/or criminal investigations have not been susceptible to such a degree of control that leads to a conclusion that they have been subject to undue influence.

The respondent submits [skeleton argument, 35] that:

> 35. The Tribunal were entitled to reach this conclusion that it was implausible that any corruption in the courts [of W] was the result of an elaborate scheme by senior members of the state to lure the Respondent's father back to [W]. As they observed, the scheme would be dependent on many uncertain variables to succeed, and also require the mother to deliberately ill-treat the Respondent to the extent that the father would be forced to return to [W] to protect him. There was no sufficient evidence that she would engage in such activity.

We agree with that submission. The Tribunal reached findings available to it on all the evidence, including that of GH and EF.

40. Finally in respect of Ground 4, we do not find that the Tribunal erred in law in its treatment of any part of the evidence of the appellant's father. In his second witness statement, the father had provided an account of 'whistle-blower evidence' given to him by a friend concerning 'ensuring the outcome' of the court proceedings concerning the appellant. The appellant submits that the Tribunal erred by making no specific findings regarding this part of the father's evidence.

41. At [100], the Tribunal found

> 100. Ms Barrow [the Presenting Officer] asked us to find that the claims made about the circumstances of the appellant's father are not credible based on a) his failure to disclose them in the Hague Convention proceedings and b) his failure to claim asylum in his own right. We do not consider it necessary to go this far. We do not consider it is necessary to make specific findings of fact about each aspect of the appellant's father's claims because we do not accept that there is a causal link between them, the harm feared by the appellant and the Convention reason.

In his skeleton argument at [79], the appellant submits:

> 79. It is not necessary for a Tribunal to make specific findings about every piece of evidence before it. It is, however, necessary to make findings about the core parts of the evidence on which a disputed claim depends. These

> three parts of evidence (EF's account, GH's evidence about IJ's statements to her; MAT's father's account in his second witness statement) each separately, and cumulatively, provide specific whistle-blower evidence of corruption of the W court proceedings involving MAT. This is a core element of MAT's claim and each of those three pieces of evidence is specifically singled out in the relevant part of MAT's Skeleton Argument (ASA [24-25]). In those circumstances, the FTT materially erred in failing to engage with them.

We are satisfied that the methodology adopted by the Tribunal in its analysis of all the evidence was sound in law. There is no suggestion that the Tribunal reached conclusions before considering the entirety of the evidence (see *Mibanga v Secretary of State for the Home Department [2005]* EWCA Civ 367). It was entitled to refrain from 'going so far' as to reject the father's evidence for the two specific reasons advanced by the Presenting Officer because, having considered all the evidence, including that of the father, there was no connection between the father's claims, the harm feared by the appellant and any Convention reason. For the reasons clearly articulated by the Tribunal at [86], it was not necessary for it to detail each and every item of evidence. The reasons given by the Tribunal's to support its findings regarding the alleged corruption of the family court proceedings are detailed and adequate and the appellant's submissions on this aspect of the appeal, whilst ingenious and eloquently put, amount ultimately to nothing more than a disagreement with findings manifestly available Tribunal on the evidence.

Ground 5: *The FTT materially erred in its approach to the two core pieces of evidence specifically relied upon (in ASA paras 23; 26) as showing that MAT's father is subject to politically-motivated attempts to criminalise him by:*

(i) acting with procedural unfairness and/or failing to have regard to material considerations and/or failing to give any or adequate reasons for rejecting that evidence when deciding to attach "no weight" to (i.e. to treat as a fabrication) the evidence of witness DE;

(ii) acting with procedural unfairness and/or failing to have regard to clearly material considerations when deciding to attach no weight to (i.e. to treat as a fabrication) the evidence of witness JK.

42. DE claims to be a former member of the anti-corruption unit of the Ministry of Internal Affairs (MIA) in a major city in W and a friend of the appellant's father. His (opinion) evidence is that the appellant is 'the instrument through which [the appellant's father] can be brought back to W and his assets taken.' He has provided written hearsay evidence regarding alleged corrupt activity in MIA against the appellant's father. JK is a lawyer based in London. The appellant's skeleton argument at [88] states that:

> JK describes how MAT's mother sought to engage him in activities which were corrupt and unconscionable. Like the other witnesses, he sets out his own fears if it becomes known that he has given evidence; and those fears are specifically corroborated by MAT's country expert, KL.

43. At [89], the Tribunal found:

> 89. We attach no weight to the witness statements of DE and JK. DE is a long-time friend of the appellant's father and his evidence is therefore not independent. He was not called to give oral evidence and so his assertions have not been tested through cross-examination. In addition, his evidence was based on information obtained from an unnamed third party which is hearsay and not susceptible to being tested

44. The appellant asserts that the Tribunal unfairly rejected the evidence of DE and JK. It had been explained to the Tribunal by the appellant's representative that DE feared for his safety if he gave evidence in the immigration appeal. The appellant submits that 'the bare fact that DE did not give oral evidence is plainly not a reason for attaching 'no weight' to his evidence.'

45. We are satisfied that the Tribunal reached findings on DE's evidence which it was entitled in all the circumstances to reach. The Tribunal was aware of the reason given for DE's absence from the hearing but that explanation did not necessarily replace the weight to be given to that evidence which it might forfeit by reason of not being tested by cross examination. The Tribunal was also entitled to question the independence of a witness who is a friend of the appellant's father. Given those limitations, the evidence, even if it had been given weight, was unlikely, in the context of the other evidence of alleged court corruption, to have led to a different conclusion on the issue of court corruption in W.

Ground 6*: In its approach to the plausibility of elements of MAT's claim and to the evidence of links between MAT's mother and the political establishment in W, the FTT erred by:*

(i) adopting an internally inconsistent approach to the evidence of MAT's expert, KL and/or doing so without giving any or adequate reasons; and

(ii) reaching a conclusion (about the links between MAT's mother and the political establishment) which was inconsistent with those parts of the evidence which it had accepted or which were unchallenged.

46. We refer again to the First-tier Tribunal's decision at [122-124] (see [39] above). We consider that the Tribunal has unequivocally found that evidence of a plot to persuade the appellant's father was not credible [122] and has then provided cogent and consistent reasons for that finding [123]. We agree with the Secretary of State's submission [skeleton argument, [40]) that 'contrary to the Respondent's arguments, the Tribunal set out ample grounds for rejecting this account (at §122-4, cited above). They did so notwithstanding the fact that they accepted links between the major players named by the Respondent's father. There is no logical inconsistency in this position.' We also find that the Tribunal did not err in its treatment of the expert evidence of KL. At [94-95], the First-tier Tribunal found:

> 94. We find that KL is appropriately qualified to act as an expert in this case. His qualifications and experience are set out at Annex 1 of his initial report. In addition, he confirms his understanding of his duty to the tribunal in his declaration at paragraphs 96 to 101 of his report. We find that we can place weight on his evidence.
>
> 95. KL's evidence was largely for the purpose of establishing the plausibility of the appellant's claim. His instructions are set out at paragraph 5 of his initial report (Volume A, appellant's bundle, page 1424). In other words, he was not commenting on the specific detail of the appellant's claim, but on the economic, social, and political landscape and the links between these various spheres of society. His evidence relates to the existence of corruption, the use of the criminal and civil courts to achieve political or other ends and whether there is evidence of a lack of judicial independence.

There is, in our opinion, no inconsistency at all in the Tribunal finding that the weight should be given to the expert's views on the *plausibility* of the appellant's father's claim that there was a plot to force him to return to W but that, having evaluated all the evidence before it, that claim was *not credible*. As the Secretary of State (skeleton argument, [41]) submits the expert 'did not and could not give evidence in relation to the plausibility of the specific scheme alleged in this case, and in any event that was entirely a matter for the Tribunal.' We agree entirely with that submission.

Ground 7: *For all of the above reasons, and for further failure to direct itself to the submissions expressly set out in MAT's Skeleton Argument, the FTT's findings on sufficiency of protection are unsafe*

47. At [126-129] the First-tier Tribunal found:

> 126. The appellant does not deal with this issue in any meaningful way. The appellant's parents have both been able to access the courts in W and we have rejected the assertion of the appellant's father that those proceedings have been unfair or unduly influenced in any way. There is therefore no explanation as to why the appellant's father, or importantly, another member of his family in W could not make an application to the court or make a criminal complaint in the event it is alleged the appellant is ill-treated by his mother.
>
> 127. There is no evidence before us that the appellant's father's family have been affected in any way by the events he describes. There is nothing to suggest that if they made a complaint to the police or other agency such as social services (or the equivalent in W) about ill-treatment that it would not be acted upon and steps taken to protect the appellant. Similarly, there is nothing to suggest that his family would be unable to have recourse to the family court in W in relation to the appellant's welfare or custody. As demonstrated by the evidence before us, the family court in W has appropriate procedures in place to obtain evidence relating to the best interests and welfare of children and to have regard to that evidence in its decision making.
>
> 128. There is nothing to suggest that the appropriate agencies/authorities of W would be unable or unwilling to protect the appellant.

> 129. We find to the lower standard that there is sufficiency of protection available to the appellant.

48. The appellant complains that the Tribunal 'inaptly' characterised the appellant's submissions regarding sufficiency of protection as 'meaningless' and refers to paragraph [48] of his skeleton argument which addresses the issue. Even assuming the terminology adopted by the Tribunal may be inapt, its conclusions on sufficiency of protection are cogent, arise as a entirely logical consequence of its legally-sound findings and are wholly sustainable. As the appellant acknowledges (skeleton argument, [96]), Ground 7 depends upon Grounds 4 and 5 also succeeding before us, which, for the reasons given above, they have not. Having 'rejected the assertion of the appellant's father that those proceedings have been unfair or unduly influenced in any way', it follows that the Tribunal should conclude that the courts and other relevant institutions of W would protect the appellant if required to do so.

49. On the grounds as pleaded, therefore, and for the reasons given above, we find that the First-tier Tribunal did not err in law such that we should set aside its decision.

Error of Law: the relevance of the judgment of Macdonald J

50. Article 13 (b) of the Hague Convention provides:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that
>
> a) …
>
> b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation. [our emphasis]

51. As recorded at [8] above, Macdonald J found, *inter alia*, that:

> 105. In July 2020, Cobb J concluded on the evidence then available to him that returning [MAT] to [W] would not create a grave risk of physical or psychological harm or otherwise place him in an intolerable situation. Having regard to the evidence now before the court some 18 months later, I reach the opposite conclusion.
>
> ….
>
> 113. In circumstances where I am satisfied that the criteria for the exception under Art 13b of the Convention are made out, I must consider whether in any event I should exercise my discretion to make a return order. I am satisfied that I should not. It would seem to me axiomatic that, having found that to return [MAT] to [W] would expose him to a grave risk of psychological harm and place him in an intolerable situation, it would not be appropriate, and indeed it would be perverse, to exercise my discretion to order that self-same outcome.

52. At the reconvened initial hearing on 4 April 2020, Mr Chirico and Mr Harland made further submissions regarding the relevance of Macdonald Judge's order to the matter of error of law.

53. Mr Chirico (and Ms Cronin) filed a position paper before the hearing on 4 April 2022. As regards the appeal on protection grounds they submit:

> 7. Secondly, in relation to MAT's appeal on protection grounds, the approach of the High Court, applying what is in substance an Article 3 test on the balance of probabilities, illustrates that MAT's Ground 3 (that the FTT irrationally characterised the harm which MAT fears as amounting to less than persecution) is made out.
>
> 8. Once it is accepted that this feared harm exposing MAT if returned to [W] to "a grave risk of physical or psychological harm" and placing him in "an intolerable situation" amounts to serious harm/persecution, then it is clear that at least one effective reason for that harm is the fact that MAT is a child. Even if the UT were to conclude that this is not the way his claim was put before the FTT (and MAT makes no concession about this), it would be *Robinson-obvious* that the persecution MAT fears is in material part by reason of his being a child.
>
> 9. In those circumstances, MAT's Grounds 2 and 3 before the Upper Tribunal are made out, the FTT's determination should be set aside, and, on reconsideration of MAT's appeal, the Tribunal is invited to adopt the findings of the High Court (which are to a higher standard of proof than would be applicable here) and to allow MAT's appeal on asylum grounds.

54. At the reconvened initial hearing, there was discussion of the Upper Tribunal's decision in *Akter (appellate jurisdiction; E and R challenges)* [2021] UKUT 272 (IAC). The headnote states:

> (1) *GM (Sri Lanka) v Secretary of State for the Home Department* [2019] EWCA Civ 1630 is not authority for the proposition that an appellate court or tribunal has a free-standing duty, derived from section 6 of the Human Rights Act 1998 (public authority not to act incompatibly with ECHR right), to disturb a decision of a lower tribunal. The jurisdiction of the appellate court or tribunal is governed by sections 12 and 14 of the Tribunals, Courts and Enforcement Act 2007, which depends on the lower tribunal having made an error of law before its decision can be disturbed on appeal.
>
> (2) A party who wishes to submit that a decision of a tribunal which is otherwise free from legal error should be disturbed on appeal on the basis identified by Carnwath LJ *in E and R v Secretary of State for the Home Department* [2004] EWCA Civ 49 should do so clearly, when seeking permission to appeal on that basis.
>
> (3) In deciding whether the principles in *Ladd v Marshall* [1954] 1 WLR 1489, as applied by E & R, should be modified in exceptional circumstances, the ability to make fresh submissions to the Secretary of State, pursuant to paragraph 353 of the immigration rules, is highly material to the question of whether those principles should be diluted.

55. Having considered the submissions, we make the following observations.

56. First, we are reminded that the appeal before the Upper Tribunal is still at error of law stage. Our role is summarised by the Upper Tribunal in *Akter* at [31]:

> 31. Section 12(1) of the Tribunals, Courts and Enforcement Act 2007 provides that section 12(2) applies, "if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law". If that condition is satisfied, then section 12(2) provides that the Upper Tribunal may set aside the decision of the First-tier Tribunal and, if it does, must either remit the case to the First-tier Tribunal or re-make the decision in the Upper Tribunal.

57. Secondly, the judgment of Macdonald J is not binding on the Upper Tribunal. The Court of Appeal in *Secretary of State for the Home Department v Suffolk County Council and others* [2020] EWCA Civ 731 held at [36-37]:

> 36. But that is not to say that the exercises performed in each of the jurisdictions are the same. The statutory schemes under which they operate are substantially different – driven by very different policy considerations – and even the factual issues and assessments are not the same. Indeed, such assistance as there is in the authorities indicates that the functions of the family courts and the immigration and asylum tribunals are largely distinct and separate: see Mohan v Secretary of State for the Home Department [2012] EWCA Civ 1363, [2013] 1 WLR 922 approving the Upper Tribunal in RS (immigration and family court proceedings) India [2012] UKUT 218 (IAC) per McFarlane LJ, Blake J. (President) and Upper Tribunal Judge Martin. As Black LJ remarked in Re H supra, even the approach to the exercise of judgement or risk evaluation is different. Furthermore, by section 55 of the Borders, Citizenship and Immigration Act 2009, the interests of a child are not paramount in the tribunal, they are a primary issue that does not take precedence over other issues. That of itself necessarily constrains the tribunal from understanding questions of risk in the same way as the family court where a child's welfare is paramount (assuming as in this case, the application being made is in respect of a child).
>
> 37. It is not even clear that the family court and the FtT (IAC) can be considered to be courts of coordinate jurisdiction. The point has not been fully argued before us and we do not purport to express a concluded view on the question; but, on the face of it, there are significant relevant differences. Whereas the family court is a court of record, the FtT (IAC) is not. The FtT has the features of a court but is quintessentially an independent judicial tribunal which is a specialist administrative law decision maker. The UT is a superior court of record that is able to bind itself and the FtT (IAC) but neither the Family Division of the High Court nor the family court can make a decision that has precedential effect in either the FtT (IAC) or the UT. And, as we have remarked, the FtT (IAC) is adversarial while, when exercising its powers under the FGMA 2003, the family court is essentially investigatory.

58. The findings of the High Court were reached following the application of a different legal test from that which the First-tier Tribunal will apply when considering a breach of Article 3 ECHR. Those findings may, we accept, be relevant in so far as they were reached on evidence which is the same as that considered in an immigration appeal and it would clearly be desirable for the approach of the court and the Tribunal to the same or similar

evidence to be consistent. However, those observations are, in our opinion, only relevant to the deliberations of the Upper Tribunal when it remakes the decision. Different considerations apply when, as in the instant appeal, the Upper Tribunal has yet to find an error of law which requires the decision of the First-tier Tribunal to be set aside.

59. Thirdly, we refer again to *Akter.* As we understand the submissions of both counsel, it is not suggested that the First-tier Tribunal has made any mistake as to fact in relation to the final judgement of the High Court such as to invoke the principles set out in *E and R* [2004] EWCA Civ 49. The First-tier Tribunal was aware of the order of Cobb J but that of Macdonald J post-dated the promulgation of its decision by eight months. There is no question of evidence having been available but concealed from the Tribunal or of the Tribunal having misunderstood evidence before it; Macdonald J's findings did not exist when the First-tier Tribunal completed its deliberations and, in the light of Cobb J's earlier order, could not reasonably have been anticipated by the Tribunal. Mr Harland sought to counter the argument that the findings of Macdonald J were so compelling that the Upper Tribunal should simply set aside the First-tier Tribunal's decision and remake the decision allowing the appeal by submitting that the approach urged by Mr Chirico (see [8-9] of his position paper) was entirely inappropriate given that the appeal was still only at error of law stage.

60. We entirely agree with that submission, not least because of what the Upper Tribunal in *Akter* says regarding the availability to the appellant of the procedure provided by paragraph 353 of HC 395 (as amended):

> 37. No doubt in consequence of her ongoing duty, specific provision is made by paragraph 353 of the Immigration Rules for the consideration by the Secretary of State of submissions, following the conclusion of an earlier claim (and any subsequent appeal), which can include submissions that the position of the individual has changed, or that information has come to light which it is argued would make removal based on the earlier adjudication unlawful. If the Secretary of State considers that the new information would give rise to a realistic prospect of success before a hypothetical First-tier Tribunal, then she will make a fresh appealable decision, if she does not decide to grant leave in the light of the new information. If the Secretary of State does neither of these things, her decision may be challenged on judicial review. So too may any decision under section 94 of the 2002 Act to certify the fresh claim as clearly unfounded.
>
> 38. The paragraph 353 procedure accordingly constitutes an important mechanism, which must be firmly borne in mind in deciding whether an appellate tribunal or court will be acting contrary to section 6(1) of the 1998 Act by leaving undisturbed the earlier adjudication. We shall return to this point later, in the context of the present proceedings.
>
> ….
>
> 42. This subsequent restriction has not, however, had any practical effect on the way in which the judgment of Carnwath LJ in *E and R* is viewed. It therefore follows that the only way in which the decision of the First-tier Tribunal in the present case can be disturbed is on the basis of a mistake of

> fact giving rise to unfairness, whereby the Tribunal ought to take account of new evidence demonstrating that mistake.
>
> ….
>
> 44. Although Carnwath LJ spoke about the possibility of the Ladd and Marshall principles being modified in exceptional circumstances, we see no reason in the present case why they should be. The ability of the appellants to make fresh submissions pursuant to paragraph 353 of the Immigration Rules is, in our view, highly material to the question of whether those principles should be diluted. The existence of the "fresh claim" procedure, arising from the overarching continuing obligation of the Secretary of State to act compatibly with the ECHR up to the point of actual removal, means there is no reason to modify.

61. It is our firm opinion that no exceptional circumstances arise in this case which should cause us to modify the *Ladd and Marshall* principles addressed by Carnwath LJ in *E and R*. As the Upper Tribunal held in *Akter*, we consider that the appellant's ability to make further representations to the Secretary of State under paragraph 353 in which he can raise the findings of the High Court is 'highly material' to the question of whether we should dilute established legal principles to accommodate the findings of Macdonald J as Mr Chirico urges us to do.

62. Fourthly, in so far as it may be argued on behalf of the appellant that it would be inconsistent to ignore the findings of Macdonald J in the context of the protection appeal given that the Secretary of State has, following the order of the High Court, withdrawn its appeal against the First-tier Tribunal's decision on Article 8 ECHR grounds, we reject that submission. The withdrawal of the appeal was entirely a matter for the Secretary of State; neither we nor the appellant and his advisers are privy in any way to her reasons for withdrawing. It simply does not follow that the Secretary of State should be compelled to alter her position as regards the protection appeal because she has chosen, for whatever reason, to withdraw her own appeal in respect of Article 8 ECHR.

63. We are satisfied, therefore, that we should have no regard to the order of Macdonald J at the error of law stage of this appeal in the Upper Tribunal.

64. Accordingly, as regards the appeal on protection grounds, we find that the First-tier Tribunal did not err in law such that its decision falls to set aside.

Notice of Decision

The Secretary of State having withdrawn her appeal in respect of Article 8 ECHR, the decision of the First-tier Tribunal allowing the appeal on Article 8 ECHR grounds shall stand.

The appellant's appeal against the decision of the First-tier Tribunal to dismiss his appeal on protection grounds is dismissed.

Signed Date 24 May 2022

Upper Tribunal Judge Lane

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

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.