



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: DA/00125/2014

THE IMMIGRATION ACTS

**Heard at Columbus House, Newport
On 05 March 2015**

**Determination Promulgated
On 10 March 2015**

Before

The President, The Hon. Mr Justice McCloskey

Between

DTS

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Appellant: Ms Evans (of Counsel), instructed by UK Migration Lawyers Limited.

Respondent: Mr I Richards, Senior Home Office Presenting Officer

ANONYMITY

I maintain the anonymity direction made at first instance. This is reflected in the title above.

DECISION

1. This is an appeal against the determination of the First-tier Tribunal (the "FtT"), dated 24 November 2014, whereby the Appellant's appeal against the decision of the Secretary of State for the Home Department

(“*the Respondent*”) to deport him from the United Kingdom was dismissed.

2. It is clear from the terms of the permission order, and not disputed by either party, that the Appellant has been granted leave to appeal against the FtT’s treatment of the issue of the non-attendance of his wife at the first instance hearing and the absence of any supporting written evidence from her.
3. The Appellant is a national of Iraq, aged 31 years. He has resided in the United Kingdom since September 2002. Since then he has applied, unsuccessfully, for asylum (twice) and settlement. The impetus for his appeal to the FtT was his conviction at the Isle of Wight Crown Court, on 15 March 2013, of burglary, giving rise to a sentence of 18 months imprisonment and the ensuing notification by the Respondent of his vulnerability to deportation.
4. The FtT treated the Appellant’s appeal as a challenge to the refusal to grant him asylum and a further challenge to the deportation decision based on Articles 2, 3 and 8 ECHR. The Appellant, who was unrepresented, gave evidence at the hearing. It is not disputed that the Appellant married a British citizen in November 2006 and that they have three children. The two older children are aged eight and two years respectively. The third child was born on 13 October 2014, one month before the hearing. In [13], the Judge recorded the Appellant’s evidence which was given in somewhat conflicting terms - that his wife was “*on the edge of*” their relationship and had not visited him in prison during the past six months (on the one hand) and that he had “*a good relationship with his wife*”, who had sent him money since his incarceration (on the other). In [14], the Judge recorded that the Appellant’s wife did not attend the hearing. In [79], the Judge found that the Appellant does not have a genuine and subsisting relationship with his wife, having regard to the evidence summarised above, coupled with her non-attendance at the hearing and the absence of any written evidence from her. This finding is reiterated in [100].
5. I consider that the determination of the FtT is vitiated by material errors of law, in two distinct respects. First, in making the aforementioned conclusion, the Judge failed to recognise and resolve the conflict in the evidence to which I have adverted above and, further, did not weigh the second, positive part of this evidence. Second, I consider that the Appellant’s hearing was unfair on the ground that he was not given an opportunity to deal with the issue of his wife’s non-attendance or the absence of any supporting written evidence from her. It was common case that the Appellant was not questioned about this matter by the Respondent’s representative and, further, that the Judge did not raise it or ventilate any concern pertaining thereto. Furthermore, it is not in dispute that if this issue had been canvassed, the Appellant would have been in a position to furnish a compellingly persuasive explanation for both matters,

based on his wife's difficult pregnancy and the recent premature delivery of their new born child, coupled with her need to care for the three children.

CONCLUSION

6. Accordingly, I set aside the determination of the FtT.
7. As the error of law consists of a failure to provide the Appellant with a fair hearing at first instance, I remit the appeal to a differently constituted Tribunal for rehearing and fresh determination.
8. I do not confine the rehearing to the Article 8 ECHR issue, given the obscurity relating to paragraph 2(d) of the grant of permission to appeal, which neither representative was able to illuminate.
9. Finally, I accede to the Appellant's application to adduce new evidence consisting of the Appellant's statement, handwritten statements from his wife and children, marriage and birth certificates, photographs and the latest Government advice relating to conditions in Iraq.

Seamus McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: 05 March 2015