**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: PA/05546/2016

**THE IMMIGRATION ACTS**

| **Heard at: Manchester Piccadilly** | **Decision & Reasons Promulgated** |
|---|---|
| **On: 10 January 2018** | **On: 15 January 2018** |

**Before**

**UPPER TRIBUNAL JUDGE PLIMMER**

**Between**

**HM**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

For the appellant: Mr Wilkins, Counsel
For the respondent: McVeety, Senior Home Office Presenting Officer

**DECISION AND REASONS**

*Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original first Appellant in this determination identified as HM.*

1. In a decision dated 3 October 2017 I found that the decision of the First-tier Tribunal contained an error of law and set it aside. I gave directions for the appeal to be reheard by me, on a later date, which took place on 10 January 2018.

2. In this decision, I refer to the appellant's four British citizen children as follows: his step-children D (born in 2003) and A (born in 2005) and his younger biological children, L (born in 2011) and M, (born in 2012). The children's mother remains the appellant's partner. They got married in an Islamic ceremony in 2012, and for this reason I refer to her as his wife in this decision.

**Background history**

3. Although much of the background history was set out in my earlier decision, for completeness I repeat the relevant background history in this decision. I only summarise the relevant history as much of it is of some vintage and no longer pertinent to the issues for me to decide.

4. The appellant is a citizen of Iraq. He came to the United Kingdom ('UK') on 17 September 2003 and applied for asylum. This was refused but he did not become appeals rights exhausted until August 2006. Shortly after this, the appellant made an application to remain pursuant to the SSHD's 'Rashid' policy. This was refused in May 2007. At around that time, in September 2007 the SSHD indicated that there were to be no enforced returns to Iraq. At the beginning of 2008, the appellant made an application to remain under the 'legacy' policy but this was also refused.

5. On 14 August 2009, the appellant was convicted of possessing false identity documents and sentenced to *six months imprisonment* with a recommendation for deportation. At this stage, the SSHD acted promptly and the appellant was served with a deportation order on 10 September 2009, in relation to which he lodged an appeal. The appellant met his wife in April 2010. In a decision dated 12 November 2010 the First-tier Tribunal disbelieved the entirety of the appellant's claim for asylum as well as his claimed relationship. The appellant again became appeals rights exhausted on 25 February 2011 and the deportation order was signed on 25 May 2011. L was born at around this time.

6. On 6 June 2011, the appellant applied to revoke his deportation order and successfully obtained a stay on his removal at that time, alongside a number of Iraqis the SSHD proposed to deport to Iraq. His revocation application was refused and certified in August 2011 and he challenged this by way of judicial review. There then followed extensive litigation regarding the

lawfulness of deportations to Iraq, including that of this appellant. During that time in 2012, M was born.

7. The decision refusing permission in the appellant's judicial review claim was not made until 6 March 2014 – see the decision of Ouseley J of that date.

8. On 16 October 2014, the appellant made a further application to revoke the deportation order. No decision was made on this until 11 May 2016, when the appellant was granted an in-country right of appeal.

9. In 2017 a First-tier Tribunal dismissed the appellant's appeal against the refusal to revoke his deportation order on protection and human rights grounds.

**Hearing**

*Issues in dispute*

10. At the beginning of the hearing both representatives agreed that the above chronology of events correctly set out the relevant background to the appeal. They also agreed that the only ground of appeal before me concerns Article 8 of the ECHR.

11. Given the mistaken assumption on the part of the First-tier Tribunal that the appellant is a 'foreign criminal' and the application of the wrong legal framework in order to determine Article 8, it was agreed that it was important to clarify with care the appropriate legal framework appertaining to a case such as this. Both representatives agreed that the appellant is not a 'foreign criminal' but in determining whether his deportation order should be revoked, weight to must be attached to the public interest in his deportation together with the SSHD's policy as contained in the relevant Immigration Rules and section 117B of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act').

12. Both representatives also agreed that some of the factual findings made by the 2017 First-tier Tribunal should be preserved:

    (i) The First-tier Tribunal accepted the detailed account of close and committed relationships between the appellant and all four children and his wife, as described in a report dated 21 December 2017 of Ms Brown, an independent social worker ('ISW').

(ii) The First-tier Tribunal also accepted that the appellant committed a single offence, at the lower end of the scale and that he had not reoffended.

13. The 2017 First-tier Tribunal made a number of adverse findings regarding the appellant's immigration history and conduct whilst in the UK at [34]. Both representatives agreed that there was more detailed information available to me, which cast considerable doubt upon the chronology outlined by the First-tier Tribunal. In the circumstances, it was agreed that I should revisit this issue on a de novo basis by reference to the chronology I have summarised above.

*Evidence*

14. Ms Brown was instructed to prepare an updated report on the family's circumstances but was unable to do so in time for the hearing. She was however able to visit the family the day before the hearing and spent 2½ hours at the family home. Ms Wilkins explained that the conclusions in the report remained the same and proposed that Ms Brown give brief oral evidence to that effect. Mr McVeety agreed that in all the circumstances it was appropriate to hear oral evidence rather than adjourn the case for a formal report.

15. Ms Brown explained that she met every member of the family when she visited the day before save for D who was at an apprenticeship. There was no significant material change to the overall family dynamics. She described the family as "*a little chaotic but in a delightful way*". Ms Brown said that she spent considerable time with A, who was articulate and candid. She described a very close and happy relationship with the appellant, who she regards to be and refers to as her dad. Ms Brown also explained that the appellant has started taking the children to the mosque. She expressed a concern that an understanding of the children's mixed heritage was likely to be lost if the appellant is deported.

16. Mr McVeety asked Ms Brown one question only i.e. whether the children were being forced to attend the mosque. She made it very clear that the children viewed the mosque as a largely social affair and were very happy to attend. Ms Brown was not asked any further questions.

17. After the completion of Ms Brown's evidence, Mr McVeety candidly acknowledged that the underlying factual matrix to the appeal was not disputed and as such he did not wish to ask the appellant and his wife any questions. They were therefore not called as witnesses.

*Submissions*

18. Mr McVeety acknowledged that the British citizen children and wife could not be expected to reside in Iraq given the difficult conditions there. He described the key question in this case to be a straightforward one given the absence of any dispute regarding the factual matrix or legal framework. He described the question in these terms: is the appellant's single low level criminal offence sufficient to tip the balance in the SSHD's favour such that the public interest outweighs the interference with the very strong family life between the appellant and his children and wife?

19. Mr McVeety acknowledged that apart from his criminal offending there was no clear public interest in the appellant's deportation. In particular, he accepted that the appellant has spent much of his lengthy time in the UK reasonably pursuing applications and awaiting their final resolution. He therefore distanced himself from the findings made by the 2017 First-tier Tribunal at [34]. Mr McVeety invited me to determine the appeal as I considered appropriate.

20. Ms Wilkins relied upon her helpful skeleton argument and invited me to find that the best interests of the children and the very strong family life are such that the interference with that family would be a disproportionate breach of Article 8.

21. After hearing from both representatives, I allowed the appeal on Article 8 grounds. I now provide my written reasons for doing so.

**Legal framework**

22. By section 3(5)(a) of the Immigration Act 1971, a person who is not a British citizen is liable to deportation if the SSHD deems his deportation to be conducive to the public good; and, by section 5(1), in respect of a person liable to deportation, the SSHD may make a deportation order requiring him to leave and prohibiting him from entering the UK. Section 5(2) gives the SSHD the power to revoke a deportation order 'at any time'.

23. The appellant's application is to revoke the deportation order signed on 25 May 2011. This was based upon his conviction and sentence of six months imprisonment for possession of false identity documents on 14 August 2009 and the court's recommendation for deportation.

24. The relevant Immigration Rules relevant to an application for revocation are found at paragraphs 390-391A, which provide as follows:

> "390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:

(i) the grounds on which the order was made;
(ii) any representations made in support of revocation;
(iii) the interests of the community, including the maintenance of an effective immigration control;
(iv) the interests of the applicant, including any compassionate circumstances.

390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.

391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course…

391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order
…
396. Where a person is liable to deportation the presumption shall be that the public interest requires deportation. It is in the public interest to deport where the Secretary of State must make a deportation order in accordance with section 32 of the UK Borders Act 2007.

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed."

25. The well-known provisions of paragraph 398 as reflected in section 117C of the 2002 Act do not apply as the appellant does not meet any of the criteria. Paragraph 391 does not apply as the appellant has not actually been deported.

26. In cases involving representations made on human rights grounds under Article 8, the heart of the assessment is whether the deportation decision strikes a fair balance between the due weight to be given to the strength of the public interest in deportation and the impact of the decision on the individual's private or family life. In assessing whether the decision strikes a fair balance I must give appropriate weight to Parliament's and the Secretary of State's assessment of the strength of the general public interest in the deportation of foreign offenders as expressed in the relevant rules and statutes: see Hesham Ali v SSHD [2016] UKSC 60.

27. As pointed out in KE (Nigeria) v SSHD [2017] EWCA Civ 1382, the statutory provisions in sections 117A-117D of the 2002 Act are the relevant drivers in cases which concern the application of Article 8(2), and they apply to the consideration of the revocation of deportation orders. The statutory provisions in sections 117A-117D are law and together with the relevant Immigration Rules set out

policy, in the sense that they provide a general assessment of the proportionality exercise that has to be performed under Article 8(2) where there is a public interest in deporting a foreign criminal but countervailing Article 8 factors. The statutory provisions provide a particularly strong statement of public policy, such that great weight should generally be given to it and cases in which that public interest will be outweighed, other than those specified in the statutory provisions and Rules themselves, are likely to be a very small minority, particular in non-settled cases – see KE at [30].

28. Where Article 8 is invoked, there is therefore a presumption that the public interest requires deportation but if after having undertaken the full assessment by reference to the statutes and Immigration Rules, to deport the appellant would result in a breach of Article 8, it should be revoked.

29. In considering the public interest question for the purposes of the Article 8 proportionality assessment in this case, regard must be given to the considerations listed in section 117B of the 2002 Act. The additional considerations in section 117C do not apply here because the appellant is not a 'foreign criminal' for these purposes.

30. As the Article 8 family life equation involves children, section 55 is immediately engaged - see **ZH (Tanzania**) [2011] UKSC 4.

**Article 8 assessment**

*Family life*

31. Having considered all the detailed evidence in the round, I accept the evidence as corroborated by Ms Brown, that the appellant has a very close relationship with his children and wife. I note that two previous First-tier Tribunals found the appellant to be dishonest in his account of his circumstances in Iraq. The 2010 First-tier Tribunal also rejected his claim to be in a relationship with his now wife. Notwithstanding this, the 2017 First-tier Tribunal was prepared to accept the genuineness of the family relationships. I have considering all these findings, together with the detailed evidence before me and entirely accept the description of the family unit and relationships within it in the statements of the appellant and his wife, and in Ms Brown's report, as updated by oral evidence.

32. For the avoidance of doubt, although the two older children are the appellant's step-children, I accept the evidence that everyone in the family regards the relationships as being akin to father and child, and there is no real distinction between the step-children and biological children. The step-children cannot recall ever having a relationship with their respective fathers and have grown up over an extended period and at particularly formative stages of their lives (7-14 and 5-

12 respectively) with the appellant playing a full and active fatherly role. They refer to him as 'Dad' or 'Daddy'.

33. The appellant's relationship with all four children is particularly close because he is not permitted to work and his wife works night shifts as a care assistant twice a week. The appellant therefore plays an important role in general household duties, caring for the children when ill (D has been hospitalised because of his asthma), school drop offs and collections. As observed by Ms Brown the appellant's relationship with each child includes very close emotional and physical bonds. Each child has developed significant emotional attachments to the appellant. The older children have experienced separation in 2011 when the appellant was detained with a view to removal and Ms Brown has described the considerable distress this caused them. Ms Brown explained that this distress was also manifest in A when she spoke to her about the 2017 First-tier Tribunal's decision.

34. I must consider the best interests of the four children concerned as a primary consideration. The appellant plays a very active part in their daily lives. He is a caring and loving father. The children benefit from his attention, care, love and involvement in their respective lives. These benefits are overwhelming for each of them. Given the nature and depth of the relationships, the use of modern means of communication would not come even close to replacing or compensating for the appellant's absence from the family, particularly given the ages of the younger children. To the credit of the appellant and his wife they have together built a large happy integrated family, notwithstanding the constraints caused by very limited finances.

35. I therefore find that by a significant measure the best interests of the children require their father to continue to play an active role in their lives in the UK.

36. I also accept that the relationship between the appellant and his wife is genuine and they work together as a team to care for the children. I note that she relies upon the appellant to be the primary carer for the children at least two nights a week to enable her to work as a care assistant (when she works from 9pm to 7.30am and must sleep the next day) and that for the remainder of the week they both takes active roles in parenting. I accept that the appellant's wife may have to give up her employment and rely to a greater extent on benefits without the appellant's assistance. I also accept her evidence that she would find it very difficult to cope with the four children on her own.

37. In making these findings I bear in mind that the family lives very near to maternal relatives, including grandparents and the extended family members are all close. I accept that the children spend time with their extended family and they will be able to offer assistance in the appellant's absence. That assistance however will have practical limitations. The grandfather is in ill-health and is

cared for by the grandmother, who also works. As noted by Ms Brown the time is fast approaching when the grandparents' care needs will have to be met at least partly by the appellant's wife. In any event, the dependency upon the appellant on the part of his wife and children goes well beyond the practical. Ms Brown describes a high level of emotional dependency in considerable detail. The children turn to their father for hugs, play-time, love, attention and support on a daily basis. I therefore accept that there is a large extended family able and willing to assist but they are entirely incapable of replacing or substituting for the appellant.

*Private life*

38. I acknowledge that appendix FM and paragraph 276ADE of the Immigration Rules can be of no assistance to the appellant as the suitability requirements disqualify anyone subject to a deportation order. I must still consider the appellant's private life, albeit little weight should be given to it because it was established when his immigration status was either precarious or unlawful. The appellant has undoubtedly resided in the UK for a lengthy period, over 14 years and has strong links to the community through his children and his local Mosque.

*Interference with family and private life*

39. The appellant's deportation from the UK will entail a substantial interference with the right to respect for family life enjoyed by the appellant, his wife and their four children. The SSHD accepts that the family members cannot be expected to go to Iraq with the appellant.

40. Having found that there will be an interference with family life of the nature rehearsed above, I record that it is not disputed that such interference will be in accordance with the law and pursues a legitimate aim. Thus, the central question to be addressed and determined is that of the proportionality of the interference, in circumstances where the sentence of imprisonment concerned is less than 12 months and the appellant is not a 'foreign criminal'.

*Public interest*

41. As this is a case in which the deportation order has already been signed I acknowledge there is a presumption in favour of deportation. The appellant remains liable to deportation, having already unsuccessfully appealed against the decision to make a deportation order against him – see the decision of the 2010 First-tier Tribunal.

42. In my judgment, there have been material and fundamental changes to the appellant's circumstances since the First-tier Tribunal dismissed his appeal against the decision to deport in 2010 and since the deportation order was signed

in May 2011. At that time, the appellant's relationship with his wife and step-children was relatively new (they only met a few months before the appeal hearing). At the time the deportation order was signed, L was a young baby and M had not been born. The situation has materially altered since then. As summarised above, the picture of family life in January 2018 as described by Ms Brown after spending over five hours on two separate occasions with the family is undeniably entirely different.

43. In addition, the appellant's conviction of a single offence in 2009 was relatively recent when the deportation order was signed. It is accepted that the offence is at the lower end of the scale of seriousness. He was sentenced to six months for identity fraud and served three months. The appellant does not dispute that he committed the offence out of desperation to obtain hospital treatment and that what he did was wrong. With the passage of time the appellant has been able to demonstrate his devotion to his family and his commitment to leading a law-abiding life. Mr McVeety did not dispute that he is now fully rehabilitated with a negligible risk of re-offending. Notwithstanding this, there remains a public interest in deportation: that is the SSHD's policy. I acknowledge that in order to deter others and to elicit public confidence in the system, the public interest in deporting those who have committed criminal offences and consequently a deportation order has been signed against them remains, even though as here, the offending was not serious and is of some vintage.

44. I now turn to the public interest considerations applicable in all cases at section 117B. The maintenance of immigration controls is in the public interest. The appellant has never had leave to remain. His immigration status has been precarious for the greater part (but unlawful at times) as much of his time has been spent awaiting the conclusion of applications reasonably open to him. In broad terms: between 2003-6 he was pursuing his initial appeal process against the refusal of asylum; between 2006-9 he was pursuing various applications to remain in the UK based upon policies at the time; after his conviction and the decision to deport him in 2009 he was again pursuing appeals until the deportation order was signed in 2011; between 2011-14 the appellant was involved in lengthy litigation involving the viability of removal of Iraqi citizens; in 2014 the appellant made a fresh application, which was not decided until 2016; this led to a further appeal process which continued from 2016 to the present day.

45. That summary of the relevant chronology demonstrates that the appellant is not culpable in seeking to unreasonably prolong his stay in the UK and as Mr McVeety accepted has been pursuing applications entirely open to him for most of his time in the UK. The chronology also demonstrates that contrary to my initial views, there has been little material serious delay attributable to the SSHD.

46. The appellant is less likely to be a burden on tax payers and more likely to integrate as he speaks English well. The appellant's discipline and acceptance of

family responsibilities together with his voluntary activities at the mosque support my view that there is every reason to believe that he is capable of employment, around the needs of his children and his wife. I therefore find that if the appellant remains, the family has the potential to be financially independent, whereas if he is deported there is a likelihood that the appellant's wife will find it too difficult to work and the family may find themselves depending upon the state to a greater extent.

47. Little weight should be given to the appellant's private life as it was developed when he was in the UK unlawfully or when his status was precarious.

48. Little weight should also be given to the appellant's relationship with his wife in so far as it was established when he was in the UK unlawfully. The chronology makes it clear that the appellant met his wife in 2010 at a time when he was appealing against the deportation decision. Although he did not have leave to remain at this time he would have benefitted from temporary admission and cannot be said to have been in the UK unlawfully. Shortly after the deportation order was signed the appellant submitted a fresh claim and commenced judicial review proceedings, which continued for an extended period until 2014. Shortly after the final determination of those proceedings the appellant lodged a further fresh claim. Whilst there were short periods during the course of the relationship, that the appellant was in the UK unlawfully, for most of the time he was entitled to be in the UK in order to pursue extant applications. When the chronology is considered as a whole, I do not find that the relationship was established when the appellant was in the UK unlawfully. Even if it was and little weight must be attached to the relationship, my decision would be the same given my findings as to the strength of the relationship and dependency between the appellant and the children.

49. It has been agreed that section 117B(6) does not apply here because the appellant is liable to deportation.

50. I have no hesitation in concluding that the public interest is outweighed by the strength of the appellant's family life in the UK and the impact the interference with this will have upon his four children and the family unit.

51. Although the application of the Immigration Rules to the appellant's case is such that he is not required to demonstrate that the impact of his deportation upon his wife and children reaches the threshold of being 'unduly harsh', I find that in any event and in the particular circumstances of this case that this demanding test is met. Given their ages and relationship with their father all four children will be bereft and traumatised by his absence. For the reasons provided by Ms Brown, which I entirely accept, this is likely to last for a considerable period and do lasting and severe emotional harm. Their best interests will be adversely impacted in a significant manner notwithstanding the availability of support from

their mother and the maternal family. Taking into account all the circumstances of the case, including the appellant's criminal offence and immigration history, the consequences for the children and the family unit will be excessively harsh.

**Decision**

52. I re-make the decision by allowing the appeal on Article 8 of the ECHR grounds.

Signed: Ms Melanie Plimmer Dated: 12 January 2018
Judge of the Upper Tribunal