Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01044/2012

THE IMMIGRATION ACTS

Heard at Bradford	**Determination Sent**
on 5th August 2013	**on 17th September 2013**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

A M (IRAQ)
(Anonymity order in force)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Ficklin instructed by Howells Solicitors LLP
For the Respondent: Mr Diwnycz – 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 Reed and Mr B D Yates (hereinafter referred to as 'the Panel') who in a determination promulgated on 22nd March 2013 dismissed the appellant's appeal against the order for his deportation from the United Kingdom made pursuant to section 32 (5) UK Borders Act 2007.

2. Permission to appeal was granted and the matter listed for a hearing to establish whether the Panel had made an error of law material to their decision. The application is opposed by the Secretary of State. Following the issuing of notices to the parties a letter was received from the appellant's representative asking for the hearing of the 5th August 2013 to be adjourned as Counsel, Miss Plimmer, who represented the appellant previously was appearing in Manchester on that

day. The representatives also requested a change in venue. A party has no right to retain counsel of their choice as a result of which the adjournment was refused. It was not established that alternative counsel could not be instructed in sufficient time for the hearing in Bradford without causing any prejudice to the appellant. A second letter from the appellant's representatives acknowledged the decision to refuse to adjourn the 5th August hearing but repeated the request for the hearing to be changed to Manchester; which was further refused by the Upper Tribunal on 16th July 2013. As a result Mr Ficklin was instructed and appeared on behalf the appellant. He more than adequately made detailed submissions on the appellant's behalf, based upon the grounds on which permission to appeal was sought. I am satisfied that notwithstanding the change of representative the appellant has suffered no prejudice and received a fair hearing.

Background

3. The appellant was born on 1st March 1972 and is a citizen of Iraq. He is said to have arrived in the United Kingdom on 26th February 2003, illegally, and claimed asylum on that day. His claim was refused on 7th April 2004 and his appeal against the refusal dismissed on 28th September 2004 by then Adjudicator Coates. Application for reconsideration was dismissed on 5th April 2006 and on 17th July 2006 the appellant submitted a fresh claim for asylum.

4. On 24th October 2007, following conviction after trial at Sheffield Crown Court in respect of one count of kidnapping and two counts of rape, the appellant was sentenced to 10 years imprisonment on each offence to run concurrently and recommended for deportation by the Sentencing Judge.

5. On 6th November 2012 the respondent issued a certificate excluding the appellant from the protection of the Refugee Convention and from humanitarian protection under the Qualification Directive in addition to refusing the claim for international protection. It was found the appellant's deportation was proportionate and would not be a breach of his rights under Article 8 ECHR.

6. In relation to the index offence, the appellant was arrested on 2nd May 2007 when attending to report for immigration matters at West Bar, Sheffield. It was alleged that on 11th February 2007 he kidnapped and raped a girl who was then only 14 years of age. He was charged with three counts of (i) kidnapping with the intention of committing a relevant sexual offence (ii) Rape (vagina penetration of the girl aged 14 without consent) (iii) Rape (vagina penetration of the girl aged 14 without consent).

7. In his sentencing remarks His Honour Judge Keen QC stated:

[A A M], you are 34 years of age and someone who has not been in this country very long, but whilst you have been here there has been no convictions or any other difficulties with the law, and that is a matter for which you can claim and will receive credit.

Your jury has convicted you on what was the clearest possible evidence. You maintained your silence both in interview and until very shortly before the commencement of this trial. That was so that you could scheme and plot your case in order to try and deceive this jury. It is your right to plead not guilty but your behaviour both before and during this trial makes it clear to me that you have absolutely no remorse for what you subjected this child to.

You took advantage of a naïve, vulnerable girl who you knew to be only 14 years of age.

From the start this defendant had sexual relations with one or more of these girls in mind. He drove off against the girl's will and kept her with him by false promises of taking her home. He formed an intention to have sex with her, regardless of her wishes, first of all at an address where she failed to co-operate and then he took her to a secluded dark part of the Northern General Hospital where he raped her twice and subjected her to other sexual indignities. It is the totality of the sentence with which I am concerned. On each offence therefore it will be the same sentence to run concurrently, which is one of 10 years' imprisonment.

By the nature of this defendant's behaviour, it is clear to me that his continued presence in this country must be to the detriment of its citizens and I am going to recommend to the Home Secretary that he be deported at the end of his sentence.

I certify that he has been convicted of an offence under the Sexual Offences Act and is now disqualified for life from working with children.

8. The appellant sought permission to appeal from the single judge which was refused. The appeal was also refused by the Court of Appeal.

9. The Panel considered all the evidence available to them including the OASys report which found that the appellant presented a high risk of serious harm to both children and the public and highlighted several areas of concern including a manipulative/predatory lifestyle and recklessness and risk-taking behaviour which were found to be significant problems. In Iraq the appellant had got drunk, had an argument with a friend, and ended up slashing his friend with a knife. Aggressive/controlling behaviour was also said to present significant problems and the appellant was very rigid in his thinking and did not consider others. The Panel noted the passage in the report: "*very bitter regarding conviction. Denies offence, will not undertake any work in relation to offending, as he*

says he is appealing. Some evidence of derogatory attitude towards victim/women. Says he is support/co-worker of Saddam Hussain. Also very bitter towards police and criminal justice system. He commented on ETS the crime in this country is down to the government and poor education".

10. I have noted within the bundle a copy of the letter dated the 15th February 2012 written by Gans & Co Solicitors to The Registrar of the European Court of Human Rights in Strasbourg in which the appellant submits an application for appealing against his conviction based upon an alleged violation of Article 6 of the ECHR. For the purpose of these proceedings the Panel were correct not go behind the fact the appellant is a convicted sex offender.

Discussion

11. The determination is challenged on two grounds the first of which is that although the Panel made reference to HM and others (article 15 (c)) Iraq CG [2012] UKUT 00409 at paragraph 34 (viii) they failed to address the fact that the appellant does not have an Iraqi passport. The Grounds submit that in deporting the appellant the respondent will not comply with her policy of not removing those without relevant documentation. As a person without either a current or expired Iraqi passport the appellant will be at risk of detention in the course of BIAP procedures and it cannot be excluded that detention conditions might give rise to a real risk of treatment contrary to Article 3 ECHR. It is submitted that in such circumstances the risk the appellant faces is not academic.

12. Mr Fickling also referred the Tribunal to the case of J1 v SSHD [2013] EWCA Civ 279. This case related to an appeal against a decision of the Special Immigration Appeals Commission (SIAC) who upheld the Secretary of State's decision that the appellant could be deported to Ethiopia. The central question was whether the deportation would constitute a breach of Article 3 ECHR and whether SIAC were entitled to conclude that assurances given by the Ethiopian Government were satisfactory safeguards, even though not all the arrangements for monitoring the return of those said to be at risk were in place.

13. Mr Fickling submitted this case was relevant as it looked at the question of whether any risk of return should be viewed as being academic. In paragraphs 42 to 55 the judgment the Court examined the question to what extent SIAC were entitled to leave issues to be resolved by the Secretary of State at a future date. In paragraph 55 the Court summarises the principles arising from the line of authorities they considered as follows:

> 55. The principles which emerge from the above line of authority are the following:
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> i) In cases where the claimant seeks asylum or a right to remain in the UK on human rights grounds, the court or tribunal must determine that claim on the basis of current evidence.

ii) Where the claim is based upon dangers confronting the claimant in their home state, that determination involves an assessment of what will happen, or what there is a real risk of happening, in the future.

iii) In determining the claim the court or tribunal will take into account any undertaking or assurance given by the Secretary of State, in so far as it is relevant to the issues under consideration.

iv) Such an assurance or undertaking cannot cut down the legal protection to which the claimant is entitled.

v) If the route or method of return is unknown, the court or tribunal may in appropriate cases leave this matter for later decision by the Secretary of State. If the Secretary of State fails to address the matter properly, the claimant's remedy is by way of making a fresh claim or bringing judicial review proceedings.

vi) The court or tribunal cannot, however, delegate to the Secretary of State the resolution of any material element of the legal claim which the claimant has brought before that court or tribunal for determination.

14. This issue arises for in HM and others, (hereinafter referred to as HM2), the Tribunal held that if a person is compulsorily returned to BIAP without either a current or expired Iraqi passport, he may be at risk of detention in the course of BIAP procedures and it cannot be excluded that the detention conditions might give rise to a real risk of treatment contrary to Article 3 ECHR. Such a risk is however, purely academic in the UK context because under the current UK returns policy there will be no compulsory return of persons lacking such documents.

15. I find there is a fundamental fact which distinguishes J1 and the issues the Court were asked to consider in that appeal from this case. The issue before the Court of Appeal related to whether terms of an assurance given by a foreign government were sufficient, on the facts of the case under consideration, to avoid any potential breach of Article 3 ECHR. In paragraph 59 of the judgment the Court refer to what are described as the 'four yardsticks ' set out in the case of BB v Secretary of State for the Home Department (SC/39 /2005), 5th December 2006, at paragraph 5 which are stated to be as follows;

i. The terms of the sureties must be such that, if they are fulfilled, the person returned will not be subjected to treatment contrary to Article 3;

ii. The assurances must be given in good faith;

iii. There must be a sound objective basis for believing that the assurances will be fulfilled;

iv. Fulfilment of the assurances must be capable of being verified.

16. This deportation appeal is not an appeal in which the avoidance of a potential risk is based upon the actions of the Iraqi Government but rather upon a policy of the Secretary of State not to return individuals to Iraq without the required documentation. Without such documentation he will not be returned and therefore at the date of the hearing, based upon the available evidence, the appellant was not facing a real risk of return to Iraq which would give rise to a breach of his rights under Articles 3 ECHR. Any such risk was purely academic as it is a risk that would only arrives in the event the Secretary of State sought to return him without such documentation which would be contrary to both current practice and stated policy. The policy is therefore one in which the terms are such that, if they are fulfilled, the person returned will not be subjected to treatment contrary to Article 3. The remaining three yardsticks are also met by the respondent's policy and practices in accordance with that policy. On this basis the challenge must therefore fail.

17. The documentation required to return an individual to Iraq includes either a valid passport or an approved travel document which can be obtained from the Iraqi Embassy in the United Kingdom.

18. It is clear from reading of the determination that the Panel considered the situation on the basis of the evidence available to them which includes that referred to by the Tribunal in HM2. It was a claim based upon alleged dangers confronting the appellant in his home state at the point of return but, in assessing what will happen, as the appellant will not be returned unless he has the necessary paperwork there is no real risk of suffering alleged harm at the point of return. The assurances of the Secretary of State, representing policy with regard to returnees to Iraq, are part of the factual matrix and the evidence the Panel were required to consider. The policy does not deprive the appellant of any legal protection but rather enhances the legal protection available to him as it recognises that action is required to be undertaken within the United Kingdom to minimise any risk to the appellant on return to Iraq. The appellant has a remedy if the Secretary of State attempted to return without the required documents as that will be a decision susceptible to judicial review, including the seeking of a mandatory injunction. This is not therefore a case of an appellant being returned to a situation where there is a real risk of harm as a result of the circumstances on return which the respondent is seeking to persuade a judicial body is academic based upon reliance on an assurance given by those whom the appellant will come into contact with at the point of return, but rather a situation in which return will not take place if such a risk exists. If the appellant was not able to obtain the required documents then this may give rise to a situation in which the respondent is unable to return him as the risk will become real and not academic. The failure of the appellant to cooperate with Iraqi authorities in obtaining the necessary documents is not, however, a reason to allow him to stay and grant him any leave.

19. Mr Fickling's argument is that because at the date of the hearing the appellant has none of the required documents, he is at risk. I do not accept this is determinative. This would mean that every Iraqi citizen who did not possess the required documentation will be entitled to a grant of international protection on the basis of potential ill treatment at the point of return. In cases of this nature the Tribunal are tasked with determining objectively, on the basis of existing circumstances in the relevant country, whether there is a reasonable degree of likelihood that the individual will suffer persecution if returned to that country. It must be a condition precedent that there is a likelihood that the individual is going to be returned. The effect of the Secretary of State's policy is that until the necessary arrangements are in place the condition precedent is not going to be fulfilled. This is more than a technical barrier being erected by the Secretary of State to reduce the risk as it is a real and tangible policy designed to prevent such risk occurring.

20. I find no merit in the first ground and reject the submission that the risk on return sufficient to engage Article 3 is more than academic in the circumstances of this appeal relating to returnees from the United Kingdom to Iraq.

21. The second Ground refers to a procedural obligation under Article 8 by reference to the case of RS (immigration and family Court proceedings) India [2012] UKUT 99218 as approved by the Court of Appeal in Mohan [2012] EWCA Civ 1363.

22. In Mohan the Appellant was being deported for drugs offences. Family proceedings had been instituted in relation to his contact with his children here. The Court of Appeal said that the general approach of the Upper Tribunal in RS and Nimako- Boateng (residence orders – Anton considered) [2012] UKUT 00216 (IAC) represented the correct reconciliation of the conflicting concepts of automatic deportation and Article 8 in immigration and family proceedings (para 21).

23. In RS at paragraph 43 the Upper Tribunal held:

> 43. In our judgment, when a judge sitting in an immigration appeal has to consider whether a person with a criminal record or adverse immigration history should be removed or deported when there are family proceedings contemplated the judge should consider the following questions:
>
> i) Is the outcome of the contemplated family proceedings likely to be material to the immigration decision?
>
> ii) Are there compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the best interest of the child?

iii) In the case of contact proceedings initiated by an appellant in an immigration appeal, is there any reason to believe that the family proceedings have been instituted to delay or frustrate removal and not to promote the child's welfare?

iv) In assessing the above questions, the judge will normally want to consider: the degree of the claimant's previous interest in and contact with the child, the timing of contact proceedings and the commitment with which they have been progressed, when a decision is likely to be reached, what materials (if any) are already available or can be made available to identify pointers to where the child's welfare lies?

24. The Panel were aware of pending proceedings and record in paragraphs 49 and 50 of their determination:

> 49. We were urged to consider not only the broad issues of Article 8, but also a claim based upon the fact that there are impending proceedings in the Family Court. The purpose of these proceedings is to enable the appellant to seek a change of his licence conditions with a view to enabling him to live with his partner and child in a family unit.
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> 50. We have no way of predicting what the decision of the Family Court will take. On the evidence before us, there appears to be a genuine relationship between the appellant and his partner. We also accept that there is a genuine purpose in the appellant pursuing the family court case and we are satisfied that the proceedings have not just been instituted delay or frustrate removal. However, having considered all of the evidence and submissions with considerable care and having borne in mind the best interests of the appellant's son, we come to the conclusion that even if the appellant were to be allowed contact or even to reside with his son and partner that there are still compelling public interests to exclude the appellant from the UK whatever the outcome of the family court case. We say this because the appellant is a convicted child rapist, he has acted in a manipulative manner, is lacking in remorse and, for the reasons stated above in paragraph 27 and 28, he still constitutes a danger to the community of the United Kingdom .

25. I am satisfied this Ground has no arguable merit. The Panel were clearly aware of the existence of proceedings which related to an application by the appellant to challenge his Licence conditions which prevent him from living with his partner and child in a family unit. The Panel considered the relationship between the appellant and his son and the arguments advanced in his favour in relation to this issue. The Panel found that even if the Licence conditions were

varied, on the facts of this case, there are compelling public interest reasons to exclude the claimant from the United Kingdom irrespective of the outcome of the family proceedings or the best interests of the child. The challenge is on the basis it is an alleged error of law and a premature assessment to make but I find this has no arguable merit for, even if the appellant were back living with his family, there is still the fact that this is an automatic deportation arising out of a horrendous offence for which the appellant was convicted after trial. The evidence does not support a claim that a sufficiently strong family life would exist even if the parties were cohabiting, or that the best interests of the child will be determinative, or that individually or cumulatively this is sufficient to tip the balance in favour of the appellant - SS (Nigeria) [2013] EWCA Civ 550 refers.

26. In conclusion, having given proper consideration to the facts of this case and the evidence and submissions relied upon in support of the challenge to the determination; I find the appellant has not discharged the burden of proof upon him to the required standard to prove there is any material legal error in the decision of the Panel. The findings they made were properly open to them and have not been shown to be perverse, irrational, or contrary to the facts, law, and evidence.

Decision

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

Anonymity.

28. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed……..
Upper Tribunal Judge Hanson

Dated the 13th September 2013