Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03787/2018

THE IMMIGRATION ACTS

Heard at the Royal Courts of Justice	**Decision & Reasons Promulgated**
On 23 July 2018	**On 31 July 2018**

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

R Q
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms P Solanki, Counsel instructed by Wilsons Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant and respondent have both sought and obtained permission to appeal in this case and to avoid any confusion, I refer to the parties as they were before the First-tier Tribunal. The determination was promulgated by First-tier Tribunal Judge Rowlands on 1 May 2018. He dismissed the appeal on asylum an human rights grounds but allowed it on humanitarian protection grounds.

2. The appellant is an Iraqi Sunni Kurd born on 20 March 1988. His asylum appeal in respect of an earlier asylum claim was dismissed in December 2007. No enforcement action appears to have been taken against him and he then resurfaced in 2013 when he was arrested on suspicion of a sexual assault whilst apparently on bail for an earlier such assault on a different woman in June 2012. He was convicted of both offences as well as driving without a licence, without insurance and taking a vehicle without consent. He received a two year prison sentence and the respondent signed a deportation order on 18 February 2014 and refused his asylum and human rights claims. On 2 March 2018 the appellant made another asylum claim which was refused on 15 March 2018.

3. The respondent challenges the judge's decision to allow the appeal on humanitarian protection grounds, arguing that (1) the judge failed to consider that the appellant was not entitled to humanitarian protection unless he could rebut the presumption that deportation was in the public interest and (2) that no weight was given to the strong public interest in deportation. Permission was granted by First-tier Tribunal Judge Keane on 24 May 2018.

4. The appellant challenges the determination on the grounds that the judge failed to consider whether the appellant's article 2 and 3 rights would be breached by his return to Iraq. His application was made out of time but time was extended and permission was granted by Upper Tribunal Judge Finch sitting as a judge of the First-tier Tribunal on 9 July 2018.

5. The Hearing

6. At the hearing before me on 23 July 2018, I heard submissions from the parties. I dealt with the respondent's case first. Mr Melvin relied on the grounds and submitted that there had been a misdirection by the Tribunal judge who had failed to attach any weight to the public interest in deportation when the scales were heavily weighted to that end.

7. Ms Solanki replied. She submitted that the judge had referred to the gravity of the appellant's offence (at 31). She expressed surprise at the respondent's grounds because she argued they were wrong in law. There had been no reference to paragraph 339D or to article 17 of the Qualification Directive. In so far as the grounds referred to the balancing exercise which had not been carried out by the judge, that could only apply to article 8 and the appellant had not pursued a claim on private/family life grounds. Neither of the refusal letters referred to exclusion despite being lengthy decisions and the Secretary of State should not be permitted to raise it at this stage. Alternative submissions had been made in the skeleton argument if the Tribunal were to found that the decisions had raised the issue of exclusion.

8. Mr Melvin responded. He conceded that the second ground was not a strong one but submitted that the public interest considerations could be looked at in the context of all matters.

9. I then heard submissions on the appellant's case. Ms Solanki relied on AAH (Iraqi Kurds - internal relocation) Iraq CG UKUT 00212 (IAC) and submitted that the respondent had there conceded that returnees not in possession of a CSID and unable to obtain one would face a real risk of destitution such that article 3 was engaged (at paragraph 93). The Tribunal had agreed with that with the exception of those who had family or friends (at 94). In those circumstances, the appeal should have been allowed under article 3 as well.

10. Mr Melvin submitted in response that the appellant could not succeed on humanitarian protection and article 3 grounds simultaneously. He submitted that AAH had not been before the First-tier Tribunal. He conceded that there had been no challenge to the judge's findings on the appellant's lack of family ties in Iraq.

11. Ms Solanki submitted that it was possible to allow the appeal on more than one basis and argued that the appellant would then be given the more favourable form of leave.

12. That completed the hearing. I reserved my determination which I now give with reasons.

13. Findings and Conclusions

14. It has to be said that the judge's determination could have been better. The findings are brief and the analysis is modest but the issue is whether the reasoning is adequate and, if not, whether a different outcome would have been possible.

15. Dealing first with the respondent's arguments, I accept entirely that the appellant's crimes are serious and extremely distasteful. The fact that the appellant has shown no remorse and does not even see that his behaviour towards his victims was unacceptable is of concern and reflects badly upon his character however the Tribunal is required to uphold and apply the law and not to be influenced by matters outside it. On that basis, I make the following findings.

16. Firstly, as Ms Solanki pointed out, the respondent did not raise the issue of exclusion in either of his decision letters. That may not have been the end of the matter if we were concerned with a s.72 exclusion as the Tribunal would have been obliged to consider it in any event. However, the appeal was dismissed on asylum grounds and so exclusion under the Refugee Convention is immaterial.

Neither party has taken issue with the judge's findings on asylum grounds and his decision to dismiss the appeal under the Refugee Conventions stands.

17. The next point is whether the judge erred in his consideration of humanitarian protection. Exclusion from a grant of leave on these grounds is dealt with by paragraph 339D. In this case sub sections (iii) and (iv) apply; that is to say that a person is excluded from a grant of humanitarian protection where the Secretary of State is satisfied that there are serious reasons for considering that he would constitute a danger to the community and has committed a serious crime. Whilst I accept entirely that there is no reference to this rule in the decision letters, it is plain from the contents of the decisions and the submissions made at the hearing before the First-tier Tribunal that the respondent is satisfied of both. Indeed, it is conceded by the appellant's representative that the appellant has committed serious crimes although his danger to the community is disputed. For these purposes, however, it is enough that one sub section applies. Due to the serious crimes committed, the appellant is excluded from a grant of humanitarian protection. The judge failed to consider this matter in his determination and he therefore erred in allowing the appeal on humanitarian protection grounds. His decision to do so is set aside. I re-make it by dismissing the appeal on humanitarian protection grounds.

18. I accept Ms Solanki's submission that the balancing exercise the judge was criticized for not having undertaken related to article 8 and as the appellant did not seek to pursue any family/private life claim, that omission is immaterial.

19. There has been no challenge to the finding of the judge that the appellant's mental health issues do not engage article 3.

20. Finally, there is the issue of whether the findings made by the judge on the security situation for the appellant in Iraq and his inability to obtain a CSID are such as to engage article 3, notwithstanding the appellant's failure to reach the required standard with his mental health grounds.

21. It is, of course, significant to the outcome of this appeal that the judge's findings on the risk to the appellant in Iraq as a Sunni Kurd without contact with family and friends and therefore without any opportunity to obtain a CSID card, to work or support himself, have not been challenged by the respondent. This was fairly conceded by Mr Melvin in his submissions. The findings are set out at 29 and 30. It is true that they are brief but as they have not been challenged, the finding of risk to the appellant in Iraq (both in the IKR and Baghdad) stands. That supersedes any arguments on exclusion as the right to protection on article 3 grounds is absolute. The finding is reinforced by the country guidance in the recent AAH which, although not promulgated at the date of the hearing or determination, supports the continued risk to the appellant. As Ms Solanki pointed out, the Tribunal found in that case that a person without a CSID and without the ability to obtain one (that is having no friends or family to help)

would be at risk of article 3 treatment on return. In this case, Judge Rowlands found that the appellant had lost touch with family in Iraq and rejected the respondent's submission that he would be able to re-establish contact. The appellant's situation is therefore akin to that of the person envisaged at paragraph 94 by the Upper Tribunal. It follows that he is entitled to article 3 protection.

22. Decision

23. The First-tier Tribunal made an error of law on humanitarian protection grounds and the decision to allow the appeal on that basis is set aside.

24. The appeal is dismissed on asylum grounds.

25. The appeal is dismissed on humanitarian protection grounds.

26. The appeal is allowed on article 3 grounds.

27. Anonymity

28. I make an order for anonymity although I was not asked to do so.

Signed

Upper Tribunal Judge

Date: 25 July 2018