Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01147/2013

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 15 July 2015	**On 17 July 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE SAFFER

Between

HM
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Capel of Counsel
For the Respondent: Mrs Pettersen a Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. The respondent notified the appellant of her intention to deport him on 30 May 2013 due to his criminal convictions. This was due to his lengthy criminal record amassing 17 convictions for 37 offences between 1997 and 2012. These included theft (x11), fraud (x5), drugs (x5), possession of offensive weapon (x3) and custodial sentences of 2 years in 2000 for possession of class A drugs with intent to supply, 18 months in 2011 for robbery, and 16 months in 2012 for threats to kill.

2. His appeal against that decision, based on asylum and human rights grounds, was dismissed by First Tier Tribunal Judge Corben ("the Judge") following a hearing on 8 August 2014. This is an appeal against that decision.

3. Miss Capel applied for the hearing to be adjourned as the appellant had fallen ill on the way to the hearing. I refused the application as his presence would have been of no assistance as this was an error of law hearing where it was plain (and was conceded by both representatives subsequently given the basis on which permission had been granted) that the only possible decision I could reach if there was a material error of law was to remit the matter to the First-tier Tribunal for rehearing. In any event, Miss Capel produced excellent representation taking and forcefully arguing every point she possibly could with vigour. The appellant's attendance would have added nothing.

4. I note here that Dr Rachel Thomas is a Consultant Clinical Psychologist and Dr Alan George is an academic who has written numerous reports and is an acknowledged expert in Middle Eastern affairs. Both were experts who filed reports on behalf of the appellant.

5. I was provided by Miss Capel with copies of Secretary of State for the Home Department v RK (Algeria) [2007] EWCA Civ 868, J v Secretary of State for the Home Department [2005] EWCA Civ 629, Y and Z (Sri Lanka) v Secretary of State for the Home Department [2005] EWCA Civ 362, and Ben Said v United Kingdom (application 44599/98) ECHR 6 February 2001.

The grounds of the application

6. Delay in promulgation - "The appeal was heard on 8 August 2014. The decision was dated and promulgated on 14 January 2015. It is suggested that an objective view would be that a decision made over 5 months after the hearing would no longer have live evidence fresh in the mind of the decision maker; and would be far beyond the time limits set out in the procedure rules". Miss Capel's submission was that the subtleties of evidence and overall impression of the witness had been lost over time.

7. Refusal to adjourn to assess the current position in Iraq – "The decision [33-34] makes reference to the request for an adjournment on several bases, *inter alia* 'the situation in Iraq'. The hearing was immediately preceded by news of US airstrikes on Northern Iraq in response to the renewed ISIS offensive against Kurdish-held territory. The IJ relied [78] on outdated evidence that the appellant could seek protection in the Kurdish region of Iraq. The IJ, whose attention had been drawn to the developments in the region, refused an adjournment for the updating of evidence, and made a *Wednesbury* unreasonable finding given the date of hearing." This was expanded on in the preamble to the

grounds where it states "the determination of IJ Corben failed to consider the impact of the ISIS offensive and related allied airstrikes, which severely impacted the very area relied upon by the respondent and the IJ for internal relocation, at the relevant date (date of hearing) – and have continued to since. Failure to consider this evidence amounted to unlawful failure to consider a material factor; furthermore it gave rise to a conclusion on risk that is *Wednesbury* unreasonable in all the circumstances." Miss Capel's submission was that Dr George had written his report on 3 March 2014 which was 5 months before the hearing. The (then) recent bombings were part of the complexity of the case and the appellant could not seek protection in the Kurdish region of Iraq. She further submitted that the respondent had produced 4 separate updates on the fluid situation in Iraq.

8. Suicide risk – "There was accepted evidence of mental health problems, including previous sectioning [70], and four suicide attempts, uncontested save for the motive [78]. The IJ [78] failed to make a finding regarding suicide risk, which would have been relevant to claimed breaches of Articles 3 and 8 ECHR."

The grant of permission

9. Upper Tribunal Judge Rintoul granted permission to appeal (18 May 2015), it having been refused by Judge Parkes (10 February 2015). Upper Tribunal Judge Rintoul stated that

> "It is arguable that the judge erred in not making a finding on the appellant's risk of committing suicide, or in stating what weight he placed on the report of Dr Thomas. While there is less merit in the other grounds, in particular ground 1, I grant permission on all grounds, given that this is a protection case and a further evaluation of the risk would be needed, were an error of law found in respect of ground 3."

Respondent's position

10. The respondent asserted in her reply (10 June 2015) in essence that the Judge

(1) directed himself appropriately,

(2) noted [5, 6] his criminal record,

(3) noted the sentencing Judges remarks [9] and probation officer report [20] where the risk of re-offending is deemed to be high,

(4) noted Dr George's conclusion [75] that "there was no reason why he could not reside permanently in the Kurdish controlled part of Iraq",

(5) carefully listed his medical condition [20-23] and psychological condition regarding PTSD and the suicide risk [78],

(6) noted Dr George's view "that the appellant is able to live and seek protection of the Kurdish region of Iraq",

(7) made findings that were open to him, and

(8) took time to consider the case which was justified given the abundance of material before him.

11. Mrs Petterson submitted that the appellant's ethnicity was the basis for the adjournment application [paragraph 35].

Findings and conclusions

Ground 1 - Delay in promulgation

12. The Judge identified the colossal amount of evidence the appellant's representative chose to produce which included [paragraph 3 and 4] bundles of subjective evidence (148 pages), the report from Dr Thomas (47 pages), 2 separate bundles of background evidence 1 part of which contained the US Country Report on Human Rights Practices for 2012 in Iraq together with the Human Rights Watch World Report Watch Report of Iraq for 2013 (63 pages) and the second part (737 pages), and case law (147 pages). This was supplemented by a skeleton argument (38 pages) and was in addition to the respondent's bundle (about 100 pages). I note here that both representatives confirmed that the fact that I did not have the 800 pages of background evidence was of no relevance to the hearing before me given the issues for me to determine.

13. I refer to RK (Algeria) as requested by Miss Capel. Paragraph 23 clarifies paragraph 18 to which I was referred (my underlining);

> "Miss Chan's brief is in effect to submit that, of itself, a delay of about six months until preparation of the decision…represents such a lamentable failure on the part of the system that the only fair reaction of an appellate court is to require the exercise to be undertaken again. When in the course of argument I suggested to her that, were her submission upheld, all judges and tribunal chairmen should, in cases in which their decisions were not fully prepared by the expiry of six months, cease work on them, she… qualified her submission. For the length of delay which would trigger the need for a rehearing under her suggested principle would of course depend upon the complexity of the decision. I also accept that the anxious scrutiny to be applied to immigration cases might make them more appropriate candidates for the sort of principle which she purports to enunciate. But, even as thus qualified, I cannot accept her principle. For she has failed to show, indeed she does not purport to show, any nexus between the delay and the safety of the decision."

14. If this was a straightforward matter then such a proliferation of information comprising almost 1,300 pages would not have been needed and the Judge would not have had to read and consider it all. He produced a comprehensive 24 page determination which plainly

showed there was anxious scrutiny to all of the appellant's evidence and strands to his claim.

15. In any event, as stated by Judge Parkes when he refused permission to appeal "the grounds do not refer to any part of the decision and reasons said to be lacking". Miss Capel was still unable (despite being on notice of this point) to identify any such credibility finding said to be lacking in any way, including due to the subtleties of evidence and overall impression of the witness, due to the passage of time. There was therefore no established nexus between the delay and the safety of the decision. Indeed so lacking in merit was the argument that I was able to announce prior to hearing from Mrs Pettersen that I was dismissing that ground.

16. In my judgement there was therefore no material error of law in the manner in which the Judge dealt with the "delay in promulgation" issue.

Ground 2 - Refusal to adjourn to assess the current position in Iraq

17. I bear in mind Nwaigwe (adjournment: fairness) [2014] UKUT 00418 (IAC) which guides me to the view that where an adjournment refusal is challenged on fairness grounds, it is important to recognise that the question for the Upper Tribunal is not whether the First-tier Tribunal acted reasonably. Rather, the test to be applied is that of fairness: was there any deprivation of the affected party's right to a fair hearing.

18. The Judge in this case considered the application which was made on 3 bases, the other 2 not being pursued in this application. The Judge said [paragraph 37] "If as was suggested to me the political landscape was very fluid there was no guarantee that any length of adjournment would produce a more definitive picture. The appellant's appeal had to be heard and a hope or expectation that at some point in the future the position would be more beneficial to the appellant's or the respondent's case was not something that would justify an adjournment."

19. I note the factual findings made in relation to the appellant's case and Dr George's observation (he being the appellant's expert witness) of the availability of internal relocation.

20. I have checked the record of proceedings. The application was indeed made on the basis identified by Mrs Pettersen and not on the basis of recent bombings. It was summarised by the Judge [paragraph 35] in this way - "The second factor concerned the situation in Iraq. The appellant had commissioned an expert country report from Dr Alan George. However the appellant had a complex ethnicity and the situation in the country had meant that the report needed to be amended. A short adjournment would suffice and it would also allow

Dr George to consider the contents of the psychologist's report". The only reference to bombings was the "prospect of air strikes and the possibility of international intervention" which was made in closing submissions. In those circumstances the Judge cannot be criticised for not adjourning the hearing on the basis of a point not made to him.

21. In my judgement there was therefore no material error of law in the Judge refusing to adjourn to assess the current position in Iraq.

Ground 3 - Suicide risk

22. Dr Thomas identified (page 38 of her report) "a number of highly traumatic life experiences occurring during his childhood, adolescence and early adult life including

(1) in Iraq;

being abandoned by his mother in childhood;

being left by her in the care of his authoritarian father;

growing up in a war-torn country and witnessing daily atrocities including people being killed;

having become a juvenile soldier aged 9;

seeing his father and brother massacred.

(2) in the UK:

being forced out of the house by his uncle who also defrauded him of benefits;

being rendered street homeless at 17;

developing a substance misuse habit whilst sleeping rough aged 17-19;

getting involved in crime to feed his drug dependency and for survival."

23. She further stated (page 39) that "the risk of returning to a country where he will undoubtedly be extremely fearful for his future and of reprisals from groups who killed his family members or on account of his homosexuality or both, is highly likely to cause his psychiatric condition to deteriorate markedly".

24. She further stated (page 40) "whilst I am not an expert on the provision of psychological therapy and psychiatric services available in Iraq … I cannot imagine that they would be of equivalent standard to what" HM "could receive in the UK on the NHS and via the voluntary sector. Moreover, even if help of an equivalent standard were available, it would be my review (sic) that being returned to Iraq for such a psychiatrically unwell and traumatised man, to the site of

his original life experiences, would rapidly cause re-traumatisation and further psychiatric deterioration. Given" HM's "level of suicidality, I would anticipate that in the circumstances the likelihood of a successful suicide would be extremely high and, even if it were not, the alternative would be likely to be (sic) severely psychiatrically ill man who would require long-term inpatient treatment in a psychiatric hospital."

25. It is a well established principle that it is for the Judge to make findings of fact. The Judge

    (1) stated "this is not a case where I can make a finding that the appellant is a generally credible witness" [paragraph 64];

    (2) identified various discrepancies in the account [paragraph 64/65];

    (3) accepted his father was dead but was unable to accept either of the accounts as to the cause of his father's death [paragraph 66];

    (4) accepted his mother lives in Kuwait [paragraph 66];

    (5) rejected the assertion that the appellant is homosexual [paragraph 69]; and

    (6) rejected the assertion that he would face persecution in the basis of his imputed political opinion due to his father's involvement with the Baath party and the appellant's ethnicity stating "it is difficult to give this claim any credence" [paragraph 74].

26. The Judge therefore did not find that he had

    (1) witnessed daily atrocities including people being killed;

    (2) become a juvenile soldier aged 9; or

    (3) seen his father and brother massacred.

27. The Judge stated [paragraph 78] that "there is of course a significant difference between being afraid of being returned to one's country of origin due to a perceived threat to one's life on return and a desire not to leave the United Kingdom because of the loss of social and economic benefits here. As Dr George has concluded that the appellant would be able to live and seek protection in the Kurdish region of Iraq there would be no objective basis to any concern that the appellant would have about a risk to his life. It may be that in time the appellant will come to appreciate that fact but in any event the authorities here will be alerted to the risk and will be able to take steps to alleviate it."

28. The Judge noted [paragraph 78] that "the appellant does not meet the high threshold set by N v SSHD [2005] UKHL 31 to establish that deportation with his medical condition at its current level would engage article 3".

29. Miss Capel rightly submits that J states that an article 3 claim can in principle succeed in a suicide case, Ben Said states that an article 8 claim can in principle succeed in a mental health case, and that Y and Z (Sri Lanka) states that if Claimants were so traumatised by their experiences, and so subjectively terrified at the prospect of return to the scene of their torment, that they would not be capable of seeking treatment they needed which could ameliorate the real risk of suicide, a forced return would reach the high threshold of inhuman treatment prohibited by article 3.

30. However it is also worthy of note that J also states that in the context of a foreign case, the article 3 threshold is particularly high simply because it is a foreign case, and if the fear of ill-treatment is not well-founded (as in this case), that will tend to weigh against there being a real risk that the removal will be in breach of article 3. If the removing and/or the receiving state have effective mechanisms to reduce the risk of suicide that will weigh heavily against an applicant's claim that removal will violate his or her article 3 rights.

31. It is also worthy of note that MN (Rwanda) v Secretary of State for the Home Department [2007] EWCA Civ 1064 states that in determining whether there was a real risk of breaching article 3 where there was a risk of suicide, it was appropriate to look separately at the risk of suicide in the United Kingdom on hearing of an adverse decision, the risk in transit, and the risk in the destination country. It is of note that the Judge considered this (without making reference to the authority) when he stated [paragraph 78] that "in any event the authorities here will be alerted to the risk and will be able to take steps to alleviate it." It was plainly in the Judge's mind that this included the MN steps. Dr Thomas properly qualified her competence to comment on the provision of services in Iraq.

32. Miss Capel placed reliance on Akhalu (health claim: ECHR Article 8) [2013] UKUT 00400 (IAC) which I note was an unsuccessful appeal against a decision of mine. The facts of that case were incomparable to the facts in this. It merely states that the correct approach is not to leave out of account what is, by any view, a material consideration of central importance to the individual concerned but to recognise that the countervailing public interest in removal will outweigh the consequences for the health of the claimant because of a disparity of health care facilities in all but a very few rare cases. The consequences of removal for the health of a claimant who would not be able to access equivalent health care in their country of nationality as was available in this country are plainly relevant to the question of proportionality. But, when weighed against the public interest in ensuring that the limited resources of this country's health service are used to the best effect for the benefit of those for whom they are intended, those consequences do not weigh heavily in the claimant's favour but speak cogently in support of the public interests in

removal. The Judge plainly had this in mind [paragraph 85] and did not have to cite Akhalu.

33. I am satisfied that the Judge was fully cognisant of Dr Thomas's views but rejected much of the factual background of what the appellant said had happened in Iraq, the claimed homosexuality, and the risk on return upon which Dr Thomas based her opinion. That inevitably would reduce the level of risk of suicide she identified. In addition the Judge was entitled to find that Dr Thomas's assertion of the risk of suicide was manageable by the respondent who would be able to take steps to alleviate it. The Judge identified the parts of Dr Thomas's report he placed weight on, where and why he disagreed with her, and why he did not agree with her assessment of the risk of suicide. He does not have to identify the weight he attached to every single point she made or give a "percentage chance" of suicide.

34. In my judgement there was therefore no material error of law in the manner in which the Judge dealt with the "suicide" issue.

Decision:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision.

Signed:

Deputy Upper Tribunal Judge Saffer
16 July 2015