Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00668/2014

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
on 5 November 2014	**On 13 November 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SHAMAL MOHAMMED WAISY

Respondent

For the Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer
For the Respondent: Mr D Byrne, Advocate, instructed by Drummond Miller, Solicitors

DETERMINATION AND REASONS

1. The parties are as described above, but are referred to in the rest of this determination as they were in the First-tier Tribunal.

2. The SSHD appeals against a determination by Judge J C Grant-Hutchison and Dr C J Winstanley, promulgated on 3 July 2014, allowing the appellant's appeal under the Immigration Rules, dismissing it on humanitarian protection grounds, and allowing it [alternatively?] on human rights grounds under Article 8.

3. The grounds of appeal run as follows:

1. **Making a material misdirection of law – 'Immigration Rules'**

a) The FTJ concludes that there are compelling reasons, outside of the Immigration Rules, to warrant allowing the appellant's appeals [§29]. These matters appear to be the appellant's children and the present country situation in Iraq [§43].

b) … The FTJ has failed to lawfully engage with the correct assessment of the exceptional factors in the instant [case] and has made an error in law as a result.

c) The FTJ concludes that returning the appellant, and his family, to Iraq would amount to 'serious interference' in the way they enjoy their family life together. The FTJ fails to make findings of fact as to whether there is a real risk to the appellant and his family and why, above others, there is a specific risk to this family. The FTJ describes the situation as fluid and concludes that it is 'difficult to speculate as to what may, or may not, happen' [§42]. As such, it is unclear why the FTJ then speculates that the worst will occur and that this precludes deportation of the appellant and his family.

d) … the findings under the Immigration Rules are fundamentally flawed.

2. **Making a material misdirection of law – 'Article 8'**

a) In the alternative, the FTJ finds that the appeal fell to be allowed on Article 8 grounds owing to the arguable special case relied upon under the Rules [§44]. As such, it is submitted that the findings on Article 8 are fundamentally infected by the flawed findings under the Rules.

b) However, in the alternative the SSHD submits that the appellant's Article 8 claim is not sufficient to outweigh deportation. The FTJ relies on the facts that the appellant has 'not committed any further crimes' and that he is now older, a family man and very sorry for his earlier conduct. The FTJ accept this evidence and conclude that there is 'no evidence produced by the respondent to show that the general public are at risk in the future from this appellant'.

c) The SSHD contends that the FTJ's assessment of the public interest is unlawful as it places determinative weight on the appellant's risk of offending. In *Gurung v SSHD [2012]* EWCA Civ 62 the Court of Appeal held that the absence of a risk of reoffending, though plainly important, is the "ultimate aim" of the deportation regime;

> *"Given what is now the Borders Act presumption, we do not consider that the absence of a judicial recommendation for deportation can carry the weight accorded to it by the Tribunal n paragraph 38 (see above). Nor do we accept (cf paragraph 40(i) cited above) that the absence of a risk of reoffending, though plainly important, is the "ultimate aim" of the deportation regime."* [§23]
>
> *We are troubled, too, by the proposition in #40(iii) cited above) that the nature and seriousness of the offence do not by themselves justify interference with family and private life without prospective regard to the public interest. Although Mr Bourne does not seek to characterise this as an error of law, he is right, in our view, to suggest that it misplaces the emphasis. The Borders Act by s.32 decides that the*

nature and seriousness of the offence, as measured by the sentence, do by themselves justify deportation unless an exception recognised by the Act itself applies." [§24]

d) As such, the SSHD submits that the FTJ should have been cognisant to the fact that deportation is not 'one-dimensional' and that there are other public interest factors to consider, including; deterrence (of the offender and others), the expression of societal abhorrence for such conduct and instilling public confidence in a system of control.

e) The appellant and his family members are all nationals of Iraq … it is not unreasonable to expect them to enjoy their family life together/establish comparable private lives outside the UK. Article 8 does not confer a choice upon the appellant and his family as to where they might wish to enjoy their family life, nor is it a general dispensing power.

4. (At 2 (c) I think the SSHD meant to say that the absence of a risk of reoffending is <u>not</u> the "ultimate aim" of the deportation regime.)

5. On 23 July 2014 Judge of the First-tier Tribunal Brunnen granted permission to appeal, observing: …

2. The grounds … submit that the panel … failed correctly to apply the applicable test in relation to the appellant's case both within and outside the Immigration Rules. This is arguable.

3. Although the grounds do not take the point, it is arguable that the panel misapprehend the nature of the respondent's decision; contrary to what is said in paragraph 13 of the determination it was not an "automatic deportation" decision under the 2007 Act but a "conducive" decision under the 1971 Act. It is arguably not apparent from the panel's findings in paragraphs 43 and 44 that the appellant's case was considered with reference to the requirement in paragraph 398 of the Immigration Rules for there to be exceptional circumstances outweighing the public interest in his deportation.

6. The appellant filed a response in terms of Rule 24:

1. The FtT did not materially err in law. The UT's jurisdiction is limited to points of law, not weight or … re-argument …

2. The grounds of appeal at (d) that the FtT erred in law in its assessment of the rules … [are] immaterial as the appeal was allowed under Article 8 ECHR. Ground 2 at (a) represents a misreading of paragraph 44 which does not disclose that the Tribunal relied upon the case under the Rules to justify the case outside them. In any event, the grounds do not disclose why that would be wrong in law where the factual matrix is the same but the legal tests are different … the FtT identified the correct test and applied [it]. It was for the Tribunal to apply the correct test to those facts having heard the evidence: *KBO* 2009 CSIH 30 …

3. Ground 2(b) is clearly a disagreement with the findings of the FtT; "the SSHD submits that the appellant's Article 8 claim is not sufficient to outweigh deportation." That … is not a legal complaint or identifies any legal ground disclosing an error of law. The grounds are inconsistent with the UT's jurisdiction which is limited to points of law … A disagreement with weight is not an error of law: *Scottish Ministers v Mental Health Tribunal for Scotland* (JMM) 2012 SC 471, at 21-2 …

4. Ground 2(c) places undue weight on the FtT's reference to the appellant's lack of re-offending and changes in circumstances; these are plainly relevant factors in the Article 8

assessment … the proposition in *Gurung* is not relevant … there the Court stressed that the ultimate aim of deportation was not solely to prevent re-offending but a risk of re-offending was "plainly important".

5. Ground 2(d) seeks to reintroduce arguments that were not made before the FtT, however the FtT set out the principles in *Maslov* at 27 of the determination … the respondent fails to show in what way either the ECtHR got it wrong in *Maslov* or how the FtT failed to identify and apply the correct test. *Maslov* has been relied upon, and not recorded to have been disputed by the Secretary of State, in *JO (Uganda and JT (Ivory Coast) v Secretary of State for the Home Department* [2010] 1 WLR 1607 (to take one example). Having set out those factors and identified the correct authority it cannot properly be argued that the FtT thought deportation was "one-dimensional". A specialist tribunal … is to be assumed to understand the complex and difficult area of law which it is charged: *MA* Somalia [2010] UKSC 49 paragraph 43 and *AH* (Sudan) [2007] UKHL 49; [2008] 1 AC 678 at paragraph 30.

6. Ground 2(e) does not … articulate a known ground of appeal showing an error of law: Hamden v Secretary of State for the Home Department 2006 CSIH 57, per Lord Carloway … [passage cited on nature of error of law issues].

7. Ground 2(e)… is not a ground of appeal but an argument for a first instance [tribunal]. It falls outwith this [tribunal's] jurisdiction...

8. The grounds insofar as they represent a disagreement, or seek to re-argue the case simply go to criticisms of weight which is outside the jurisdiction of this [tribunal] …

Decision Granting Leave to Appeal

9. The decision of Judge Brunnen raises a point that the FtT arguably misapprehended the nature of the respondent's decision, it being a conducive decision and not an automatic deportation. As a result paragraph 398 applies and deportation outside the Rules can only take place in terms of 399 and 399A. Under that route the question is one of exceptionality. This does not disclose a material error of law. The "exceptionality" test was held to be the route by which a decision maker should consider Article 8. It does not denote a test: *MF* (Nigeria) 2014 1 WLR 545 and *MM* (Lebanon) [2014] EWCA Civ 985 at 130-134. Consequently the material question is whether the Article 8 analysis is vitiated by error of law.

10. The grounds having no merit, the appeal should be refused.

Submissions for SSHD.

7. Mrs O'Brien said that her argument would expand upon the grounds but that they were wide enough to encompass the points she wished to make. The panel misdirected itself about the statutory basis of the case, at paragraphs 13 to 17 wrongly setting out the law relevant to "conducive" rather than "automatic" deportation. The panel misled itself into thinking that the decision making process did not involve the exercise of discretion by the respondent.

8. The SSHD had certified the decision under section 72(2) of the 2002 Act. The appellant did not challenge the certification in the First-tier Tribunal, because he was not pressing his case under the Refugee Convention. However, the certificate raised a rebuttable presumption that the appellant constitutes a risk to the community, which remained relevant. The appellant might say the point was immaterial because

the real question was a balance between the public interest and any exceptional circumstances in favour of the appellant, but the panel made serious errors at the beginning which vitiated its subsequent decision making process. The main error was apparent again at paragraph 44, where the panel said that the respondent produced no evidence to show risk to the general public, overlooking that the onus is the other way.

9. There was an absence of reasoning to explain why exceptional circumstances were found to take the case outside the Immigration Rules. The only factors mentioned were the general circumstances and level of terrorism in Iraq, set out at paragraphs 30-40. The appellant's wife is also Iraqi and the children are young. Given their origins, bad immigration history, and family situation, there was nothing to differentiate them from any other family returning to Iraq. It was incongruous to find that general instability there determined the appeal in their favour. There were no findings which could justify the outcome. The case did not call for rehearing. On a proper acknowledgement of the public interest, there was no strong Article 8 claim, no significant "best interests of the children" argument, and a decision should be substituted to dismiss the appeal.

Submissions for appellant.

10. Mr Byrne submitted that the argument for a wider significance of section 72(2) went beyond the words of the statute and of the refusal letter at paragraph 6. The presumption was relevant only to the Refugee Convention claim. Once that was conceded and attention turned to the family and private life consideration, there was no presumption to rebut. It does not carry over into the Immigration Rules and wider Article 8 consideration. It is not reflected in paragraph 398 of the Rules and should not be artificially extended there. The point was not argued in the First-tier Tribunal, is not in the grounds of appeal to the Upper Tribunal, and should not be entertained now.

11. Mr Byrne acknowledged that the panel wrongly identified the statutory underpinning of the decision. He said that the point was immaterial, because whether the procedure took place under the 1971 Act or the 2007 Act the relevant consideration still fell to be carried out under paragraph 398 of the Rules and, if appropriate, under Article 8 outwith the Rules. The outcome would be the same whichever statutory regime had been thought to apply.

12. As to whether the panel correctly identified exceptional circumstances, Mr Byrne relied on the Rule 24 notice, set out above. It was relevant to consider circumstances in the country of return, on which the panel correctly cited *Maslov* factor (viii) at paragraph 27 of the determination. The determination made it clear the difficulties which were likely to arise in return to Iraq particularly with young children, and it was open to the panel to place such weight on that situation as it did.

13. In the alternative, if error were to be found, Mr Byrne sought a rehearing of the evidence, preferably in the First-tier Tribunal, because (1) there would likely be a lay

member on the panel, well placed to assess issues of the public interest, an advantage of which the appellant should not be deprived (2) the weighing of the evidence should proceed upon personal assessment of the oral evidence of the appellant and his wife and (3) any reassessment should be on the basis of a full hearing and not "paper based."

Reply for SSHD.

14. Mrs O'Brien said she was not arguing that the statutory presumption in section 72(2) had to be "read across" into every Article 8 assessment, but that because the appellant did not abandon his Refugee Convention the panel had to consider the effect of the presumption.

Discussion and conclusions.

15. Section 72(1) of the 2002 Act says:

> This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).

16. There has been no reference to any provision applying section 72 for any other purpose. The scheme of the refusal letter is to treat it as significant only in relation to the Refugee Convention aspect of the case. The panel was correct to regard the certificate as otiose for its purposes. The point argued is not in the grounds, and is unsound.

17. The appellant concedes that the panel was wrong to say that this case arises in terms of the 2007 Act. This point is also not in the grounds, but it would be wrong to overlook an error about the applicable statute, if that was fundamental. Mrs O'Brien submitted that the panel misled itself into thinking that the case did not involve the respondent exercising any discretion about which decision to make. That might have been a significant misconception in some instances, but here I prefer the submission that it has no significant bearing on the "exceptional circumstances" or proportionality issue which the panel ultimately had to decide.

18. At paragraph 21 the panel correctly poses the question of "exceptional circumstances" in terms of paragraph 398(c), 399 and 399A of the Rules. From paragraphs 23 onwards the determination treats the issue as whether to go outside the Rules and if so on what basis. It looks for and purports to find "very exceptional and compelling circumstances" (paragraph 29) and a "special arguable case … outside the Rules" (paragraphs 43 and 44) without ever considering whether there are "exceptional circumstances" within the Rules. In spite of that, the panel says at paragraph 46 that "the appeal under the Immigration Rules is allowed". At paragraph 48 the appeal is also "allowed on human rights grounds under Article 8". There is no explanation of why the appeal should be allowed on that basis, if the appellant had met the terms of the Rules.

19. The panel was referred to several cases but apparently not to *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192, [2014] Imm AR 211. I do not set out in full here the discussion in that case at paragraphs 35 – 46, but it might have saved the panel from its confusion. I draw from *MF* that the distinction between approaching Article 8 in or out of the Rules is more apparent than real (p.37); the exceptional circumstances in terms of the Rules incorporate a proportionality test including all relevant Article 8 criteria (p.44); and the result would be the same in or out of the Rules. This is the point made in the appellant's rule 24 response.

20. Does it matter that the panel became confused about whether the case needed to be decided in or out of the Rules, or both, and about the phrasing of the relevant tests? It needed only to decide whether there were exceptional circumstances such that the public interest in deportation was outweighed by other factors. That is not an issue of primary fact, but it is a highly fact-sensitive assessment. The case raises an anxious and emotive question about the return of a family to Iraq, but the facts on which the assessment is to be reached were uncontentious and straightforward. I find that the panel's confusion is ultimately irrelevant to the outcome.

21. The real complaints to be extracted from the SSHD's grounds are that the panel did not adequately explain what the exceptional circumstances were, and that general country difficulties which fall short of invoking international protection cannot suffice. The reply for the appellant is that those complaints are only disagreement and a re-run of the case.

22. I find this issue finely balanced. The First-tier Tribunal assessment did (as I observed in course of submissions) come perilously close to a general finding that an ordinary Iraqi family cannot be expected to return, due to the difficulties in the country. The panel did not conduct an overall country analysis to justify that, and it would be out of line with Upper Tribunal and other case law on general protection needs of Iraqi citizens. Although Mr Byrne pointed to "*Maslov* factor (viii)" of the seriousness of difficulties in the country of removal, that goes to problems of non-nationals in a foreign country, not returning nationals. However, relative disadvantages may have *some* relevance. The panel noted recent dramatic deterioration in the country situation. That in itself is not an error. Although the panel explained earlier why issues of the best interests of the children did not advance the appellant's case significantly, at paragraph 43 account was also taken of their best interests in relation to "having to live in such an environment". Again, *some* weight could be given. At paragraph 44 the panel took account of the appellant's non-offending over the last 6 years, and gave reasons for finding that he did not present a risk. There is a slip about the respondent not producing evidence, but the finding of no risk was open to the panel, and is justified by the considerations set out. Contrary to the grounds, the panel did not regard this as determinative. It was a factor correctly found to weigh on the appellant's side.

23. Much of the grounds do amount to a re-run of the case. The panel had more to say about the relevant factors than the grounds recognise. Not all panels of the First-tier Tribunal might have arrived at the same assessment, but it is adequately supported.

24. If the determination had been set aside, I would not have directed fresh hearing of evidence either in the First-tier Tribunal or in the Upper Tribunal. The appellant has had the chance to put forward his case in full. There has been no application to lead further evidence, and no suggestion that the important facts have changed. In terms of Practice Statement 7.2 the case would have been apt for remaking of the decision in the Upper Tribunal, based upon submissions.

25. The determination of the First-tier Tribunal shall stand.

26. No anonymity direction has been requested or made.

12 November 2014
Upper Tribunal Judge Macleman