Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/09457/2014

THE IMMIGRATION ACTS

Heard at : IAC Birmingham	**Decision Promulgated**
On : 30 June 2016	**On: 12 July 2016**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DLR
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Ms H Aboni, Senior Home Office Presenting Officer
For the Respondent: Ms E Rutherford, instructed by Coventry Law Centre

DECISION AND DIRECTIONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing the appeal of DLR against the decision to refuse his protection and human rights claim.

2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and DLR as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Iraq, born on [ ] 1986. He arrived in the UK on 28 September 2003 and claimed asylum the same day. His claim was refused on 8 November 2003. He appealed against that decision and his appeal was heard on 2 February 2004 and dismissed on 23 March 2004. He became appeal rights exhausted on 21 May 2004 and was subsequently listed as an absconder.

4. On 29 June 2005 the appellant was arrested and charged with two counts of robbery. He and two others had stolen a mobile telephone at knife point from a taxi driver and had made off without payment. He was convicted on 26 September 2005 at Derby Crown Court of robbery and making off without paying and was sentenced to 20 months' imprisonment.

5. On 27 April 2006 the appellant was informed of a decision to make a deportation order against him. He appealed against that decision. His appeal was heard on 25 May 2006 and was dismissed on 15 June 2006. He became appeal rights exhausted on 23 June 2006. A Deportation Order was signed on 19 December 2006. However that was revoked on 25 September 2008 when it was decided to reconsider his case in the light of the case of HH Iraq. A new decision to make a deportation order was made on 26 September 2008. In the meantime the appellant was arrested on 17 December 2008 and charged with offences relating to GBH with intent. The appellant's appeal against the new deportation decision was heard on 3 April 2009 and was dismissed on 16 April 2009. On 21 May 2009 he was found not guilty of GBH with intent. He became appeal rights exhausted on 17 June 2009.

6. A signed Deportation Order was obtained against the appellant on 28 August 2009 which was served to file as he had not complied with his reporting restrictions. He was classed as an absconder. The appellant was served with the Deportation Order on 28 August 2010 after he was encountered and arrested by immigration officials. Removal directions were set for his removal on 6 September 2010. His solicitors made asylum and human rights submissions on 3 September 2010, in relation to his fear of return to Iraq and his relationship with a British citizen partner. These were considered as an application to revoke the deportation order previously made against him, and a decision was made on 6 September 2010 to refuse to revoke the deportation order and to certify his claim under section 94(2) of the Nationality, Immigration and Asylum Act 2002. An application for permission to seek judicial review was refused on 26 October 2010 and removal directions were set for 29 November 2010.

7. The appellant's removal was aborted due to his disruptive behaviour on the aircraft. New removal directions were set for 13 December 2010 but were cancelled when judicial review proceedings were commenced following the making, and rejection, of further submissions. Further submissions were made

on 24 February 2011 in regard to the appellant's relationship with a British citizen and on Article 3 grounds in relation to his medical condition. A High Court Judge accepted that the submissions should be considered as a fresh claim. There followed several sets of further submissions on Article 8 family and private life grounds in relation to the appellant's relationship with his British partner, AN, whom he then married on 30 June 2011, and further submissions thereafter on Article 8 and 3 grounds. It was claimed that the appellant had been diagnosed as having severe depressive symptoms and suffering from PTSD. Submissions were also made in regard to the security situation in Iraq, in September 2012, and in relation to the appellant's and his partner's health issues. A psychiatric report was submitted, from Dr Katona, together with a letter from the appellant's therapist, Yusuf Mangera. Further representations followed in 2013 in relation to the appellant's mental health and judicial review was threatened as a result of the respondent's delay in determining the appellant's case.

8. On 24 February 2014 the appellant was served with a notice of liability to deport and the appellant's representatives responded with submissions made in regard to Article 8 and 3. There followed a complaint made to the Home Office about the managing of the appellant's case, when the Home Office was unable to locate the representations previously made.

9. Finally, on 29 October 2014, the respondent made a decision to refuse the appellant's protection and Article 8 claim. He was granted an in-country right of appeal.

10. The appellant appealed against that decision and his appeal was heard on 3 July 2015 in the First-tier Tribunal. The appeal was dismissed on asylum grounds but allowed on human rights grounds.

The Appellant's Protection and Human Rights Claim.

11. The appellant's claim was summarised by the respondent in the decision of 29 October 2014 as follows.

12. The appellant claimed that his removal to Iraq would breach his Article 3 and 8 human rights. The appellant claimed that he and his brother suffered harassment from their father owing to their refusal to join and be involved in the Islamic Movement of Iraqi Kurds, IMIK, an Islamic terrorist group of which their father was a member. They fled Iraq as a result. The appellant claimed that his brother was returned to Greece in 2006 and was removed from there to Iraq, where he was murdered by their father. His cousin was also shot and killed and the appellant was accused of his murder. He was told that there was a warrant out for his arrest. He was therefore at risk on return to Iraq. The appellant claimed further that he had established a family and private life in the UK. He was married to a British citizen and he suffered from depression, PTSD and other disorders and was at risk of committing suicide. He would not be able to access medical treatment in Iraq. His wife also suffered from various

physical ailments and from depression and relied upon him for emotional and physical support. She could not access treatment in Iraq.

13. The respondent noted that the appellant's asylum claim had been considered in previous appeals and had been rejected as lacking in credibility. The respondent considered in any event that there was a sufficiency of protection available to the appellant in Iraq. It was not accepted that there was a risk of the appellant suffering indiscriminate violence in Iraq under Article 15(c) of the Qualification Directive and it was not accepted that he was at risk on return. With regard to Article 8, the respondent accepted that the appellant was in a genuine and subsisting relationship with his British wife. It was noted, however, that the relationship began when he was in the UK unlawfully. It was not accepted that it would be unduly harsh for the appellant's wife to relocate to Iraq with him. It was noted that she previously held Barbadian nationality and that she had managed to adjust to a new country when relocating to the UK. It was considered that there was medical treatment available in Iraq. It was also not accepted that it would be unduly harsh for the appellant's wife to remain in the UK whilst he was deported. There was no evidence of any practical care that the appellant provided to his wife and no confirmation that there was no other support she could access. The respondent did not, therefore accept that the appellant could meet the criteria in paragraph 399(b) of the immigration rules. Neither was it accepted that he could meet the requirements in paragraph 399A on the basis of private life or that there were very compelling circumstances for the purposes of paragraph 398. With regard to Article 3, the respondent considered that the appellant could access any necessary treatment in Iraq. The respondent considered that the appellant did not meet the test in J v Secretary of State for the Home Department [2005] EWCA Civ 629 as a suicide risk.

Appeal before the First-tier Tribunal

14. The appellant's appeal was heard by First-tier Tribunal Judge Hubball. Further to the request of the appellant's representatives, the appeal proceeded by way of submissions only, owing, it was said, to the health issues of the appellant and his wife, AN. The appellant's asylum and protection claims were not pursued and the appeal proceeded only on Articles 3 and 8 grounds, in relation to the health issues.

15. The judge noted that it was accepted that the appellant could not meet the criteria in paragraph 399A in regard to private life. He noted that the appellant could not qualify under paragraph 399(b) because he was not in the UK lawfully and therefore the case before the Tribunal was whether there were very compelling circumstances over and above those in paragraph 399 and 399A, for the purposes of paragraph 398. The judge accepted that it would be unduly harsh for the appellant's wife to relocate to Iraq. The judge noted the submission made for the respondent that the medical evidence relied upon by the appellant was almost three years out of date but accepted the submission made on behalf of the appellant that his psychiatric condition was ongoing. The judge noted the delay over a five year period in considering the appellant's

representations and also accepted that the appellant had not offended since 2005. He took note of the respondent's acceptance that the appellant may be at risk of suicide on return to Iraq and considered an expert report from Sheri Laizer in regard to the inadequate medical care available in Iraq. He concluded that there was not an availability of treatment in Iraq to prevent the appellant's suicidal impulses and therefore found that there was an Article 3 suicide risk on return to Iraq. With regard to Article 8, he found that the effect of the appellant's deportation on his wife would be unduly harsh, owing to her severe disability and her reliance upon the appellant for support. He concluded that there were very compelling circumstances over and above those in paragraph 399 and 399A and that the appellant's removal would also breach Article 8. Accordingly he allowed the appeal on human rights grounds.

16. The respondent sought permission to appeal to the Upper Tribunal on the following grounds: that the judge, in making his findings on Article 3 suicide risk, had erred by failing to have proper regard to the objective evidence in the refusal letter as to medical facilities in Iraq and had relied upon outdated medical opinions and risk assessments; that the judge, in considering the "unduly harsh test", had erred by mistakenly considering that the respondent had accepted that the appellant's wife was severely disabled and had failed to have regard to the high threshold in the unduly harsh test; and that the judge had failed to have regard to the many adverse factors against the appellant in section 117 of the 2002 Act.

17. Permission was granted on 12 August 2015.

Hearing in the Upper Tribunal

18. The main premise upon which Judge Hubball allowed the appellant 's appeal was that he remained a suicide risk and that, whilst that risk could be managed in the UK and on removal to Iraq, the facilities did not exist in Iraq to prevent his suicidal impulses. The starting point for that premise appears to have been what was said by the respondent at [168] which was considered as an acceptance by the respondent that Article 3 was engaged on the basis of the appellant being a suicide risk. Ms Aboni submitted that there was no such concession. That certainly seems to be borne out by the fact that the Home Office presenting officer, at the hearing, submitted that there was no evidence before the Tribunal to show that the appellant was currently a suicide risk. I find myself in agreement with Ms Aboni's submission, and with the second ground of appeal, that the judge misdirected himself as to the existence of a real risk of suicide and that his reliance on medical evidence which was three years out of date rendered his findings unsafe. Although the judge was aware that that was a point relied upon by the respondent, he accepted submissions made on behalf of the appellant that the appellant's psychiatric condition was ongoing, based upon a more recent medical report referred to at [93]. However that report, from Dr Neil Basu, at page 26 of the appeal bundle, concluded that he was not actively suicidal. Accordingly, it seems to me that the judge's finding, that the appellant was a suicide risk, was simply unsustainable on the evidence before him.

19. Likewise, it seems to me that the judge's findings on the appellant's wife's circumstances were also unsustainable. The judge found that it would be unduly harsh for the appellant's wife to be separated from the appellant and based that finding, at [112], upon an understanding that paragraph 118 of the refusal letter made it clear that she was severely disabled and relied on the appellant to perform the everyday tasks of life. However, the judge appears to have misunderstood what was said at paragraph 118 of the refusal letter, since it is clear that the respondent, whilst accepting that the appellant's wife suffered from a range of health issues, did not accept that she was severely disabled and did not accept that the evidence showed that she was dependent upon the appellant for her care. The document relied upon by the judge, in the form of a decision of the Social Entitlement Chamber, made no mention of any dependency upon the appellant.

20. Finally, I find merit in the last ground of appeal, in which it is asserted that the judge failed to have regard to the adverse factors in section 117 of the 2002 Act. Whilst the judge referred to section 117 at [111] and [112], and at [114] to the "competing interests", it seems that he did not in fact give any, or any proper, consideration to the factors set out at paragraph 19 of the grounds.

21. In the circumstances it seems to me that Judge Hubball's decision has to be set aside. His findings on the availability of medical treatment in Iraq were premised upon the conclusion that the appellant was a suicide risk, and given that that premise has been found to be unsafe on the evidence available, the entire matter has to be revisited in a fresh decision. Likewise, given the unsafe basis upon which the judge concluded that the appellant's circumstances were very compelling, his Article 8 assessment cannot be preserved in part and must be conducted afresh.

22. Accordingly, whilst I indicated at the hearing that the appropriate course would be for there to be a resumed hearing in the Upper Tribunal, it seems to me, upon reflection, that the appropriate course would in fact be for the case to be remitted to the First-tier Tribunal to consider afresh with the benefit of up to date medical evidence for both the appellant and his wife. The appeal will therefore be remitted to the First-tier Tribunal to be heard de novo, on the same basis as previously, namely on Article 3 and 8 grounds.

23. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The Secretary of State's appeal is allowed. The decision is set aside. The appeal is remitted to the First-tier Tribunal, to be dealt with afresh, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge Hubball.

.

Signed
Upper Tribunal Judge Kebede
12 July 2016