Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01220/2013

THE IMMIGRATION ACTS

Heard at Centre City Tower Birmingham	**Decision & Reasons Promulgated**
On 8 October 2015	**On 26 January 2016**

Before

UPPER TRIBUNAL JUDGE PITT
DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAFEEN HAMAD
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Mr Smart, Senior Home Office Presenting Officer
For the Respondent: Ms Rutherford, instructed by TRP Solicitors

DECISION AND REASONS

1. For the purposes of this decision we refer to the Secretary of State as the Respondent and to Mr Hamad as the Appellant, reflecting their positions before the First-tier Tribunal.

2. The Appellant is a citizen of Iraq and was born on 22 January 1961.

3. This decision remakes Mr Hamad's appeal against the Respondent's decision dated 14 March 2013 to make a deportation order. The re-making follows our decision dated 30 September 2015 and promulgated on 7 October 2015 which found an error of law in the decision of First-tier Tribunal Judge Pirotta and Mr Sandall which allowed Mr Hamad's appeal against deportation.

4. The parties were in agreement that the sole ground of appeal before us was whether the decision breached Article 8 of the ECHR.

5. We heard oral evidence from the Appellant, his partner, and her son, T. We heard submissions from Mr Smart and Ms Rutherford. We also had a skeleton argument for the Appellant and the materials already provided for the appeal before the First-tier Tribunal and the error of law hearing before us.

6. The somewhat extensive background to this matter is set out in our error of law decision which is contained in Appendix 1. We draw particular attention to [3]-[26] thereof, which need not be replicated here.

7. The parties agreed that we should make two corrections to the history set out in the error of law decision.

8. At [23] of the error of law decision we indicated that the issue of whether the Appellant applied in time to extend his discretionary leave to remain was still in dispute. There was agreement before us at the hearing on 8 October 2015 that the Appellant did apply in time, his leave expiring on 24 August 2010 and the Respondent's records showing an entry to the effect that the application was received by 16 August 2010 at the latest.

9. At [25] of our error of law decision we suggested that the Appellant did not appeal the decision of 14 March 2014 in time. That was not correct as he did so on 28 March 2013. Due to what appears to have been an administrative error the Tribunal did not process that appeal, a notice dated 21 June 2013 later confirming that the appeal had been lodged in time.

The Law

10. A number of statutory provisions now govern the approach we must take in a deportation appeal which raises Article 8 ECHR. These are contained in Appendix 2 hereto.

11. It is now well understood that these legislative changes approved by Parliament mandate that when making an Article 8 assessment in a deportation case, great weight falls in favour of the public interest in the deportation of foreign national criminals.

12. The exegesis of the President of the Upper Tribunal in the case of Greenwood (No.2) (para 398 considered) [2015] UKUT 00629 (IAC) puts it thus:

"10. In all cases belonging to this sphere, the contest is between the several public interests favouring deportation – deterrence, protecting the public, maintaining firm immigration control and promoting the economic wellbeing of the nation – and the private, personal interests of the offender and, frequently, the members of his family circle. The potency of the public interest in play was emphasised resoundingly by the Court of Appeal in SS (Nigeria) v SSHD [2013] EWCA Civ 550. This theme has continued to chime in further decisions of the Court of Appeal. In LC (China) v SSHD [2014] EWCA Civ 1310, … at [24]:

> "The starting point for any such assessment is the recognition that the public interest in deporting foreign criminals is so great that only in exceptional circumstances will it be outweighed by other factors, including the effect of deportation on any children. However, in cases where the person to be deported has been sentenced to a term of imprisonment for less than four years and has a genuine and subsisting parental relationship with a child under the age of 18 years who enjoys British nationality and is in the UK, less weight is to be attached to the pubic interest in deportation if it would not be reasonable to expect the child to leave the UK and there is no one else here to look after him. By contrast, however, where the person to be deported has been sentenced to a term of four years' imprisonment or more, the provisions of paragraph 399 do not apply and accordingly the weight to be attached to the public interest in deportation remains very great despite the factors to which that paragraph refers. It follows that neither the fact that the Appellant's children enjoy British nationality nor the fact that they may be separated from their father for a long time will be sufficient to constitute exceptional circumstances of a kind which outweigh the public interest in his deportation. The Appellant's children will not be forced to leave the UK since, if she chooses to do so, their mother is free to remain with them in this country."

11. Most recently, in PF (Nigeria) v SSHD [2015] EWCA Civ 251, the Court of Appeal, having emphasised the supreme importance of the tribunal identifying exceptional, or compelling, factors sufficient to outweigh the public interest in deportation, stated at [43]:

> "I fully recognise that if the Judge's factual findings are well founded, they will be a real and damaging impact on his partner and the children; but that is a common consequence of the deportation of a person who has children in this country. Deportation will normally be appropriate in cases such as the present, even though the children will be affected and the interests of the children are a primary consideration."

We are also mindful of the statement of the Court of Appeal in SSHD v MA Somalia [2015] EWCA Civ 48, at [17], that –

> "…. the scales are heavily weighted in favour of deportation and that something very compelling is required to outweigh the public interest in deportation." "

13. In Greenwood, the President of the Tribunal went on to refer to the case of Chege (Section 117D – Article 8 – approach) [2015] UKUT 00165. The head note of Chege states:

> "The correct approach, where an appeal on human rights grounds has been brought in seeking to resist deportation, is to consider:

(i) is the Appellant a foreign criminal as defined by s117D (2) (a), (b) or (c);

(ii) if so, does he fall within paragraph 399 or 399A of the Immigration Rules;

(iii) if not are there very compelling circumstances over and beyond those falling within 399 and 399A relied upon, such identification to be informed by the seriousness of the criminality and taking into account the factors set out in s117B.

Compelling as an adjective has the meaning of having a powerful and irresistible effect; convincing.

The purpose of paragraph 398 is to recognize circumstances that are sufficiently compelling to outweigh the public interest in deportation but do not fall within paragraphs 399 and 399A.

The task of the judge is to assess the competing interests and to determine whether an interference with a person's right to respect for private and family life is justified under Article 8(2) or whether the public interest arguments should prevail notwithstanding the engagement of Article 8."

14. The guidance in Chege is entirely in line with the learning of the Court of Appeal in SSHD v AJ (Angola) [2014] EWCA Civ 1636. That case indicates at [39] the correct approach to the role of the Immigration Rules – that is paragraphs 399 and 399A – in the "very compelling circumstances" assessment:

"39. The fact that the new rules are intended to operate as a comprehensive code is significant, because it means that an official or a tribunal should seek to take account of any Convention rights of an Appellant through the lens of the new rules themselves, rather than looking to apply Convention rights for themselves in a free-standing way outside the new rules. This feature of the new rules makes the decision-making framework in relation to foreign criminals different from that in relation to other parts of the Immigration Rules, where the Secretary of State retains a general discretion outside the Rules in exercise of which, in some circumstances, decisions may need to be made in order to accommodate certain claims for leave to remain on the basis of Convention rights, as explained in *Huang* and *R (Nagre) v Secretary of State for the Home Department* [2013] EWHC 720 (Admin).

40. The requirement that claims by Appellants who are foreign criminals for leave to remain, based on the Convention rights of themselves or their partners, relations or children, should be assessed under the new rules and through their lens is important, as the Court of Appeal in *MF (Nigeria)* has emphasised. It seeks to ensure uniformity of approach between different officials, tribunals and courts who have to assess such claims, in the interests of fair and equal treatment of different Appellants with similar cases on the facts. In this regard, the new rules also serve as a safeguard in relation to rights of Appellants under Article 14 to equal treatment within the scope of Article 8. The requirement of assessment through the lens of the new rules also seeks to ensure that decisions are made in a way that is properly informed by the considerable weight to be given to the public interest in deportation of foreign criminals, as declared by Parliament in the 2007 Act and reinforced by the Secretary of State (as the relevant Minister with responsibility for operation of the immigration system), so as to promote public confidence in that system in this sensitive area."

15. Following Forman (ss 117A-C considerations) [2015] UKUT 00412 (IAC) we treat the provisions of paragraph 117C as mandatory considerations, the head note of that case stating:

> "(i) The public interest in firm immigration control is not diluted by the consideration that a person pursuing a claim under Article 8 ECHR has at no time been a financial burden on the state or is self-sufficient or is likely to remain so indefinitely. The significance of these factors is that where they are not present the public interest is fortified.
>
> (ii) The list of considerations contained in section 117B and section 117C of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") is not exhaustive. A court or tribunal is entitled to take into account additional considerations, provided that they are relevant in the sense that they properly bear on the public interest question.
>
> (iii) In cases where the provisions of sections 117B-117C of the 2002 Act arise, the decision of the Tribunal must demonstrate that they have been given full effect."

We also take cognisance of [17]:

> "We consider the correct analysis of sections 117A and 117B to be as follows:
>
> i. These provisions apply in every case where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8 ECHR and, as a result, would be unlawful under section 6 of the Human Rights Act 1998. Where a Court or Tribunal is not required to make this determination, these provisions do not apply.
>
> ii. The so-called "*public interest question*" is "*the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).*", which appears to embrace the entirety of the proportionality exercise.
>
> iii. In considering the public interest question, the court or tribunal must have regard to the considerations listed in section 117B in all cases: per section 117A(1) and (2).
>
> iv. In considering the public interest question in cases concerning the deportation of foreign criminals, the court or tribunal must have regard to the section 117B considerations and the considerations listed in section 117C.
>
> v. The list of considerations in sections 117B and 117C is not exhaustive: this is clear from the words in parenthesis "*(in particular)*".
>
> vi. The court or tribunal concerned has no choice: it must have regard to the listed considerations.
>
> To this we would add the following. While the court or tribunal is clearly entitled to take into account considerations other than those listed in section 117B (and, where appropriate, section 117C), any additional factors considered must be relevant, in the sense that they properly bear on the "*public interest question*". In this discrete respect, some assistance is provided by reflecting on the public law obligation to take into account all material considerations which, by definition, prohibits the intrusion of immaterial factors. We are not required to decide in the present case whether there is any tension between section 117A (2), which obliges the court or tribunal concerned to

> have regard to the list of considerations listed in section 117B and, where appropriate, section 117C) and the contrasting terms of section 117B (5) and (6) which are framed as an instruction to the court or tribunal to attribute little weight to the two considerations specified."

16. We also found the learning in Treebhawon and others (section 117B(6)) [2015] UKUT 00674 (IAC) of assistance in interpreting the provisions of s.117C, the second paragraph of the head note of that case stating:

> "Section 117B (4) and (5) are not parliamentary prescriptions of the public interest. Rather, they operate as instructions to courts and tribunals to be applied in cases where the balancing exercise is being conducted in order to determine proportionality under Article 8 ECHR, in cases where either of the factors which they identify arises"

with elaboration of that part of the ratio at [18] to [20], including the comment at [19] that:

> "The effect of Part 5A of the 2002 Act is, of course, that this discrete public interest must yield to more potent public interests in certain circumstances."

Our Decision

Paragraphs 399 and 399A

17. It was common ground before us that the Appellant is a foreign criminal as he is someone who has been convicted of an offence "that has caused serious harm" as provided for in s.117D(2)(ii). It was also common ground before us that the Appellant cannot benefit from the provisions of either paragraph 399 or paragraph 399A. The Appellant does not have a relationship with a child under the age of 18 so cannot meet paragraph 399(a).

18. The Appellant's relationship with his partner, a British citizen, is not disputed. All the witnesses before us gave entirely straightforward and consistent evidence and their evidence was not subject to challenge from the Respondent. The Appellant and his partner explained that they were friends for some years and then formed a partnership in approximately 2010.We accept, therefore, that their relationship was formed in 2010 and has continued since then during a period in which the Appellant has been in the UK with leave. The Appellant cannot come within the provisions of paragraph 399(b)(i), however, as his relationship with his partner was formed whilst he was in the UK with discretionary leave to remain. To our minds that is a precarious status; AM (S 117B) Malawi [2015] UKUT 0260 (IAC) and Deelah and others (section 117B – ambit) [2015] UKUT 00515 (IAC) applied.

19. Nor can the Appellant meet the requirements of paragraph 399A. He came to the UK at the age of 38 in 1999, is now aged 54 and has been here lawfully only since 2010.

"Very Compelling Circumstances"

20. Therefore, following the rubric of paragraph 398, we now assess the question of whether the public interest in the Appellant's deportation is outweighed by very

compelling circumstances over and above those described in paragraphs 399 and 399A, that assessment to have regard to the considerations set out in s.117B and s.117C of the 2002 Act. The current approach is set out in Greenwood (No. 2), cited above.

21. We have indicated above that when carrying out this assessment, the law mandates that the scales are heavily in favour of the Appellant's deportation. While this is not a case to which the automatic deportation provisions of s.32 of the UK Borders Act 2007 apply, because of the Appellant receiving sentences below 12 months, we do not find that much, if anything, turns on this since paragraph 398 provides down that "the presumption shall be that the public interest requires deportation" and s.117C(1) states unambiguously that the "deportation of foreign criminals is in the public interest".

22. Our starting point and a primary consideration in our assessment, therefore, is the great weight which the public interest in the deportation of the Appellant attracts.

23. At the outset of our assessment we consider the facts of the Appellant's criminal history, comprising four convictions between May 2001 to February 2008 and, in particular, the two convictions which had led to custodial sentences. We bear in mind the remarks of the sentencing judge on 25 February 2008 who handed down the three month sentence for affray which activated the nine month suspended sentence for assault occasioning actual bodily harm with intent:

> "Mr [Hamad], you have pleaded guilty to an affray, taking place on the 17th of October 2007, in the course of which you threw a glass that injured your son. I have no doubt at all that you are very ashamed of what you did.
>
> The photograph of the injury shows a very serious wound, which luckily has not had long-term effects. I suspect that you had had far too much to drink, which clouded your judgement and affected your self control. I accept that behind the offence lay concern for your son's well-being. But in view of the fact that you have a suspended sentence for an offence of violence, the court is left with no alternative but to pass a custodial sentence. The court will try to keep the sentence as short as is possible, acknowledging the following points; that you pleaded effectively at the first opportunity, the difficulties that a single parent has in bringing up teenage children, the fact that you are in prison in a foreign land and the fact that this, at the age of 47, is your first experience of custody. All those matters, combined with the principle of totality, mean that the sentence I shall pass will be very much shorter than you might otherwise expect."

24. At this juncture, we turn to consider Part 5A of the 2002 Act.

25. Section 117B:

    'a. The maintenance of effective immigration control is clearly engaged.

    b. The Appellant speaks English but gains no positive benefit from that following AM and Deelah.

    c. It weighs against the Appellant that he is not in work and not financially independent: s.117B(3).

d. In line with s.117B(4) and (5) we give little weight to the Appellant's private life of 16 years as most of it was established whilst he was here without leave and precariously.

e. The provisions of s.117(4)(b) do not prevent us from placing weight on the Appellant's relationship with his partner this was formed whilst he was here lawfully. We deal with this factor in more detail below as the relationship also falls to be considered under s.117C(5).

f. As s.117B(6) concerns a relationship with a child, it has no application here.'

26. Section 117C:

'a. Section 117C(1) reminds us again that the deportation of the Appellant is in the public interest.

b. The provisions of s.117C(2) concern the weight to be added attract to the public interest depending on the seriousness of an offence. The sentences of three and nine months' imprisonment given to the Appellant are at the lower end of the scale of offending. They were not, in our view, sufficiently serious so as to add to the weight that we have already identified as attracting to the public interest.

c. Following s.117C(3) and s.117C(5) we must assess whether "Exclusion 2" applies, that is, whether the effect of the Appellant's deportation on his partner would be unduly harsh, the remaining provisions of s.117C having no relevance here.

27. We have indicated that the evidence of the Appellant and his partner was such that we were able to accept it at its highest. We also indicated above that the genuine and subsisting nature of their relationship was not challenged before us. They have known each other since approximately 2005 but became partners in approximately 2010. They retain separate accommodation but spend most of their time together. To this we add a series of specific findings as follows.

28. There are some notable features in their histories which appeared to us to explain their particular closeness and dependence upon each other. Prior to meeting the Appellant, his partner experienced a difficult marriage as her husband was an alcoholic. She separated from her husband in 1998 and he died in 2008. From approximately 2010 onwards the Appellant took on the role of a father to his partner's children where their own father had not been able to act as such due to his alcoholism and separation from their mother.

29. The Appellant's partner also cares for her widowed father, cooking food for him and visiting him on a daily basis accompanied by the Appellant. It is out of respect for the partner's father that she and the Appellant do not live together formally as it would offend his religious beliefs where the Appellant remains a Muslim and the partner is Hindu.

30. The Appellant's partner supports him in the usual way that partners do, for example attending hospital and legal appointments with him. She was by the Appellant's side during the period when one of the Appellant's sons was seriously injured in a car accident and in hospital for some weeks. The Appellant looks to her and to her children for support, including emotional support, where one of his sons has been deported from the UK and the other has become estranged from him and his partner's family, due in part, it seems, to the after effects of his car accident.

31. We find that there is a strong relationship between the Appellant and his partner's children. ST talked of the Appellant as his father and to feeling that, having lost his own father because of his alcoholism, separation from his mother and his death in 2008, his father-figure was being taken away from him again. He stated that his older sister felt the same. His evidence appeared to us to be particularly reliable in this regard as he took care to indicate that his younger sister, although close to the Appellant, would not be as badly affected by the Appellant's deportation as he and his older sister. ST and his younger sister continued to live with their mother, so saw the Appellant every day. The Appellant continued to be in close contact with the older sister who was at university, acting as a father-figure by assisting her with her car and so on. The written statements of the partner's daughters were entirely consistent with the oral and written evidence of ST and the other evidence before us.

32. We attribute particular weight to the closeness of the Appellant and his partner, taking into account their particular circumstances and mutually difficult histories and the importance he has in her life as the father-figure to her children. This impels us to conclude that the Appellant's partner would experience great difficulty if he were to be deported. Whilst alert to the very high threshold, we find that the effect of the Appellant's deportation on his partner would be unduly harsh.

33. We are mindful, as set out above, that this relationship does not meet the requirements of the Immigration Rules and that the "very compelling circumstances" that can lead to an appeal being allowed must be "over and above" what is provided for under the Rules. It might appear initially to be anomalous that the relationship cannot benefit the Appellant under the Immigration Rules can become of significance in the "very compelling circumstances" assessment because of the wording of s.117C. However, we consider that the primary legislation must prevail. We construe the combined wording of s.117(3) and s.117(5) as an instruction as to how we should approach the "very compelling circumstances" assessment to the effect that the public interest does not require deportation if the Appellant's deportation would be unduly harsh for his partner. As in Treebhawon:

> "The effect of Part 5A of the 2002 Act is, of course, that this discrete public interest must yield to more potent public interests in certain circumstances."

Conclusion

34. We are mindful of that potent public interest in the deportation of this Appellant. The public interest must be a starting point and a primary factor in our assessment. However, we conclude that s.117C has the effect that the public interest in this case

does not require the Appellant's deportation as that would result in an unduly harsh outcome for his partner.

35. We consider, as a minimum, that s.117C operates to place significant weight on the Appellant's side of the balance because of the unduly harsh circumstances for his partner in the event of his deportation. Further, we have taken into account and weighed factors over and above those specified in Part 5A of the 2002 Act.

36. In summary, we conclude that the particular configuration of factors in this case, the unusual closeness and dependence of the Appellant and his partner, the unduly harsh impact of his deportation on her, his importance to her children, the significant length of time since the last offence and the relatively short sentences that were imposed amount to very compelling circumstances over and above the provisions of paragraphs 399 and 399A to the extent that the public interest in deportation is, exceptionally, outweighed.

37. We recognise that our decision is finely balanced and that others adjudicating upon the same kaleidoscope of competing factors might decide them differently. However, this is the very stuff of individual and independent judicial adjudication.

Notice of Decision

38. The decision of the First-tier Tribunal discloses an error on a point of law and is set aside.

39. The appeal is re-made as allowed.

Signed  Date 20 December 2015

Upper Tribunal Judge Pitt

APPENDIX 1 – ERROR OF LAW DECISION PROMULGATED ON 7 OCTOBER 2015

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01220/2013

THE IMMIGRATION ACTS

Heard at: Birmingham
On: 30 July 2015

Decision Promulgated:

Before

Upper Tribunal Judge Pitt
Deputy Upper Tribunal Judge O'Ryan

Between

Secretary of State for the Home Department

Appellant

and

Safeen Hamad
(Anonymity Order Not Made)

Respondent

Representation:
For the Appellant: Ms Rutherford, instructed by TRP Solicitors
For the Respondent: Mr Smart, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This appeal is against the decision of First-tier Tribunal Judge Pirotta and Mr Sandall promulgated on 11 February 2015 which allowed the respondent's appeal against deportation on humanitarian protection and Article 8 ECHR grounds.

2. The appellant before us was the Secretary of State. For the purposes of this decision

we refer to the Secretary of State as the respondent and to Mr Hamad as the appellant, reflecting their positions before the First-tier Tribunal.

Background

3. Even by the often quite protracted litigation in asylum and deportation cases, this matter has a complicated and troubling history.

4. The appellant claims to have entered the UK illegally on 22 August 1999. He claimed asylum on grounds of political activity against the Saddam Hussein regime. His two sons, Hardi Hamad (dob 1 June 1989) and Ari Hamad (dob 20 December 1992) were dependent on that claim. The respondent refused the asylum claim on 28 May 2001. The appeal against the refusal was dismissed on 4 March 2002 by Immigration Adjudicator Lewis (the first appeal). The Adjudicator accepted that the Appellant was an opponent of the Saddam Hussein regime and would be at real risk of serious harm from in Central and Southern Iraq, but noted that the Appellant resided in the KAA and that he would be afforded sufficiency of protection there against any risk of harm from the Saddam Hussein regime. Permission to appeal that decision was refused on 22 April 2002.

5. Meanwhile, on 17 May 2001, the appellant was convicted of driving with excess alcohol and find £100. He was disqualified from driving for 12 months. On 27 July 2001 he was convicted of driving with excess alcohol and otherwise than in accordance with the license and fined £120 and disqualified from driving for three years. On 14 March 2002 the appellant was cautioned for assault occasioning actual bodily harm in respect of his son Hardi.

6. On 28 July 2004 the appellant applied for indefinite leave to remain for himself and his sons under the "family exercise". The application was rejected as the appellant was ineligible due to his criminal convictions. The respondent maintains that the appellant misinformed his MP concerning his own convictions as she wrote to the respondent on 5 June 2006 maintaining that the police had confirmed the appellant they had no criminal convictions. The respondent replied to the MP on 26 April 2007, advising her that she had been misled by the applicant and informing her of his convictions as of that date.

7. In April 2007 the appellant's oldest son, Hardi, was sent to a Young Offenders Institution having received his own criminal conviction.

8. On 3 August 2007 the Appellant was convicted of assault occasioning actual bodily harm and given a nine-month suspended prison sentence and an 18 month supervision requirement.

9. On 17 October 2007 the appellant was involved in an incident where he injured his son, Ari, by throwing a glass at him. Ari was subsequently taken into care by Social Services. This incident led to a conviction for affray on 25 February 2008. He was sentenced to 3 months imprisonment and his earlier 9 month suspended sentence from 3 August 2007 was thereby activated, resulting in a total custodial sentence of

12 months.

10. On 8 April 2008 the respondent informed the appellant of his liability to deportation and gave him the opportunity to present reasons why he felt he should not face deportation. The appellant did not reply.

11. On 17 April 2008 the respondent issued a decision to make a deportation order together with reasons for that order. On 7 July 2008 the appeal against that decision (the second appeal) was allowed by Immigration Judge Astle on Article 8 ECHR grounds. A claim for protection on the grounds that the Appellant was at risk from his wife's family on the grounds that he had married her without her family's consent, was rejected, in part on the basis that this matter had not been raised in his earlier asylum application in 1999 and that his evidence on it contained discrepancies.

12. However, on 25 September 2008, Senior Immigration Judge Warr ordered reconsideration as the decision of Judge Astle was found to contain a material error of law. A reconsideration hearing took place on 26 November 2008 before Designated Immigration Judge O'Malley and Immigration Judge Hobbs. In a determination promulgated on 7 January 2009 it was found that the appellant did not have a family life with his sons, Article 8 ECHR was not engaged, and the appeal was dismissed on all grounds. The appellant became appeal rights exhausted as of 16 February 2009 after being refused permission to appeal by the Court of Appeal on 28 January 2009.

13. The matter might have ended there but on 24 March 2009 the respondent wrote to the appellant in error indicating that his deportation would be reconsidered in light of country guidance case law. In fact, the decision of Judge Astle dated 7 July 2008 had concluded that the new country guidance case law did not have any bearing on the appellant's protection claim and that finding was not set aside so the respondent's reconsideration was not necessary.

14. Seemingly as a result of that confusion, on 2 June 2009 the respondent issued the appellant with a further decision to make deportation order which generated a further in country right of appeal (the third appeal). The appeal was heard on 2 October 2009 and the appellant and his two sons gave evidence. The appeal was allowed on 7 October 2009 by Immigration Judge Obhi and Mrs Greenwood under Article 8 ECHR.

15. The Secretary of State sought to appeal the decision of Immigration Judge Obhi but permission was refused on 23 October 2009. As a result of the successful appeal on Article 8 ECHR grounds, therefore, on 24 February 2010 the appellant was granted 6 months discretionary leave valid until 24 August 2010.

16. The appellant maintains that he applied for an extension of his leave on 11 August 2010. That matter remains in dispute, of which more below.

17. What is not in dispute is that on 25 May 2011 the appellant made a further asylum claim with his sons as his dependents, notwithstanding the fact that both sons were

by then adults.

18. In a letter of 11 July 2011, the appellant reiterated his asylum claim and requested further leave to remain on asylum and human rights grounds. The letter of 11 July 2011 also set out a claim for leave to remain on medical grounds under Article 3 ECHR.

19. The letter of 11 July 2011 was also accompanied by a statement from Ms Bina D stating that she had been in a relationship with the appellant for six years from 2005 onwards. It is not disputed that the appellant had not mentioned his relationship with Ms D at any point prior to the letter of 11 July 2011.

20. On 3 December 2012 the appellant was issued with a Statement of Additional Grounds in order for the respondent to be provided with any change in circumstances or further evidence since the original application. The response was dated 19 December 2012. It made no mention of any medical issues or the relationship with Ms D but relied only on the appellant's relationship with his sons.

21. The further applications for leave to remain on asylum and human rights grounds were refused on 14 March 2013. The respondent rejected the asylum claim as his claims on the basis of opposition to the Saddam Hussein regime and a blood feud due to his marriage had been refused definitively in his first and second appeals and the further representations raised nothing new as regards those claims.

22. The decision of 14 March 2013 also indicated that the respondent had carried out an active review and concluded that there had been a material change in the appellant's family circumstances. The grant of 6 months discretionary leave following the third appeal was on the basis of the appellant's relationship with his sons. Those sons were now adults, one of whom was himself subject to deportation action.

23. It was also not accepted that an in-time application to extend discretionary leave had been made on 11 August 2010, there being no evidence to that effect. The special delivery reference number provided was not held on record by Royal Mail and the respondent had nothing to show that it had been received in time.

24. The decision of 14 March 2013 also informed the appellant of the respondent's decision to make deportation order under s.3(5)(a) Immigration Act 1971. The respondent relied on the conviction of 3 August 2007 for assault occasioning actual bodily harm and of 25 February 2008 for affray which, in combination, had led to a sentence of 12 months. The respondent also noted that the Appellant had been convicted of five offences in the UK. He was found to come within paragraph 398(c) of the Immigration Rules as the respondent considered the offending had caused serious harm or he was a persistent offender who had shown a particular disregard for the law.

25. It would appear that the appellant did not appeal against the decision of 14 March 2013 in time, filing notice of appeal only on 17 June 2013 (see section 4 'Appeal' of the Respondent's bundle index on form ICD.3237), by which time the respondent had,

on 17 May 2013, signed a deportation order against him. It remains the case that he lodged an appeal which was accepted by the First-tier Tribunal (the fourth appeal).

26. In a supplementary reasons for refusal letter dated 4 July 2013 the respondent maintained her position that no application to extend leave was made on 11 August 2010, her records only containing reference to such an application being made out of time on 28 September 2010. The letter of 4 July 2013 went on to indicate that even if the application had been received in time the respondent would have refused it under paragraph 322(5) of the Immigration Rules as a result of the appellant's criminal conduct.

The Current Appeal

27. The fourth and current appeal came before the First tier Tribunal (Judge Somal and Ms Endersy) on 19 December 2013. The decision does not indicate that the Appellant pursued a protection claim on the grounds of his original anti-Saddam Hussein political activities, but he did pursue such a claim in relation to a claimed fear of harm from his wife's family on the grounds of the blood feud. The Tribunal rejected the claim to fear harm on the grounds of a blood feud, placing 'little weight' on a country expert report produced by Sheri Laizer dated 16 December 2013 on the grounds that it made no reference to earlier determinations of the AIT in relation to the Appellant, and was said to be based on a distorted picture of the Appellant's previous asylum claims.

28. The Appellant also relied on Article 8 ECHR as regards his son, Hardi, and his partner Ms D. The Tribunal accepted at [37] that the Appellant did have a genuine and subsisting relationship Ms D and was impressed by her evidence and that of her son. The appeal was allowed on Article 8 ECHR grounds.

29. Both parties were granted permission to appeal the decision of Judge Somal and Ms Endersby. In a decision dated 29 October 2014, the Upper Tribunal (Judge Coker) allowed the Appellant's appeal against dismissal of his protection claim as inadequate consideration had been given to the country expert report. Judge Coker also allowed the Secretary of State's appeal against the First tier Tribunal's decision on Article 8 grounds, on the basis that the Tribunal had failed to give adequate consideration to the public interest in deportation. The appeal remitted to the First tier to be 'heard afresh'.

30. The Appellant's appeal against the respondent's decision of 14 March 2013 therefore came again before the First tier Tribunal on 31 January 2015, this time before Judge Pirotta and Mr Sandall.

31. At the hearing, Counsel for the Appellant did not pursue the protection claim in relation to the Appellant's past political activities but did pursue the appeal in relation to his fear of a blood feud with his former wife's family. The Article 8 ECHR claim was also pursued.

32. The Tribunal held for reasons set out at [30]-[39] that the Appellant's account in

relation to the claimed blood feud with his wife's family was not credible. There is no challenge before us in relation to those findings. There is therefore no live asylum claim in existence.

33. However, the Tribunal held as follows in relation to a claim for Humanitarian Protection, at [40]-[41]:

> "40. The objective country evidence and Ms Laizer's report show that the Appellant could not return to Iraq or any part of the Kurdish areas because of the strategic violence of a war zone and his personal profile, which would impair his ability to relocate or obtain protection in a general sense against sectarian violence and generalized armed conflict.
>
> 41. As a Sunni Kurd, the Appellant would find conditions unduly harsh in the KRG, could not relocate to any part of Iraq with any expectation of safety. Article 15c provides that in these circumstances, the Appellant could not be returned to a situation of escalating violence, the policy of the Secretary of State not to return failed asylum seekers to war zones where armed conflict produces anarchy demands that the Appellant cannot be returned in any event. He would be entitled to Humanitarian Protection in these circumstances as no alternative relocation process is available to him."

34. The First tier Tribunal noted that by this time, the Appellant's younger son, Ari, had been deported to Iraq, and that there was no strength to the Appellant's relationship with the older son, Hardi, who had no leave to remain in the United Kingdom in any event [53]. The Appellant did have 'some sort of' family life with Ms D, however, and the appeal against deportation was allowed on that basis.

35. The result was that the First tier Tribunal dismissed the claim on refugee grounds but found the Humanitarian Protection and the Human Rights Convention claims made out. The appeal against deportation was therefore allowed (the Tribunal, we think erroneously, referring to the Respondent's decision being a refusal to revoke a deportation order).

36. The Respondent sought permission to appeal on grounds, in summary, that the First tier Tribunal had erred in law in:

> (i) failing to give adequate reasons for allowing the appeal on humanitarian protection grounds, and failing to apply the country guidance case of HM (Iraq) v SSHD CG [2012] UKUT 00409 IAC;
>
> (ii) insofar as the Tribunal had allowed the appeal on Article 3 ECHR, failing to give adequate reasons for doing so; and
>
> (iii) failing to give adequate reasons for allowing the appeal under Article 8 ECHR, and in failing to give adequate regard to the pressing public interest in deportation.

37. Permission to appeal was given on those grounds by Judge of the First tier Tribunal Judge Cruthers on 10 March 2015.

Error of Law

Humanitarian Protection and Article 3

38. As above, the respondent's first ground challenges the finding of the First-tier Tribunal that the appellant qualifies for Humanitarian Protection. The consideration of the issue appears to be found at [40]-[41] of the First tier decision, as set out above. The reasoning appears to draw on country evidence, the expert report of Ms Laizer and the particular profile of the applicant.

39. We must admit to finding the decision of the First tier on Humanitarian Protection somewhat difficult to follow, however. The test is not set out and nor are the requisite parts of it discussed with any clarity at any point. There is no identification of what aspects of the Appellant's personal profile might raise the level of risk to him such that the requirements that he would face a real risk of suffering serious harm were met.

40. The second ground of appeal maintained that inadequate reasoning had been given for, apparently, allowing the Article 3 claim, it not being entirely clear if this was on medical grounds [51] or the country situation at [58], thus:

> "The return of the Appellant in the current political situation, even between Muslims, and accentuated hostility towards failed asylum seekers, would expose him to unreasonable risks of treatment contrary to the Human Rights Convention."

41. Given our difficulty in parsing the decision of the First tier Tribunal on Humanitarian Protection and Article 3, we were grateful for the concession at [4] of the appellant's skeleton argument that the respondent's challenge to the findings on Humanitarian Protection and Article 3 were conceded. Ms Rutherford also confirmed for the appellant that he no longer pursued either of those claims.

Article 8 ECHR

42. The only remaining issue in dispute before us, therefore, was the decision of the First tier Tribunal that deportation would breach the Appellant's Article 8 ECHR rights.

43. We can deal with this point relatively quickly. Through primary and secondary legislation the respondent has set down a structure for the consideration of deportation decisions including appeals. Those provisions are contained in s.117 of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002') and Part 13 of the Immigration Rules.

44. The Respondent argues in her grounds of appeal that the First tier Tribunal misapplied the provisions of s.117 and that it is not clear which aspects of the Immigration Rules relating to deportation have been applied.

45. We found the respondent's grounds in this regard had merit. The First tier Tribunal finds at [56] that it would be "unduly harsh" for the appellant to be deported and Ms D remain in the UK. Firstly, there is no reference to the provision in paragraph

399(b)(i) that the relationship must be established at a time when the appellant was not "precarious". The appellant began offending in 2001 and the respondent has been trying to deport him since 8 April 2008. It appeared to us that an assessment of precariousness was necessary in order to assess whether paragraph 399(b)(i) applied at all and where that assessment did not take place a material error arose.

46. Further, although the Tribunal finds at [56] that the Appellant's deportation would be unduly harsh on Ms D, the reasoning for so finding are unclear. It was accepted that the couple do not live together. It is nowhere clear that the Tribunal appreciated applied the high threshold for a finding of undue hardship, iterated, for example, in the recent case of MAB (para 399; "unduly harsh") [2015] UKUT 435 (IAC) as a requirement for circumstances being "inordinately" or "excessively" harsh.

47. The determination is not saved by the Tribunal having gone on to assess whether the "very compelling circumstances" requirement of paragraph 398 could allow the appeal to succeed even where it could not under paragraphs 399 and 399A. Any suggestion that the Tribunal attempted to do so could not have merit given the suggestion at [46] and [49] that the weight that must attract to the public interest under s.117B(1) and s.117C(1) was in some way altered here by the respondent's delay in seeking to deport the appellant and the appellant not offending since 2008.

48. We conclude that the findings of the First-tier Tribunal on Article 8 do not properly apply the relevant statutory criteria, in particular as regards whether the Appellant's deportation would be "unduly harsh" for Ms D. Where that is so, an error on a point of law arises such that the Article 8 decision must be set aside and re-made.

Decision

49. The decision of the First-tier Tribunal discloses an error on a point of law in the Article 8 ECHR assessment. That part of the decision is set aside to be re-made.

50. The decision of the First-tier Tribunal on Article 3 of the ECHR and humanitarian protection discloses an error on a point of law. Those parts of the decision do not need to be re-made as the appellant no longer maintains those grounds of appeal.

Directions

(i) Any further evidence on which the Appellant relies shall be filed and served not less than 5 days before the adjourned hearing.

(ii) The parties to file and serve skeleton arguments, 5 days before the adjourned hearing.

Signed:

Deputy Upper Tribunal Judge O'Ryan
Date: 30.9.15

APPENDIX 2 – LAW

Nationality, Immigration and Asylum Act 2002

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part—

'Article 8' means Article 8 of the European Convention on Human Rights;

'qualifying child' means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

'qualifying partner' means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, 'foreign criminal' means a person—

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under—

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc), has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it.

The Immigration Rules

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.

Deportation and Article 8

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

399B. Where an Article 8 claim from a foreign criminal is successful:

(a) in the case of a person who is in the UK unlawfully or whose leave to enter or remain has been cancelled by a deportation order, limited leave may be granted for periods not exceeding 30 months and subject to such conditions as the Secretary of State considers appropriate;

(b) in the case of a person who has not been served with a deportation order, any limited leave to enter or remain may be curtailed to a period not exceeding 30 months and conditions may be varied to such conditions as the Secretary of State considers appropriate;

(c) indefinite leave to enter or remain may be revoked under section 76 of the 2002 Act and limited leave to enter or remain granted for a period not exceeding 30 months subject to such conditions as the Secretary of State considers appropriate;

(d) revocation of a deportation order does not confer entry clearance or leave to enter or remain or re-instate any previous leave.