Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04322/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 November 2019	**On 3 December 2019**

Before

THE HONOURABLE MR JUSTICE DOVE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE ALLEN

Between

S A H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Chakmakjian instructed by Descartes Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Iraq. He appealed to a Judge of the First-tier Tribunal against the Secretary of State's decision of 1 February 2018 refusing a human rights claim.

2. The appellant claimed to have been in the United Kingdom since January 2001. He made an unsuccessful asylum application but on 20 August 2010 he was granted indefinite leave to remain outside the Immigration Rules.

3. On 27 August 2015 the appellant was convicted of possession with intent to supply Class A controlled drugs (cocaine) and Class B controlled drugs (cannabis) and sentenced to five years and four months' imprisonment.

4. He had claimed to be in a relationship with an EEA national partner, Ms K, who was resident in the United Kingdom. In his grounds of appeal he asserted that the decision was unlawful under section 6 of the Human Rights Act, referring among other things to the best interests of his EEA national partner. However, he subsequently sought and was granted permission to amend his grounds on introducing a new matter. He had learned while in prison that he was the father of a British national child. After he was released from prison he and Ms K broke up and he made contact with the child's mother, Ms S, a DNA test confirmed paternity and since then he has had regular contact with his daughter M, who lives with her mother. Ms S is an EEA national exercising treaty rights as a worker. The respondent consented to the appellant's relationship with the child and with her mother being introduced as new matters, and the judge as well as giving permission to amend the grounds of appeal permitted amendment to include an Article 3 claim with regard to conditions on return to Iraq in the absence of required identification documents.

5. The judge set out the relevant Immigration Rules, noting reliance on the relationship with the appellant's daughter who was born in the United Kingdom who it was submitted was entitled to British citizenship although the judge noted there was no evidence that that had been confirmed but proceeded as if she were a British citizen.

6. The daughter, M, was born in 2014. The appellant contacted M's mother, Ms S, on Facebook and met her in May 2018 and he began to see M the following month. His case was that he and his daughter quickly bonded and he had frequent contact with her and he and the child's mother recommenced their relationship and now planned to live together.

7. The judge heard evidence from the appellant, Ms S and the appellant's sister-in-law with regard to the nature and quality of the relationship with M. The appellant lives in Guildford whilst Ms S and M live in Southend-on-Sea which is some 80 miles away. He said that he visited them every week and occasionally more during weeks when he was in Southend and that he spoke with them daily.

8. The judge accepted what appeared to be the reality that the appellant had regular contact with his daughter but considered that his actual parental role was limited. She noted that he lived a considerable distance away from the child and her mother and at most he picked her up some mornings and dropped her off at nursery, but he did not collect her and therefore the time spent with her during the week was very short. He also saw her at weekends although that had not yet been for a period of twelve months.

9. The judge noted a letter from Andrew Green of 8 April 2019 confirming that the appellant was still subject to licence following his imprisonment and he was the appellant's responsible officer, having been working with him since February 2019. He said that the appellant had settled in well and presented as remorseful, evidencing his ability to recognise triggers to his offending and made a conscious effort to avoid pro-criminal influences and appeared dedicated to desist from criminality. He prioritised his family and spoke of his focus to do so.

10. The letter also referred to a good support network in Surrey including the appellant's partner and their daughter, though the judge noted that in fact the letter was inaccurate as the couple live a considerable distance apart and if the appellant is considered to have a good support network in Guildford where he lives if he now proposed to move to Southend, he would be a considerable distance from the support network.

11. The judge went on to consider whether it would be unduly harsh for M to live in Iraq and concluded that it would not be reasonable to expect her to live in the IKR from where the appellant comes, or any region of Iraq. Nor would it be reasonable to expect her mother to live there.

12. The judge went on to consider whether the impact on M and her mother would be unduly harsh if the appellant was to be deported. She took into account the decisions of the Upper Tribunal in KMO [2015] UKUT 00543 and MAB [2015] UKUT 00435 with regard to the meaning of "undue harshness".

13. The judge summarised the effect of these cases as being that the appellant must show that on balance the impact on the child is inordinately or excessively harsh. The judge took into account the line of cases referring to the Secretary of State's duty to have regard to the welfare of children affected by his decision, under section 55 of the Borders, Citizenship and Immigration Act 2009, and the best interests of the child beginning with the decision of the House of Lords in ZH (Tanzania) [2011] UKSC 4.

14. The judge went on then to consider the evidence concerning the child's best interests, including the contact at the weekend, the fact that the relationship was fairly new and noting that her primary carers were her mother and her grandmother. She noted that the child now knows she has a father but the reality is that he lives a long distance away and she lives with her mother and maternal grandmother and also has an aunt who lives nearby.

15. The judge went on to note the fact that the offence committed by the appellant was very serious. M's mother had not explained why she had so quickly agreed to the appellant coming into her daughter's life, being aware of his previous background and his recent release from prison. She went on to say that the public interest in the appellant's deportation had to be weighed against the impact on a fairly young child who has been

seeing her father for a few months. In regard to the public interest the appellant relied on probation letters regarding the appellant settling back into the community and also the OASys Report. The judge considered from this that the offender manager appeared not to have any information from the CPS or the findings of the sentencing judge with regard to the appellant's actual role in drug dealing and the person who was close to the source. He scored a low risk of reoffending and low risk of serious harm and produced a drug test certificate dated 13 August 2016 and certificates relating to various other matters such as food safety, hygiene, English, mathematics and personal and social skills.

16. The judge went on to consider whether pursuant to section 117C(6) of the Nationality, Immigration and Asylum Act 2002 there were very compelling circumstances over and above those described in Exceptions 1 and 2 in sub-sections (4) and (5) and concluded that, bearing in mind the serious nature of the offence and its type and the profound harm to society and other factors, balanced against the very recent limited contact which the appellant had with his daughter, the precarious nature of the relationship with her mother who was her primary carer and was able to look after her while working full-time assisted by her mother who came to the United Kingdom specifically for that purpose, it would not be unduly harsh for the appellant to be deported and to remain in the United Kingdom. She would remain living with her mother and other family members in an environment in which she is comfortable and which her mother said was confirmed by social services. There was no evidence that she was not thriving.

17. The judge went on to consider Article 8 outside the Immigration Rules, noting positive factors such as the appellant's new relationship with his daughter and her mother and his relationship with his sibling and his sibling's family; on the other hand the fact that he had not been living with them for a significant period of time before he went to prison, and noting also evidence concerning depression and anxiety from which the appellant suffers. The judge found the appellant's circumstances did not outweigh the public interest in him being deported from the United Kingdom.

18. The judge went on to consider Article 3, noting the appellant's evidence that he had never had a passport and did not have a CSID. He said his parents were deceased, his younger brother had recently sought asylum in Italy and he had lost contact with his two other brothers who were in Iraq. He had an uncle living in Switzerland who appeared to make regular visits to Iraq and his brother, who gave evidence, and who lives in the United Kingdom, has visited Iraq within the last few years. He has a British passport and said he had no knowledge of how to obtain a CSID in Iraq.

19. The judge noted that a CSID was required in order to facilitate travel and obtain financial assistance from the authorities. She bore in mind that the appellant was not from a contested area but had been born and lived all his life before coming to the United Kingdom in Suleymaniya. His brother, uncle and sister-in-law had been able to travel to the IKR without difficulty.

The judge noted what had been said in the country guidance in AAH concerning the ability of a maternal uncle in possession of a CSID to assist in locating the original place of relocation of an individual's mother and there the trail could be followed to the place where her records were transferred upon marriage. The judge considered that simply deciding not to make any enquiries was not a reasonable explanation and that the appellant had failed to show that he was not in a position to make contact with male family members in his home area to obtain material needed to obtain a CSID. He noted that no supporting evidence such as a death certificate had been produced to support the claim that the appellant's parents were deceased, and in his interview for the OASys assessment the appellant had given an account of a close-knit family in Iraq and no reasonable explanation had been offered as to why neither he nor his brother in the United Kingdom had information of the whereabouts of their two remaining male siblings in Iraq and also their uncle who was evidently in contact with people in Iraq. The appeal was dismissed on all grounds. The appellant sought and was granted permission to appeal the decision of the judge with regard to the Article 8 and Article 3 issues. The Secretary of State provided a Rule 24 response.

20. In his submissions Mr Chakmakjian relied on and developed the points made in the grounds of appeal. He argued first with regard to grounds 5 and 6 that the judge had failed to apply the correct standard of proof with regard to Article 3, which by itself, he argued was fatal, and had also failed to give adequate reasons with respect to the evidence concerning the ability of the appellant to obtain a CSID. The remarks about the family being close-knit had been made in the OASys Report concerning his childhood in Iraq more than two decades earlier. No reasons were given for assuming that the appellant's uncle could help him in getting a CSID when the uncle was resident in Switzerland. No reasons were given for not accepting that the appellant's parents had passed away, and reference was made to the appellant referring to his father suffering a stroke in 2015 and having fears about his healthcare.

21. The other matters concerned in particular an argument that the judge had failed to consider the best interests of the child as a primary consideration as was required. It was also argued that the judge had erred in including the seriousness of the offence in the assessment of undue harshness, contrary to what had been said in KO (Nigeria) in the Supreme Court. The judge had failed to consider the child's best interests prospectively, bearing in mind the positive obligation to promote the best interests of the child, including the requirement to pursue measures enabling family ties to be developed. The judge had failed to consider future family life and the obligation to promote it. There would be a definite or permanent severance between the appellant and his daughter.

22. It was also argued that the judge had failed to consider relevant matters such as the appellant's family life with his partner, his private life and length of residence and issues of rehabilitation in the evaluation of proportionality. In particular with regard to the latter there was

substantial evidence concerning the appellant's rehabilitation and low risk of reoffending and the judge had failed to consider matters in the round.

23. In his submissions Mr Lindsay relied on the Rule 24 response, and argued that though there were imperfections in the decision, mainly with regard to self-directions in law, the law had been applied properly in substance. Though the judge did not refer to the best interests of the child being a primary consideration, she had cited ZH and section 55. In any event, in light of the appellant's sentence of five years and four months, the threshold was very high. There was nothing in the evidence to show that the case was beyond the normal run of deportation cases. It was a consequence of deportation that families were split.

24. Though the judge's reference to KMO was wrong, it was not a case where the undue harshest provision was in play as a matter of law. The threshold went over and above the exceptions. The self-direction at paragraph 85 was correct and also at paragraph 100. Everything needed to go into the balance and the conclusions were not perverse. The judge had carried out a proper balancing exercise. Proper regard had been given to the likely difficulties the child would face, in particular at paragraphs 86 and 93. Although paragraph 34 in PF (Nigeria) [2019] EWCA Civ 1139 was quoted by the appellant in the skeleton, there had been a consideration of undue harshness in effect. There was no error of law.

25. Likewise with regard to ground 4, there was no indication that the judge was unaware of the relationship and incapable of weighing it in the proportionality balance. There was a choice for the family whether the partner went to Iraq. The appellant's skeleton referred to Kamara [2016] EWCA Civ 813, but the appellant could not argue he would not be able to integrate. He had not shown that he had no capacity to participate in life on return or be accepted and develop relationships. No material weight should be attached to the low risk of reoffending as argued in the Rule 24 response. The absence of offending was what society expected. It was true as argued in the skeleton at paragraph 21 that there were rare circumstances where rehabilitation could play a role, but there was an absence of such circumstances here.

26. The absence of stating of the standard of proof with regard to Article 3 was not fatal as the judge had made safe findings and it could not be said that on the basis of those findings the appellant could succeed on the basis of the proper standard being applied. The judge was aware of the situation of the maternal uncle. She had found the appellant could get a CSID with his uncle's help and proper enquiry. The judge was entitled to conclude that a person who said he could not get a CSID on return where a relative could help could not show he could not obtain it unless he showed he had made proper enquiries and that had not been done. No death certificates had been produced and the judge was entitled to draw inferences from the lack of evidence. With regard to the OASys Report and the point at paragraph 26C, the judge could not be expected to deal

with every item of the evidence and there was a lot of evidence in this case. The main reasons for dismissing the appeal have been set out. There was no reason to suspect that the judge was not fully in command of the facts of the appeal.

27. By way of reply Mr Chakmakjian argued that what was said at paragraph 85 about the best interests of the child was insufficient. It was clear from PG (Nigeria) that KO was still to be followed with regard to exception 2. The judge had not explained how the constituent elements were weighed and why. The points made with regard to the child at paragraphs 46 and 50 were not brought into the conclusions at paragraph 86. There was a lot of objective evidence including AAH about difficulties for returnees in Iraq and the decision was contaminated by the erroneous Article 3 findings. With regard to lack of reoffending, rehabilitation went much further and reference was made to paragraphs 53 to paragraph 58 of the skeleton before the judge. Protection of the public was relevant. It could be unfair to require a judge to refer to everything, but the reference to a close-knit family came from the OASys Report so the judge must have looked at that page.

28. We reserved our decision.

29. The appellant's sentence was one of 60 months and hence he is a person who falls within the regime in deportation cases concerned with people who are sentenced to four or more years' imprisonment. Thus under Rule 398(a) the deportation of a person from the United Kingdom 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 four years, and the Secretary of State 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. Neither of those two paragraphs is applicable in this case because both paragraph 399 and paragraph 399A are applicable only to people falling within paragraph 398(b) or (c) and those are people either whose conviction was for a period of less than four years but at least twelve months or they are people whose offending has caused serious harm or they are a persistent offender showing a particular disregard for the law.

30. It is clear from section 117C(6) of the 2002 Act that 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. Exception 1 does not apply, and Exception 2 is concerned with cases where the appellant 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 his deportation on the partner or child would be unduly harsh.

31. This then is the context in which the Article 8 claim fell to be decided by the judge.

32. The absence of any reference to the best interests of the child being a primary consideration, at paragraph 85 of the judge's decision, in our view has no materiality to it. As was pointed out by Mr Lindsay, the judge was clearly aware of the section 55 duty and also the best interests of the child with consideration of the case law beginning with ZH (Tanzania). It was not necessary for the judge to spell out the well-known fact that the best interests of the child are a primary consideration. We do not agree that the absence of a reference to this being a primary consideration in any sense contaminates the Article 8 assessment. The judge clearly gave detailed consideration to the child's best interests, noting for example in paragraph 86 that it is generally in the child's best interests to live with both parents and noting relevant evidence in that regard elsewhere at paragraph 86 and also at paragraph 93.

33. Nor do we see any error with regard to the KO (Nigeria) point. It is clear from PF (Nigeria), as pointed out by the respondent in the Rule 24 response, that section 117C(6) cases bring the public interest being back in play as opposed to the situation under section 117C(5), which was also the view expressed earlier by the Upper Tribunal in NS [2019] UKUT 122 (IAC). It is true as pointed out in the appellant's skeleton that in PF the court went on to say that a consideration of undue harshness will not necessarily be unhelpful even when section 117C(6) applies, but of course it is the case that the judge in any event gave consideration to undue harshness and did so on the proper basis of taking into account the appellant's criminality as well as the situation of his daughter.

34. As regards ground 3, again we see no error of law in this respect. The judge gave full consideration to the implications for the appellant's daughter of separation from her father. It was observed at paragraph 86 that the centrality of her life and her current understanding is that she has a father but he lives a long distance away and she lives with her mother and maternal grandmother and has an aunt living nearby and none of this would alter if her father were removed, save being able to spend time with him. The judge also noted at paragraph 83 that the daughter would remain living with her mother and other family members in an environment in which she is comfortable and there was no evidence that she was not thriving. Clearly the judge was aware of the impact of separation on the child, but equally given the limited extent to which a relationship between the appellant and the child had developed, the findings were fully open to her.

35. As regards ground 4 the first point is failure on the part of the judge to give any or any adequate weight to family life with the partner. The judge had accepted the appellant was in a genuine relationship with Ms S. The judge did however also note, for example at paragraph 93, that the relationship is precarious. She clearly had some doubts about the relationship in that she considered, at paragraph 82, that it was not

unreasonable as a supposition that the relationship had been engineered, but she said that however whether or not it was a cynical ploy the evidence was that the appellant had been regularly seeing the child since May 2018. The fact of the matter as the judge noted is that the appellant lives in Guildford and his partner lives in Essex, some 80 miles apart. The revival of the relationship, as the judge noted, is relatively recent, having developed since the appellant was released from prison in April 2018. In light of the judge's conclusions about the precarious nature of the relationship we consider that the conclusions to which she came in that regard in the context of proportionality were fully open to her.

36. The judge was also fully aware of the amount of time the appellant had been in the United Kingdom. It is unclear what evidence was given to the judge of private life other than the duration of it, and of course it has to be seen in the context of the significant criminal offence that was committed that must have disrupted the appellant's private life to a marked extent during his time in prison. It does not appear that evidence beyond friendships, day-to-day existence in the United Kingdom and the duration of his time here was provided to the judge. Again, there is no materiality to any restricted consideration of this point.

37. As regards the issue of risk and rehabilitation, forming a further part of ground 4, the quotation from Binbuga [2019] EWCA Civ 551 in the grounds is of relevance, noting that rehabilitation will generally be of little or no material weight in the proportionality balance. The argument in the grounds that if the judge had taken material matters such as rehabilitation and low risk of offending and good behaviour into account, together with the entry of his daughter into his life she would not have dismissed the appeal is in our view entirely unrealistic. The judge was clearly aware of the evidence from the offender manager, though she noted that he did not appear to have any information from the CPS or the findings of the sentencing judge when noting also the inaccuracy in the letter from Mr Green concerning the good support network, including the appellant's partner and daughter which is of course not correct. Neither individually nor cumulatively do we consider the points raised in ground 4 show any error of law in the judge's decision.

38. Bringing these matters together, it is clear in our view that the judge, although not always expressing herself as clearly as she might have done, and on occasions misdirecting herself, for example with regard to KMO and MAB, nevertheless considered the evidence in the context of the correct legal tests. Undue harshness was properly considered and the judge went on to consider very compelling circumstances over and above the circumstances set out in Exceptions 1 and 2, which were properly considered, in particular at paragraph 93 of the judge's decision. The threshold is a very high one, and a case such as this, which will unfortunately have the consequences of separating a child from her father and her mother from her partner, are no more than the all too frequent consequences of deportation and come nowhere near crossing the high

threshold set for a person whose conviction is for more than four years' imprisonment, as the judge properly found.

39. As regards Article 3, the absence of any statement of the standard of proof in our sense does not in any sense flaw this decision. A judge cannot be expected in every case to set out what is a routine point, that of the lower standard of proof in Article 3 cases. It does not show an error of law in the judge's decision but no more than a minor omission of no materiality.

40. As regards the issue of the CSID, we consider the judge's findings were properly open to her. She noted that the appellant when interviewed by representatives from the Iraqi Embassy in the UK did not enquire about obtaining a passport or CSID. His claim was based on the fact that he said his parents were deceased, his younger brother had recently sought asylum in Italy and he had lost contact with two other brothers who had been in Iraq. His brother and his uncle who lives in Switzerland had visited Iraq within the last few years. He said there was no-one in Iraq to assist. However, as the judge noted, no supporting evidence such as a death certificate had been produced to support his claim that his parents had died, and although in the OASys assessment he gave an account of a close-knit family in Iraq which related to some two decades earlier, it was open to the judge to conclude that there was no reasonable explanation for why neither the appellant nor his brother in the UK had information on the whereabouts of their two remaining male siblings in Iraq. It was also proper for the judge to note that they have their uncle who is evidently in contact with people in Iraq. It was relevant to note that the appellant's brother and uncle, and indeed his sister-in-law, have all been able to travel to the IKR without difficulty and to conclude that simply deciding not to make any enquiries was not a reasonable explanation. As a consequence it was open to the judge to find that the appellant had failed to show he was not in a position to make contact with male family members in his home area to obtain the material needed to obtain a CSID and as a consequence to conclude that the Article 3 claim was not made out.

Notice of Decision

41. Accordingly, we uphold the judge's decision in respect of Article 8 and Article 3, finding there to be no error of law in her decision, which is as a consequence maintained.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date: 2 December 2019

Upper Tribunal Judge Allen

TO THE RESPONDENT
FEE AWARD

The appeal has been dismissed and therefore there can be no fee award.

Signed Date: 2 December 2019

Upper Tribunal Judge Allen