Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08177/2016

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre
On 15th April 2019

Decision & Reasons Promulgated
On 30th April 2019

Before

UPPER TRIBUNAL JUDGE COKER

Between

TMA
(anonymity order made)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Uddin, instructed by Paragon Law Solicitors
For the Respondent: Ms H Aboni, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant in this determination identified as TMA. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings

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1. For the reasons given in his decision, Upper Tribunal Judge O'Connor found that the First-tier Tribunal judge had erred in law in dismissing the appeal on Article 8 human rights grounds, and that the primary findings of fact were retained. A transfer order was made and hence the resumed appeal hearing came before me.

2. The appellant's solicitors, very helpfully, filed a new comprehensive bundle with all the relevant documentary evidence relied upon. I heard no oral evidence, the primary facts having already been determined. I heard submissions from both representatives.

3. The primary facts are as follows:

   - TMA claimed to have entered the UK on 7th October 2002, aged 19, and applied for asylum 2 days later. His asylum claim was refused but he was granted exceptional leave to remain until 4th December 2006. Having made an application for indefinite leave to remain but before a decision was taken on that application he was, on 8th February 2008, convicted of theft, breaching a previous suspended sentence and sentenced to 5 months imprisonment.
   - A deportation order was signed on 5th June 2009 following an unsuccessful appeal against a decision to make a deportation order;
   - Between 9 December 2003 and 29 January 2015 TMA was convicted of a total of 46 offences;
   - TMA has a current partner (JS) with whom he has a genuine and subsisting relationship which amounts to family life although they have not lived together since February 2016. They have known each other for 9 years (8 at the time of the First-tier Tribunal decision). JS is a British Citizen, not of Iraqi origin, she has never been to Iraq; she could visit him in the IKR. JA has adult children who themselves have children;
   - TMA has two British Citizen children, born October 2004 and August 2007, with two different (British Citizen) mothers (neither of whom is JS);
   - TMA has a parental relationship with each child and has family life with them, by way of physical contact for a few hours every 3 to 4 weeks; regular telephone contact in the intervening periods of time;
   - It is in the best interests of the children to remain living with their respective mothers and realistically it would never be the case the children would go to Iraq /IKR with him;
   - Although physical contact with the children would cease on his removal to Iraq, they are used to not living with him and not having him around;
   - There was no evidence to suggest TMA's absence would have any adverse effect on the children's health or development;
   - He and the children could maintain contact through modern means of communication, and it would be open to the children to visit him in Iraq.

4. The First-tier Tribunal judge also made findings that there was no evidence to suggest that TMA was not familiar with the customs, culture and language of Iraq, and no evidence he could not overcome any obstacles to his return to Iraq. The first is a generalised finding which does not seem to have been based on evidence – the appellant is a Kurd from Kirkuk. The First-tier Tribunal judge does not appear to have considered those matters, but in a country that has been ravaged by war for a number of decades and where there are numerous internal conflicts continuing it is difficult to justify such a generalised statement. In so far as obstacles to return are concerned, the appellant does not have a CSID. Country Guidance case law makes clear the difficulties likely to be faced by someone without a CSID. That finding of the First-tier Tribunal judge cannot be relied upon.

5. The appellant is from Kirkuk which, according to current Country Guidance is an area where there is a real risk of an Article 15(c) breach. He cannot return to Kirkuk. Country Guidance indicates that if he can get to the IKR, he would be able to stay there; although conditions there would not be easy and could be described as very difficult, there is no risk of an Article 3 or 8 breach of his rights when there. The respondent returns individuals to Baghdad, not to the IKR; in any event the appellant is not from the IKR and would not be returnable there direct. It is not possible to get to the IKR without real risk of serious harm, unless flying internally to the IKR from Baghdad. Current Country Guidance confirms that it is not possible to undertake a flight without a CSID.

6. The appellant does not have a CSID or any other form of identity. He has no living relatives in Iraq, Kirkuk or the IKR or in the UK who would be able to assist him in obtaining ID documents; he has been away from Kirkuk for some 17 years. The current Country Guidance is that he would not be able to leave the airport without real risk of serious harm. He would not be able to access employment, find accommodation or be able to travel to the IKR.

7. I am satisfied that returning to Baghdad without any ID would result in him having no access to telephone, internet etc because he would have no access to employment or other financial support. I am satisfied that he would not be able to communicate using ‘modern means of communication’, with either JS or either of the two children. He would, therefore, disappear totally from their lives.

8. In considering the factual matrix and the potential breach of the right to respect for private and family life, although the appellant was not subject to ‘automatic deportation’, he is the subject of a deportation order made in 2009 having commenced his offending very soon after his arrival in the UK. The considerations to be taken into account in the assessment of the potential breach of Article 8 on deportation following the refusal by the respondent to revoke the deportation order, includes the considerations in s117C Nationality, Immigration and Asylum Act 2002, which are reflected in the Immigration Rules.

9. The appellant has not been lawfully resident in the UK for most of his life. Because of the lack of a CSID, there would be very significant obstacles to his integration into Iraq and although (for the reasons in the next paragraph) it is reasonable to conclude that he is socially and culturally integrated in the UK he does not meet the criteria in s117C(4) of the NIAA 2002.

10. The appellant speaks fluent English. He has been in the UK for some 17years and has worked consistently when not in prison. Although little documentary evidence was put to me on his social and cultural integration, he has established relationships with British Citizens and had British citizen children with whom he retains a parental relationship and whom he sees regularly; despite his criminal offending he is clearly socially and culturally integrated in the UK. His relationship with JS commenced when he was subject to a deportation order. Little weight can be placed upon this relationship, even though it is genuine and subsisting. They do not live together, and I accept that it would be upsetting and difficult for them not to see each other. Although the First-tier Tribunal judge found that JS could visit the appellant in Iraq, I reject that finding: the Foreign and Commonwealth Office advise against all travel to significant provinces of Iraq including part of Erbil in the IKR; they advise against all but essential travel to the remainder of Iraq. Without a CSID, the appellant would be destitute in Baghdad; she would have to visit him there, where the FCO do not permit official visitors to stay in hotels. Hotels and guest houses where foreign nationals stay are, according to the FCO, subject to regular threats. To state that she could visit him in Iraq is unrealistic and would place her in danger. I find that his removal from the UK pursuant to the deportation order would result in the termination of their relationship. But the nature of their relationship is not such that such a conclusion can result in a finding that it would be unduly harsh for either of them to be so separated. he does not meet the criteria in s117C(4) of the NIAA 2002.

11. Realistically, pragmatically and for safety reasons, for the same reasons as I have set out in paragraph 10, neither child (with or without their respective mothers) could visit the appellant in Iraq. Although the appellant only sees them every 3-4 weeks, he has a relationship with them which is consistent and continues through telephone contact. Such contact is important for the children and will continue to be so both because of their dual heritage and because he has been a significant part of their lives throughout. It is plain that it is not reasonable for the children to travel to Iraq: they do not live with the appellant and there is no expectation, realistic or otherwise, that they would do so if he continued to live in the UK. Were it not for the appellant’s criminality, I would find that he met the criteria in s117B(vi) of the 2002 Act.

12. But the appellant has criminal convictions and there is a deportation order. Although, as I have said above, s117C is not directly applicable, the principles that lie behind the statute and the Rules reflect an analysis of the impact of personal circumstances upon whether there would be a breach of Article 8. This is not simply whether there would be a breach of the appellant’s Article 8 rights but also those of the two British citizen children.

13. The fundamental question is, therefore, whether the separation of the appellant from these children would be unduly harsh. The nature and extent of his criminality is not relevant save to the extent that the criminality has, in effect, brought him within s117C. This requires consideration whether the total breakdown in any communication between the appellant and the children is unduly harsh. The evidence before me, which I accept, is that the appellant is particularly supportive of the oldest child with regard to his GCSEs. The regular

telephone calls are valued by the child at this stressful time of his school career and I accept that the loss of that support would have a significant impact on the child in terms of his performance. The younger child has recently changed schools and the evidence, which I accept is that the appellant has proved supportive for this change in the child's life. This support is provided through the frequent telephone calls the appellant has with the children

14. If the telephone/facetime/Skype contact could continue and there was the possibility of occasional visits to Iraq or a neighbouring country, I would have no hesitation in finding that although the children would lose the current relatively frequent face-to-face contact they have with their father, the fact that they would be able to maintain a means of communication which they had grown accustomed to would be such that the appellant's departure from the UK would not be unduly harsh upon the children. In this case however there will be the total termination of contact between father and child. With no means of securing identity documents the appellant would be in Baghdad with no possibility of leaving either elsewhere in Iraq or out of the country. These children have had their father in their lives their whole life; the separation has been managed in their best interests given the parents are not together. Current Country Guidance case law means that continued communication and occasional contact would not be merely difficult but impossible. This cannot be other than unduly harsh for these children.

15. If this were an appeal following the making of a deportation order I would find that Exception 2 applies. As a human rights appeal that follows the making of a decision to refuse to revoke a deportation order, I am satisfied that because Exception 2 applies, it would be a breach of Article 8 to remove the appellant.

Conclusions:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law, the decision of the First-tier Tribunal is set aside to be remade.

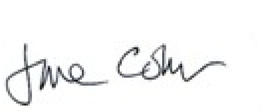
I re-make the decision in the appeal by allowing it

Anonymity

The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I continue that order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Date 25th April 2019



Upper Tribunal Judge Coker