Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08809/2017

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 1 MAY 2019	**On 15 MAY 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

NAJAT [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Greer
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 13 March 2019, I rejected the submission made on behalf of the appellant at the first resumed hearing that the Secretary of State's decision to deport the appellant was unlawful. My reasons for so finding, together with my earlier decision identifying an error of law in the First-tier Tribunal decision, were as follows:

> "1. The appellant was born on 2 February 1985 and is a male citizen of Iraq. By a decision promulgated on 2 October 2018, Upper Tribunal Judge Rintoul set aside the decision of the First-tier Tribunal and directed a resumed hearing in the Upper Tribunal. A transfer order was made on 1 November 2018 and I conducted the resumed hearing at

Bradford on 28 January 2019. Upper Tribunal Judge Rintoul's reasons for finding an error of law was follows:

> "1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Parkes promulgated on 6 February 2018.
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> 2. The appellant is an Iraqi Kurd from near Kirkuk who left Iraq in 2002 at the age of 17 arriving in the United Kingdom shortly thereafter, and claimed asylum. He was initially granted discretionary leave to remain but was granted indefinite leave to remain on 4 February 2008. The appellant has on twelve separate occasions been convicted of a total of nineteen offences. Most recently he was convicted on the involvement of the production of cannabis and also perverting the course of justice at Sheffield Crown Court. On that occasion he was sentenced to nine months in respect of the production of cannabis and three months in respect of doing acts intended to pervert the course of justice. The sentences were imposed consecutively.
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> 3. The appellant's case is that he is at risk of return to Iraq on the basis that his father was opposed to the regime of Saddam Hussein and was killed by supporters of an opposition group; and, that he would be at risk from the same people. He also feared that he would be at risk on account of the general situation in Iraq and that he could not live safely anywhere there. He also states he does not speak Arabic, that he has no relatives with whom he is in contact with in Iraq, has never held a CSID card and would be unable to return as he would not be able to obtain a CSID.
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> 4. The Secretary of State's case as set out in the refusal letter is that he was not at risk has not made out noting that the basis of his claim as now put that his father had worked for a group opposed to Saddam Hussein's regime yet in his initial protection claim and so that his father was affiliated to the Ba'ath Party. The Secretary of State concluded also that the part of "Iraqi Kurdistan" where he lives, the Erbil Directorate in which Kirkuk is located, the degree of armed conflict does not give rise to indiscriminate violence engaging Article 15(c). The Secretary of State concluded also it would not be a breach of either the Refugee Convention or Articles 2 or 3 of the Human Rights Convention to return the Appellant to Iraq concluding that the seriousness of his offence was such that he was excluded from humanitarian protection and that his deportation would not be in breach of Article 8 given that he did not fulfil the grounds of paragraphs A398 to 399D of the 2002 Act.
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> 5. On appeal the judge found that:-
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> (i) the claim the appellant was at risk owing to the connection with his father was without substance there being no evidence to show that the group who targeted his father is still in existence or how it would identify him [25];
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> (ii) it was unlikely that the appellant would co-operate with efforts to remove him [27] to [29]; that the appellant could not rely on his own unreasonable refusal to co-operate in

circumstances to show that he could not be returned in line with AA (Iraq) [2017] EWCA Civ 944;

(iii) the appellant was not a foreign criminal as defined given that he had not been sentenced to a single term of twelve months; and, that despite the respondent's submissions, not pre-figured in the refusal letter [32], he was not satisfied that the appellant was a persistent offender as defined and thus was not caught either by the automatic deportation provisions nor was he a foreign criminal as defined in Section 117D of the 2002 Act;

(iv) the appellant could not meet the terms of paragraph 276ADE [36] nor did he meet the grounds of Appendix FM in respect to his relationship with his partner [37] and that it had not been shown that family life could not be pursued in Iraq by the appellant and his partner although both being unwilling to do so [40].

6. The appellant sought permission to appeal on the grounds that the judge had erred:-

(i) in failing properly to apply the guidance in AA (Iraq) [2017] in that, having apparently accepted that relocation to Baghdad was not an option, he failed properly to consider the practicality of travel from Baghdad to the IKR;

(ii) in irrationally concluding that the appellant's family would be able to assist him in obtaining a CSID; having lost contact with his sisters he had no remaining relatives in Iraq the family in any event being unable to return to the Kirkuk Civil Status Office as the region was one of conflict such that Article 15(c) would be engaged;

(iii) in failing properly to take an assessment of proportionality with regard to the factors set out in Section 117B of the 2002 Act.

7. On 5 March 2018 First-tier Tribunal Judge Pedro granted permission.

8. In his Rule 24 response the Secretary of State submits that the judge erred

(i) in the assessment of whether or not the appellant was a persistent offender, wrongly taking into account the fact that the grant of indefinite leave to remain in 2008 showed the offences were not serious this not being relevant to the question of the persistence of offending, the judge failing to look holistically at the totality of the offending in light of Chege ("is a persistent offender") Kenya [2016] UKUT 187;

(ii) in concluding that in any event the appellant would not be at risk of destitution without a CSID if he had no family to turn to for support which was not the case as found by the judge.

9. Both parties accepted that the judge had erred in not noting that the appellant's ILR had not been revoked by operation of Section 5 of the 1971 Act as, for the duration of the appeal, it is

preserved by operation of Section 34 of the UK Borders Act 2007. On that basis, the findings with respect to article 8 were flawed given that they proceeded wrongly from the assumption that the appellant did not currently have leave.

10. Mr Greer has submitted that the simple finding that the appellant was not credible was not sufficient as findings of fact still needed to be made with regards to those with whom the appellant was in contact and it would not be right to impute things onto him in the absence of credibility. There were no proper findings as to whether the appellant could obtain a CSID and it therefore followed that the findings with respect to internal relocation were misplaced.

11. Mr Greer submitted also that the judge had erred as, having found that the appellant was not a foreign criminal there was no proper consideration of the underlying legality of the decision which was relevant to proportionality as was a proper analysis of Section 117B of the 2002 Act.

12. Mr Greer had submitted also that the submission that the appellant was a persistent offender was to overstate the nature of his offending given that most of them related to a failure to attend court, to answer to bail or to a failure to comply with a curfew.

13. Mr Mills submitted that the judge had not addressed the submission from the Secretary of State that Kirkuk is no longer a contested area and that the case was that the appellant could return to Kirkuk to get help, albeit that he had left Iraq at the age of 17 in 2002. It had been open to the judge to find that the appellant was not telling the truth when he said he could not get a CSID and the judge had also erred in concluding that the appellant was not a persistent offender as the judge should not have discounted the offences which occurred prior to the grant of indefinite leave. It was noted also that the judge had said that it would be arguable that the appellant is a persistent offender if they had been taken into account see decision at paragraph 34.

14. I am satisfied that the judge's analysis of Article 8 is flawed given that the fact that the appellant still had indefinite leave to remain was not properly taken into account. Further, having concluded that the appellant was not a foreign national offender, and was not a persistent criminal, then the entire basis of the decision to deport the appellant fell away; this is not a case where there had been a separate revocation of indefinite leave to remain on other grounds. A failure to take this into account is a matter which infects significantly the Article 8 analysis and on that basis the decision involved the making of an error of law.

15. Was this error material? I consider that it was. There is significant merit in the respondent's submission as set out in the rule 24 letter that the judge wrongly concluded that the appellant was not a persistent offender. The judge did not appear to have directed himself in line with Chege and it was wrong to discount the offences committed prior to 2008 in assessing whether offending was persistent. The issue of the seriousness of the

offences was not strictly relevant and they should not have been ruled out of consideration. There was a clear thread in the offending in that the appellant appears at many different occasions to have ignored and disregarded the law in failing to attend court, failing to comply with bail and failing to comply with curfews. That attitude of disregard for the law is also shown in the most recent convictions.

16. Accordingly, I consider that the judge's decision that the appellant was a persistent offender is flawed and cannot be sustained. That does not, however, mean that any decision will inevitably be that the appellant is a persistent offender. That would require a further fact-finding exercise but the errors are material and the decision must be set aside on that basis also.

17. With regard to the findings about the CSID and whether the appellant could obtain one, as well as the difficulties of relocating to Kirkuk, I remind myself that this is a protection case and the decision has now been set aside. I consider that given that there has been a further country guidance case and the situation in Iraq has changed to some degree since the last decision, that it would be in the interests of justice to set aside the protection part of the claim as it will be necessary to undertake further fact-finding.

18. I consider that the findings with respect to the availability and assistance for the appellant in Iraq are unsustainable. Whilst I accept that it was open to the judge to find that the appellant was not credible, the issues of relocation are, for the reasons set out in the grounds, unsustainable and it is not clear how the appellant could relocate from Baghdad to the Kurdish region. Further, there appears to be some degree of confusion about the location of Kirkuk which is not in the IKR. This appears to arise from the refusal letter, and a proper analysis must be made.

19. Accordingly, for these reasons, I consider that the decision must be set aside in its entirety and remade. The issue that remains is to whether this should be remade in the Upper Tribunal and I am satisfied that in the circumstances of this case that it would be appropriate to do so therefore I do not order this to be remitted to the First-tier Tribunal.

Notice of Decision

(1) The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

(2) As agreed between the parties, the appeal will be remade in the Upper Tribunal at Bradford on a day to be fixed."

2. At the resumed hearing, Mr Greer, who appeared for the appellant, raised a matter which he submitted is fundamental to the Tribunal's jurisdiction to remake the decision. Both parties accept that the decision to deport the appellant sought to rely upon section 32(5) of the United Kingdom Borders Act 2007. Further, they accept the index offence (the production of cannabis) led to the appellant receiving sentence of 9 months imprisonment for production and 3 months for acts intended to pervert the course of justice. The

sentences were imposed consecutively. Section 38 (1) (b) of the 2007 Act provides:

> "In section 32(2) the reference to a person who is sentenced to a period of imprisonment of at least 12 months—
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> (a) …
>
> (b) does not include a reference to a person who is sentenced to a period of imprisonment of at least 12 months only by virtue of being sentenced to consecutive sentences amounting in aggregate to more than 12 months,"

3. Mr Greer submitted that the decision to deport the appellant under the provisions of the 2007 Act was not lawful as the appellant did not fall within the provisions of section 32(2). After some discussion, I told the representatives that I would consider the submission and I adjourned the resumed hearing accordingly.

4. Mr Greer sought to rely upon Charles (human rights appeal: scope) [2018] UKUT 00089 (IAC) in support of his argument. At [45-49], the Upper Tribunal held;

> "45. We find we must take issue with the last part of paragraph 23 of Greenwood (No. 2). The former ability of the Tribunal to conclude that a decision of the Secretary of State was unlawful, with the result that a lawful decision remained to be made by her, depended upon the fact that under the version of section 86 of the 2002 Act as it was, prior to its amendment by the 2014 Act, the Tribunal was required to allow an appeal insofar as it thought that a decision against which the appeal was brought or was treated as being brought was not in accordance with the law (including immigration rules). That requirement has been removed from the legislation. In this regard, therefore, Parliament has most definitely "taken the opportunity to interfere".
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> 46. The correct approach to adopt in a human rights appeal under section 82(1)(b) is as follows. As section 84(2) makes clear, and as is reflected in the present notice of decision, served in compliance with the Immigration (Notices) Regulations 2003, the decision being appealed is the decision to refuse the claimant's human rights claim. Section 84(2) provides that the only ground upon which that decision can be challenged is that "the decision is unlawful under section 6 of the Human Rights Act 1998". Section 6(1) of the 1998 Act provides that it "is unlawful for a public authority to act in a way which is incompatible with the Convention rights".
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> 47. The definition of "human rights claim" in section 113(1) of the 2002 Act involves the making of a claim by a person that to remove him or her from or to require him or her to leave the United Kingdom would be unlawful under section 6.
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> 48. The task, therefore, for the Tribunal, in a human rights appeal is to decide whether such removal or requirement would violate any of the provisions of the ECHR. In many such cases, including the present, the issue is whether the hypothetical

> removal or requirement to leave would be contrary to Article 8 (private and family life).
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> 49. In such a paradigm human rights appeal, therefore, we do not consider that paragraph 21 of the decision in Greenwood No 2, including its sub-paragraphs (a) and (b), has any purchase. If the decision to refuse the human rights claim would violate section 6 of the 1998 Act, the Tribunal must so find. In such a paradigm case, we see no purpose in the Tribunal making any statement to the effect that "a lawful decision remains to be made by the Secretary of State". It would certainly be wrong to conclude that, having allowed the appeal, the appellant's human rights claim remains outstanding, in the sense that the Secretary of State must make a fresh decision on that claim. The actual position will be that the Secretary of State, faced with the allowing of the appeal by the Tribunal, will decide whether and, if so, what leave to enter or remain she should give to the appellant. Any deportation decision or decision under section 10 of the 1999 Act that the Secretary of State may have made in respect of the appellant will fall away. Again, we see no need for the Tribunal to make any express statement to that effect."

5. I do not find that Charles offers Mr Greer any support. Whether or not the decision of the Secretary of State to deport the appellant has been made under the correct statutory provision, the appellant has made protection and human rights application to the Secretary of State, an application which the decision letter 23 August 2017 clearly indicates was refused. There was no right of appeal against the making of the deportation order but only against the Secretary of State's asylum/human rights decision. The First-tier Tribunal (and now the Upper Tribunal) was required to determine the appeal on asylum and human rights grounds only because the only decision of the Secretary of State with which it was concerned was the refusal and not the decision to make a deportation order. Neither Tribunal has any jurisdiction to conclude that the deportation decision was not in accordance with the law.

6. Accordingly, I direct that the resumed hearing be listed in Bradford on the first available date before me. Judge Rintoul [17-19] do not preserve any of the findings of fact of the First-tier Tribunal. Matters such as the risk to the appellant of return to his home area of Iraq, any risk he may face upon forced return to Baghdad and whether it would be unduly harsh to expect him to relocate within Iraq, in particular to the IKR, may be raised at the resumed hearing. The legality of the deportation decision will not, for the reasons given above, be revisited.

Notice of Decision

7. The First-tier Tribunal decision has already been set aside. The Upper Tribunal (Upper Tribunal Judge Lane) will remake the decision at or following a resumed hearing which shall be fixed on the first available date at Bradford (2 hours: Kurdish Sorani interpreter).

2. The appellant attended the adjourned resumed hearing and adopted his witness statement as his evidence in chief. There was no cross-examination.

3. Mr Greer submitted that, as long ago as 2009, the Secretary of State had accepted that the appellant had no identity documents (including a CSID) and could not obtain such documents; accordingly, the Secretary of State had issued the appellant with an emergency travel document. He queried why now, some 10 years later, the Secretary of State believes that the appellant would be able to obtain the necessary documents. He submitted that the appellant had given consistent evidence regarding the complete absence of family members who would be able to assist him in Iraq (his parents are dead and he has not had any contact with his sister many years).

4. I have considered all the evidence very carefully. I agree with Mr Greer that the prospects of the appellant obtaining the necessary identity documents now certainly no better and possibly even more remote than they were in 2009. I accept what the appellant says regarding an absence of friends or family members who would be able to assist him in obtaining replacement documents. Applying the existing country guidance (*AA (Iraq) [2017]* EWCA Civ 944) I am satisfied that the appellant would be exposed to a real risk of destitution should he return undocumented to Baghdad. Consequently, I allow his appeal on humanitarian protection grounds. Whether the Secretary of State seeks to revoke his indefinite leave to remain and to substitute a shorter period of the humanitarian protection leave is a matter for him. The appellant should remain aware of the fact that, should country conditions alter in Iraq, then he may in the future be expected to return to his country of nationality.

Notice of Decision

The appellant's appeal against the decision of the Secretary of State to refuse his claim for international protection following a decision to deport him to Iraq is allowed on humanitarian protection grounds.

Signed Date 1 MAY 2019

Upper Tribunal Judge Lane