Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00119/2014

THE IMMIGRATION ACTS

Heard at Stoke	**Determination Promulgated**
on 17th December 2014	**On 22nd January 2015**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

MAGHDID KHALIL TAHIR
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Mohzam of Burton and Burton Solicitors.
For the Respondent: Miss Johnstone Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of a panel of the First-tier Tribunal composed of Judge TRP Hollingworth and Mrs Bray JP (hereinafter referred to as 'the Panel') who in a determination promulgated on 20th June 2014 dismissed the Appellant's appeal against the refusal of the Secretary of State to recognise him as a refugee and the decision, also dated 23rd December 2013, to deport

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him from the United Kingdom made pursuant to section 5 (1) Immigration Act 1971.

2. The original grounds of challenge assert the Panel erred in:

   a. Failing to grant an adjournment.

   b. Failing to assess the asylum claim without proper reference to the background material relating to Iraq. It is said the determination is based upon a situation in Iraq that no longer exists and has changed dramatically and so the appeal needs to be reconsidered.

   c. Failing to properly consider the best interests of the children which as a primary consideration should be considered first and foremost. It is said there is no clear conclusion as to where the best interests of the child lie.

   d. The assessment of the relationship between the Appellant and the child is said to be flawed with no proper account being taken of a passage from a social worker's report which shows the Appellant has a good relationship with the child.

   e. The assessment of the impact on the child of the Appellant's removal is said to be inadequate.

   f. The Panel failed to take proper account of the delay by the Respondent in pursuing deportation which resulted in family life between the Appellant and the child, for if there had been no delay the child would not have been born and its welfare would not be adversely affected by its father's deportation.

Background

3. The Appellant was born on 1 January 1975 and is a national of Iraq. He arrived in the United Kingdom without leave on 8th May 2001 and made a postal application for asylum five months later. On 19th October 2001 the Appellant was arrested for unlawful wounding and served with illegal entry papers. On 18th February 2002 the asylum application was refused on grounds of non-compliance as it is said the Appellant failed to attend for interview. On 8th September 2003 the Appellant was involved in an offence of conspiracy to commit violent disorder for which he received a 20 month sentence of imprisonment.

4. In January 2005 the Appellant was informed of the decision to make a deportation order. On 9th September 2005 his appeal against the refusal of the asylum claim was refused by the Tribunal and the deportation order signed on 13th March 2006.

5. On 21st December 2006 further representations were made which were refused in January 2007. On 26th March 2008 the Appellant's representatives stated a further asylum claim would be launched which led, on 3rd August 2009, to the March 2006 deportation order being revoked.

6. An independent social workers report was commissioned in October 2006 and on 19th December 2009 the Appellant's child Reece was born who has subsequently been the subject of a supervision order made in the Mansfield Family Proceedings Court involving Nottinghamshire County Council. On 18th July 2013 further representations were made by new solicitors which were treated as a fresh asylum claim and eventually refused in a reasons for refusal letter dated 23rd December 2013 which is also the date of the latest deportation order.

Discussion

7. The Panel record that an application was made for an adjournment by Mr Mohzam. He indicated to the Panel that there was no pre-sentence report or Oasys report and nor was there an adequate record of interview. The Panel enquired whether correspondence had been sent by the Appellant’s solicitors seeking any such documents which had not. The Presenting Officer objected to the application on the basis these issues had not been raised before or at the time of the 2005 determination. The Panel record at paragraph 14 their ruling on the adjournment application, which was to refuse it. They record that they pointed out to both sides that they would have preferred to have such reports and that although the Home Office may experience difficulties obtaining such documents the Panel state no explanation was provided for why the Appellant's current representatives had not sought copies from earlier advisors. The Panel found there was no guarantee that even if they adjourned any further documentation would be forthcoming and did not consider it in the interests of justice to adjourn in these circumstances.

8. The documents that it is stated were required are those ordinarily seen by Tribunals dealing with deportation appeals. The grounds assert that an assessment of the Appellant's rehabilitation and likely future behaviour is clearly a factor of some significance in assessing proportionality and that although the Panel accepted that the Appellant posed a low risk of reoffending his behaviour, attitude and rehabilitation, should have been considered in detail by the Panel. The grounds state that as this information was not before the Panel there was no assessment from the Probation Service or any other relevant professionals involved with the Appellant. It is said the Panel should have adjourned so this evidence could be produced.

9. These are not the first set of proceeding as noted by the Panel and do relate to a decision made on 23rd December 2013. The hearing took

place on 12th June 2014 nearly 6 months later. The First-tier Tribunal gave directions in relation to the filing of documents to be relied upon by the parties and documents that came into existence during the course of criminal proceedings would have been available to the Appellant and/or his previous representatives. If the Appellant was alleging his conduct was such that it could impact upon the proportionality assessment no reason has been made out for why he himself could not give this evidence to the Tribunal. No satisfactory explanation has been provided for why the earlier documents had not been obtained and no satisfactory explanation provided for why a report on these matters was not commissioned if it was deemed to be of such importance whilst the Appellant was waiting for the hearing of his appeal.

10. As the Panel could not be satisfied the adjournment would result in the production of these documents it had not been established that the interests of justice and fairness required the matter to be put off. The key principle when considering an adjournment request is that of fairness. The Panel clearly considered the submissions made in the application in detail which was opposed. No satisfactory explanation was provided for the situation and nor had it been established there was any justification for granting the adjournment that would produce something that had not been produced in the preceding six months. No procedural irregularity sufficient to amount to a material error of law has been established.

11. The grounds also asserts the claim was assessed without proper reference to the background situation in Iraq as by the time the decision was promulgated the situation had change dramatically following the takeover by IS (Islamic State) of parts of the KRA which is said to be the Appellant's home area. It is also claimed that his brother was involved in tackling extremist Islamic groups which was not disputed by the Panel and hence his return had to be assessed in light of the change in circumstances.

12. This ground is without arguable merit. The Panel were required to consider the merits of the claim based upon the evidence made available at the date of the hearing on 12th June 2014. If there was material relating to the activities of IS at that time it is reasonable to assume the Appellant’s representatives would have brought it to the attention of the Panel. If there has been a material change in the country situation between the date of hearing and the date of decision, accepted as being the date of promulgation, which was brought the attention of the Panel there may have been good grounds for reconvening the hearing yet there was not. Two issues arise in relation to this ground the first being that the grounds as pleaded acknowledge that it is based on post promulgation developments and in relation to a situation that did not exist at the date of hearing or date of decision. It is hard to see how arguable legal error can be said to arise in relation to something of which neither the Panel nor the

parties had any knowledge or notice. The second point is more straightforward. The Appellant asserts that the KRA is his home area. Initially IS made incursions into the Kurdish area as demonstrated by the capture of Mosel and the Mosel Dam which is in the north of Iraq nears the KRA border. They advanced no further and since have been repelled by the Kurdish Peshmerga forces from the KRA and parts of Northern Iraq. It is also the case that returns to Iraq are facilitated by flights to Baghdad in relation to which there is no such threat by IS at this time or at the date of hearing or shortly thereafter, or Sulaymaniyah in the KRA. There is no evidence that such flights have been suspended or to show that the Appellant could not be safely returned to Iraq. The fact his brother may have assisted in the fight against IS suggests an action in accordance with the position of the authorities in the Kurdish region.

13. If there has been a material change in the country situation a fresh claim can be made.

14. Ground three asserts the Panel failed to consider the best interests of the child properly and claim that as a primary consideration it should be considered first and foremost, but that argument has no merit and is not supported by the case law or the finings made in relation to this issue. For example in Zoumbas v SSHD [2013] UKSC 74 the Supreme Court held that there was no error of law in the tribunal considering Article 8 proportionality first before moving to consider the best interests of children who would be removed as a family with their parents. In that case it was contended that the Respondent had failed properly to consider the children's best interests because she had not recorded all the relevant factors in the decision letter such as, for example, that the children were born in the United Kingdom, that they were English speakers, that the eldest child was doing well at school, and that two of the three children had never been to the Congo. It was held that the SSHD did not have to record and deal with every piece of evidence in her decision letter. The decision-maker was clearly aware of these factors and referred to them in some cases in general terms and that sufficed.

15. The assertion in the grounds there is no clear conclusion by the Panel as to where the best interests of the child lies, whereas the expert evidence states it is clear that the best interests lie with the Appellant being allowed to remain and take an active part in the child’s life, has no arguable merit. The opinion of the reports author was clearly a factor of which the Panel were aware. The Panel specifically refer to the needs of the child in paragraph 89 and state that the child’s basic needs will be met by the network of family members around him. At paragraph 84 they acknowledge that the child's best interests are of primary consideration and note the nature of the contact between the Appellant and the child which is limited. The Panel give adequate reasons for their findings in relation to the report before stating in paragraph 94 that there is not a great deal of or existence of

evidence indicating the existence of any emotional or psychological consequences to the child if the Appellant is removed from the United Kingdom. They note in paragraph 95 that if the Appellant is removed the child will continue to be looked after by his primary carer who is his mother, as he has been all his life. It can clearly be inferred from the determination that the Panel's conclusion is that the best interests of the child are to remain living in his mother's care in the United Kingdom with his needs being provided for by her and other family members, with no evidence of consequences for the child if the Appellant is removed such as to make the decision disproportionate. That is a decision the Panel are entitled to make on the basis of the evidence made available and that they had been asked to consider.

16. Paragraph 4 of the grounds challenges the Panel's assessment of the relationship between the Appellant and the child but it is clear that proper account was taken of the social worker’s report and other evidence on this issue and, even if there is a good relationship, the quality of that relationship is limited to ongoing contact. That there may be a good relationship does not establish the existence of facts sufficient to make the decision disproportionate. The best interests of the child are not the determinative factor. It is one element, albeit one of great importance, that must be considered as part of the proportionality assessment. In paragraph 92 the Panel note that at section 6.59 of the social workers report it is suggested that the Appellant’s absence is unlikely to have a major impact upon the child’s day-to-day life.

17. Paragraph 5 of the grounds criticises the Panel's assessment of the impact on the child which is based upon a statement in the determination that there was not a great deal of evidence indicating the existence of emotional or psychological consequences if the Appellant is removed. The grounds state reliance is placed upon the support from other family members such as the mother’s aunt and her boyfriend but then criticises the Panel for not hearing evidence from them although, one assumes, if their evidence was considered to be material they would have been called to give such evidence before the Panel by Mr Mohzam. The Panel do not dispute the social workers conclusion that the Appellant's absence may have an increased impact upon the child as he grows older but that was not found to tip the scales in the Appellant's favour which is the core finding the ground should be addressing. It is clear the Panel considered all the evidence made available with the required degree of anxious scrutiny and there is no legal obligation upon them to conduct a ‘fishing expedition’ to seek additional evidence if the Appellant decides not to provide such material. A Tribunal is entitled to assume that any evidence a party seeks to rely upon will be made available to them – see SS (Nigeria) [2012] EWCA Civ 550.

18. Paragraph 6 of the grounds alleges the Panel erred in failing to take proper account of the delay by the Respondent in issuing the

deportation order as it is stated this has resulted in the family life between the Appellant and the child. It was suggested the delay was from 2006 to 2013 although as the most recent asylum claim was made in 2008, the delay is only for a period of four years from 2008 to 2013, during which time there was an ongoing communication between the parties regarding relevant issues.

19. The Panel took into account the nature of the family and private life the Appellant has been able to develop in the United Kingdom. At paragraph 98 the Panel recognise that if the Appellant entered the United Kingdom in 2001 he will have been here for nearly 14 years residence, albeit, a large part of which has been unlawful. The nature of the private and family life developed was considered by the Panel and any assertion they failed to consider this element is without arguable merit. Whether delay will result in a breach of Article 8 is fact sensitive as illustrated by the cases of **Kaplan and Others v Norway (Application no. 32504/11) ECtHR (First Section)** in which it was held that there was a breach of Article 8 in removing the claimant to Turkey despite a 1999 conviction for aggravated assault, in part because family life had been established before going to Norway, because of the burden on the youngest autistic child, because on the facts the offence was not that serious, but also because the authorities took no measures to deport the Claimant for about six years and apart from minor offences he had not offended again, and **ZZ (Tanzania) v SSHD [2014] EWCA Civ 1404** when there was an extensive delay, in which the Court of Appeal took into account when dismissing the appeal that the Respondent was overworked and under-resourced. It has not been established that there is any arguable merit in the claim delay was a determinative factor or that the Panel were unaware of the delay and failed to factor the effects of the same into their proportionality assessment. Such an argument is irrational.

20. The grounds as originally pleaded therefore fail to disclose any material error of law in the determination. An additional matter was, however, raised both pre and during the hearing by way of application to amend the grounds.

21. In a letter dated 10th December 2014 Burton & Burton Solicitors wrote to the Upper Tribunal at Stoke requesting the hearing on the 17th December is vacated or stayed. The basis for the request is said to be that First-tier Tribunal Judge TRP Hollingworth had resigned as a Deputy District Judge (Magistrates Court) following what had been reported as inappropriate comments made during the course of a hearing as confirmed by the Judicial Conduct Investigation Office. The letter states Judge Hollingworth is also refraining from other duties. The letter states the solicitors believe the hearing should be vacated or stayed until a full investigation has been undertaken and further submits that the determination of 29th June 2014 should be set aside. The basis for such a contention is stated to be as follows:

i. The decision of 29/06/2014 is not one can now be held as an impartial one due to the ethnic make-up and background of the Appellant.

ii. Comments made by TRPH are clearly inappropriate, as evidenced by the fact that the Prosecutor stepped down from the case and her superiors made a formal complaint leading to the resignation of TRPH.

iii. This leads to the position that TRPH held stereotypical views and thus was not impartial in his privileged position of being a Judge and dealing fairly with peoples' lives and futures.

iv. It is clear and evident that the decision of 29th June 2014 cannot stand as this would impeach the common law principles set in stone that every individual is entitled to natural justice and fairness.

22. The application was refused by a judge of the Upper Tribunal on the papers on the grounds that "the grounds of appeal did not raise any concerns about the panel's approach in considering and determining the appellant's appeal and there is no reason why that should now be an issue. In any event all relevant matters can be considered by the Judge hearing the appeal on 17th December 2014".

23. It is assumed the reference to a decision dated 29th June 2014 is to the decision promulgated on the 20th June 2014. At the hearing before the Upper Tribunal an application was made to amend the grounds of appeal to include a challenge to the determination based upon the reasons set out in the above correspondence from Burton & Burton.

24. It is an established principle that justice must not only be done but must be seen to be done. Parties are entitled to have their case properly considered by an un-bias judge and, within reason, to have open to them avenues of challenge against decisions that are infected by legal error. The original grounds of challenge to the Panel's determination raise no issues of actual or perceived bias or breach of the common law duty of fairness or the above principles. It may be that the reason for this is that a reading of the determination gives rise to no basis for such an assertion being made.

25. This is also a Panel decision of both Judge Hollingworth and an experienced non-legal member who also sits as a Justice of the Peace, Mrs Bray, both whom contributed to the decision-making process. No assertion is made about the suitability of Mrs Bray.

26. Whilst it is accepted Judge Hollingworth has resigned as a Deputy District Judge (Crime) as a result of making what are said to be inappropriate comments made whilst sitting in such capacity, he is not suspended from other judicial duties and has agreed voluntarily

not to sit pending the outcome of an investigation by the Judicial Conduct Office. The application by Burton & Burton is based upon an inference Judge Hollingworth is guilty of being racial prejudiced and that this has impacted upon their client's case, as their client is not a British national but a national of Iraq. It does representatives no credit to "jump on the bandwagon" when such issues arise without proper foundation or reason. An allegation a judge is racially prejudiced is a very serious allegation especially against one sitting in the Asylum and Immigration Chamber of the First-tier Tribunal. If there was a genuine concern regarding the approach of the Panel, both during the hearing and determination process, it is reasonable to expect it would have appeared as a specific allegation in the original grounds pleaded but it did not. There is no finding Judge Hollingworth is racially prejudiced or is unfit to hold judicial office. The issues in the determination relating to whether the Appellant was able to demonstrate his deportation was disproportionate as a result of a breach of his Article 8 rights which are not issues involving race or ethnicity. The material available creates no justification for the Upper Tribunal finding any express or implied statements giving rise to cause for concern on racial grounds in the determination or to support an assertion Judge Hollingworth is prejudiced to the extent the Appellant did not receive a fair hearing. Permission to amend the grounds to include this head as an additional head of challenge was refused on the basis it is not supported by adequate evidence, appears to be based upon perception that clearly was not present when the original grounds of appeal were drafted, and has not been shown at this stage to have any arguable prospects of success. If the ground had been admitted permission will be refused on the same basis.

27. In conclusion, having considered the determination, it is clear the Panel considered the evidence with the required degree of anxious scrutiny and have given adequate reasons for the findings they made. The Panel conducted a proper assessment of the points in favour of the Appellant and hose in favour of the Secretary of State before reaching a conclusion that the decision to deport is proportionate notwithstanding the period of delay. That finding is within the range of those available to the Panel and no arguable legal error material to the decision to dismiss the appeal has been established.

Decision

28. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

29. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……………………………………………….
Upper Tribunal Judge Hanson
Dated the 21st January 2015