Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/01407/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7th December, 2017	**On 15th January, 2018**

Before

Upper Tribunal Judge Chalkley

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[M R]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the Respondent: Mr A Wagner of Counsel

DECISION AND REASONS

1. The appellant in this appeal is the Secretary of State for the Home Department and to avoid confusion I shall refer to her as being the, "claimant". The respondent is a citizen of Iraq who was born on 1st January 1970.

2. The respondent arrived in the United Kingdom on 5th February 2000 and applied for asylum on arrival and his application was refused on 19th

September 2001, but he was granted exceptional leave to enter until 19th February 2005.

3. On 1st October 2003, the respondent was convicted at Kingston Crown Court of two counts of attempting wounding for which he was sentenced on 21st October 2003, to eighteen months' imprisonment on each count to run concurrently. Leave to appeal against sentence was refused on 22nd January 2004. The respondent was recorded as having returned to the United Kingdom on 22nd May 2005, it appears that he had travelled to Tehran in Iran, according to stamps present in his Home Office travel document. On 22nd August 2005, he applied for indefinite leave to remain. A liability for deportation letter was issued on 6th August 2008 and on 1st October 2008, a decision was deport and reasons for deportation letter were issued. A subsequent appeal against that decision was dismissed on 11th March 2009, and a reconsideration request granted on 7th April 2009. The appeal was again dismissed on 28th July 2009 and permission to appeal to the Court of Appeal was refused on 4th September 2009.

4. The respondent then applied for voluntary assisted return under the voluntary assisted return and reintegration programme on 5th September 2005, but this application was refused on account of his convictions on 10th September 2009.

5. Representations were received on his behalf on 19th November 2013, with additional information being provided on 13th December 2013, 1st August 2014, 14th January 2015, 5th January 2015 and 8th September 2015. Representations were considered to constitute a fresh application for asylum and human rights and they were refused on 25th January 2016. The respondent appealed and his appeal was heard by First-tier Tribunal Judge Boardman sitting at Taylor House on 17th July 2017. Judge Boardman allowed the respondent's appeal based on Article 8 rights. He made no direction for anonymity. The claimant, dissatisfied with the judge's decision, applied for and was granted permission to appeal to the Upper Tribunal.

6. It was suggested that the judge was wrong to conclude that it was not currently feasible to return the respondent. Enforced removals of foreign national offenders are possible after approval from the Kurdish Regional Government with the use of a EUL or valid passport. The issues of feasibility of return the respondent being documented or undocumented were technical obstacles and matters for the Secretary of State.

7. The second challenge suggested that the First-tier Tribunal Judge had repeatedly referred to the claimant attaching an unjustifiably high public interest in deportation at paragraphs 60 to 79 of the determination. It pointed out that Parliament had set the weight to be attached to the public interest and although acknowledged this is dependent on the circumstances, it is not for the First-tier Tribunal to make such an assertion. The grounds submit that the First-tier Tribunal Judge has failed

to give clear reasons at paragraph 81 why the respondent's partner and children's circumstances can be considered to be unduly harsh. Reference was placed on *PF Nigeria* and *AJ Zimbabwe* and others such as *NA Pakistan*, confirming that separation of a child from the [respondent], even if they are a British citizen, does not in itself amount to unduly harsh or exceptional circumstance. The judge has pointed to nothing more than the separation of the respondent and concluded that this will amount to unduly harsh circumstances outweighing deportation. It was submitted that the public interest in deportation outweighs the best interest of the respondent's two children.

8. Mr Melvin suggested that the judge had erred by saying as he did that the weight attached by the claimant to the public interest in deporting foreign criminals in this case is unjustifiably high. The weight to be attached to deportation of foreign criminals is a matter for Parliament and Parliament has decreed that foreign nationals should ordinarily be removed. This respondent is from the Kurdish Autonomous Region. The judge has failed to properly consider country guidance in the form of *AA (Article 15(c)) Iraq CG [2015] UKUT 00544 (IAC)*. Relatives would be in a position to obtain the necessary documentation for the respondent. This had not been considered by the judge.

9. Mr Wagner pointed out that the appeal had been granted on Article 8 grounds only. He referred me to the decision of the Court of Appeal in *Rhuppiah v the Secretary of State for the Department* [2016] EWCA Civ 803 and, in particular to paragraphs 49 and 50. The question of public interest he said goes into the balance and it is clear, reading the determination as a whole, that the judge has considered the question of public interest as part of the balance. He says at paragraph 81 that having considered all the factors in the round he finds that:

> "(a) …
>
> (b) …
>
> (c) …
>
> (d) …
>
> (f) The weight attached by the respondent to the public interest in maintaining immigration control in this case is unjustifiably high."

10. As to the question of whether or not the removal would be unduly harsh, Mr Wagner referred me to the decision of the Court of Appeal in *NM (Uganda) and Another* [2016] EWCA Civ 617 and in paragraphs 22 onwards. The respondent had undergone an Islamic marriage in 2008 after the decision of the claimant and he and his wife had two children. His wife enjoys immigration status in the United Kingdom and in 2015

made application for naturalisation. Counsel was not able to tell me whether or not that application had been considered, but on the question of unduly harsh, it was necessary to consider in detail the clinical psychology report placed before the judge at paragraph 37 the judge summarises it. The expert confirms that the children would struggle emotionally, socially and intellectually without the respondent. His son in particular would be likely to suffer with self-confidence, self-concept and in his educational achievements and it would be unduly harsh for the children to live without the appellant in the United Kingdom. The expert suggests that were they likely to suffer emotional distress then at least one of them would find it difficult and would struggle to trust people easily in the future. The expert reported that the respondent and his wife by Islamic marriage have a stable and happy relationship together and that she relies on the respondent for practical and emotional support herself and social and academic support with the children. Removing the respondent from the United Kingdom would have a detrimental impact on her psychological and emotional wellbeing placing her at risk of suffering from emotional distress, depression and anxiety and as a result she may not be able to fully meet her children's needs emotional and development needs as a single parent particularly in the context of her children being emotionally distressed, confused and anxious at not having their father in their lives. Mr Wagner pointed out that this was a decision which this judge was entitled to reach on the evidence before him. It was not a decision that no reasonable judge could have reached.

11. The question of the appellant's returnability was not in any event relevant. At paragraphs 54 and 55, the judge considers the question of returnability and concludes that he is not persuaded that the respondent can be returned to Iran however, that is not relevant because he has allowed the appeal under Article 8.

12. Mr Melvin addressed me briefly in conclusion and asked me to uphold the determination.

13. I have carefully read the determination. It is very full. It is detailed and I have concluded that it is sustainable. The judge reaches conclusions on the evidence which may be considered to be generous, but nonetheless are sustainable. They may very well not be the same conclusions that I would have made had I been deciding the appeal, but that is not the test. The test is whether or not the judge has made a material error of law.

14. So far as the first challenge is concerned, the judge considered the question of the public interest in deportation at paragraph 60 of the determination. He noted that the more serious the offence committed by a foreign criminal the greater the public interest is in deportation. He noted the appellant's two offences of attempting wounding were very serious as is reflected in the sentences of eighteen months' imprisonment on each concurrent. The judge points out that this is three times the length of a maximum sentence which a magistrate's court can impose for

a single offence. He noted that the respondent had pleaded not guilty, but was found guilty after trial and that the public interest in deportation of a foreign criminal not only takes account of public interest in the prevention of crime but also the public's revulsion at the commission of serious crimes and the need to deter others from committing crimes. He was entitled to note that the sentence was imposed some fourteen years earlier and that the respondent was released from prison after only four months. He was correct to note that there was no evidence of reoffending by the respondent and he was entitled to take into account the fact that the respondent expressed regret and that he was described as being a very kind and gentle person. He concluded by finding that the weight to be attached by the claimant to the public interest in deportation in this case was unjustifiable high. That was a finding which, on the evidence before him, he was entitled to reach. The judge went on to consider the best interests of the respondent's children, having examined the clinical psychology report by Dr Rozmin Halari, as well as the respondent's son's school report. The judge was entitled to conclude as he did at paragraph 81(f) and was also entitled, having taken into account the expert evidence, that the respondent's removal would have unduly harsh consequences for the respondent's spouse and children. In summary, therefore, I find that the judge has not erred in law and I uphold his determination.

No anonymity direction is made.

Richard Chalkley
Upper Tribunal Judge Chalkley

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal I have considered making a fee award and have decided to make a fee award of any fee which has been paid or may be payable (adjusted where full award not justified) for the following reason. The appeal has been allowed.

Richard Chalkley
Upper Tribunal Judge Chalkley **Date: 12 January 2018**