**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: DA/01993/2013

**THE IMMIGRATION ACTS**

| **Heard at Manchester** | **Determination Promulgated** |
|---|---|
| **On 15 May 2014** | **On 28th May 2014** |

**Before**

**UPPER TRIBUNAL JUDGE CLIVE LANE**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MEIRAN UMER FATAH**

Respondent

**Representation:**

For the Appellant: Miss Johnstone, a Senior Home Office Presenting Officer
For the Respondent: Miss Green

**DETERMINATION AND REASONS**

1. The respondent, Meiran Umer Fatah, was born on 5 February 1974 and is a male citizen of Iraq. I shall hereafter refer to the respondent as “the appellant” and to the Secretary of State for the Home Department as “the respondent” (as they were respectively before the First-tier Tribunal). The appellant appealed against a decision of the respondent dated 4 October

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2013 to make a deportation order. The First-tier Tribunal, in a determination promulgated on 30 December 2013, allowed the appeal on Article 8 ECHR grounds. The Secretary of State appealed to the Upper Tribunal and was granted permission by Judge McGeachy on 10 February 2014.

2. Relying on *MF (Nigeria)* [2013] EWCA Civ 112 and *Masih (deportation – public interest – basic principles) Pakistan* [2012] UKUT 00046, the grounds of appeal (and Miss Johnstone in her oral submissions) assert that the Tribunal failed to carry out a proper and fair analysis of the evidence in order to assess the proportionality of the appellant's removal from the United Kingdom. Notwithstanding the fact that this appeal postdates the changes to the Immigration Rules (which, *inter alia*, introduced Appendix FM) there was no mention whatever of the Rules and their application in the determination. The two-stage process detailed in *MF* was overlooked entirely by the Tribunal.

3. I find that the determination of the First-tier Tribunal should be set aside. I have reached that finding for the following reasons. The Tribunal noted that the appellant had received twelve months' imprisonment for a criminal offence "as long ago as 4 October 2002". The Tribunal found there to have been a "singular lack of urgency" on the part of the respondent in allowing "the appellant to establish a family and private life in the United Kingdom having formed a relationship in 2006 with a British national with whom he has lived since 2007". The Tribunal noted [23] that the appellant's partner has a child "which clearly the evidence indicates the appellant has adopted as his own ..." At [24], the Tribunal found that the respondent's "decision to make a deportation order is to totally ignore the position of the appellant, his partner and their child" and that such a decision was "not in accordance with the law". The Tribunal went on to assert that it had "taken into account the guidance given in the case of *Razgar.*" The Tribunal considered "the respondent's behaviour towards the appellant [2] to amount to "an abuse of process." The Tribunal at [28] found that the respondent had not "give a proper and detailed consideration to the obligations upon him (*sic*) under Section 55 of the Borders, Citizenship and Immigration Act 2009". The respondent "cannot decide the burden of proof upon him (*sic*) and satisfy us that his (*sic*) decision is in accordance with the law ..."

4. The tone of the First-tier Tribunal determination is somewhat intemperate. The Tribunal clearly was not impressed by the fact that the respondent had taken several years following the appellant's criminal conviction to seek to deport him. However, whilst the Tribunal was, of course, entitled to give weight to that factor in the proportionality exercise, it should not have done so to the exclusion (following *MF*) of a proper consideration of the position under the Immigration Rules and of all the relevant facts (for and against the appellant's deportation) which might indicate whether his deportation was lawful. There was, for example, no consideration whatsoever of the public interest concerned with the deportation of a foreign criminal. No attempt was made to engage with the refusal letter

(which, for example, explained why the appellant had not been considered eligible for voluntary return to Iraq). The strong impression left by reading the determination is that the Tribunal has taken one aspect of the case (the delay in making the immigration decision) and has determined the appeal solely by reference to it. By failing to carry out a structured and even-handed analysis of even-handed assessment of the proportionality of the decision to deport the appellant constitutes an error of law such that the determination falls to be set aside.

5. Miss Green submitted that the facts of the case indicated only one possible outcome to the appeal, namely that the appellant should be allowed to remain in this country with his partner and her child. I do not deny that, on the face of the facts, the appellant has a strong case. He does not, however, have an unarguably strong case. A Tribunal, properly directing itself as to the law, might reach a different outcome. The next Tribunal will need to apply principles of *MF* and to carry out a two-stage process involving an application of the relevant Immigration Rules followed, should it be necessary, by a consideration of the Article 8 ECHR grounds. I do not accept the submission that the need to carry out a two-stage process only arises where there is some possibility that an appellant may qualify under the Immigration Rules; Miss Green submitted that, in the present appeal, there was no prospect of the appellant doing so, so the Tribunal had not erred in law by moving directly to an Article 8 analysis. That approach ignores the fact that the judicial decision maker will embark on the Article 8 ECHR analysis aware that the appellant fails to meet the requirements of the complete code now provided by the Immigration Rules and aware also that only cases having exceptional or unusual facts (lying outside the broad range of circumstances contemplated by the Rules) are likely to succeed under Article 8 where they have failed under the Rules. By failing to consider the Immigration Rules at all in the present appeal, the Tribunal did not approach the Article 8 assessment with that mindset.

6. I find that the Tribunal has, in effect, failed to give the respondent's arguments a proper hearing. It is for that reason that I have decided to direct that this appeal be returned to the First-tier Tribunal for that Tribunal to remake the decision. None of the findings of fact of the First-tier Tribunal shall stand.

## DECISION

7. The determination of the First-tier Tribunal promulgated on 30 December 2013 is set aside. The appeal will be remitted to the First-tier Tribunal (not Judge M Davies; Mr B B Yates) to remake the decision.

Signed                                                            Date 27 May 2014

Upper Tribunal Judge Clive Lane