Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10923/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 23 July 2019	**On 02nd August 2019**

Before

UPPER TRIBUNAL JUDGE SMITH
DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

S. A.
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Warren, Counsel, instructed by Sutovic & Hartigan
For the Respondent: Mr Avery, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, an Iraqi national, entered the UK illegally and made a protection claim after his arrest on 13 January 2005 in which he claimed to be a minor. At screening interview, he said that he was born, and had lived all of his life in Iraq in Chamchamal, in the Suleymanyeh governate. Thus, he gave this town as his last permanent address in Iraq. He said that his identity card had been issued to him in Chamchamal in 1987. He denied having this in his possession in the UK and stated that it had been left with his family. He denied having ever been issued with a passport.
2. The Appellant's protection claim was founded in the claim that he had been forced to flee Chamchamal because he was at risk of honour based violence from members of a family based there who were connected to the PUK, and who could be expected to use its resources to find him anywhere in the KRG, following the offence they had taken to his request that he should be allowed to marry a member of their family. That protection claim was refused. His appeal against that refusal was dismissed by decision of Immigration Judge Camp of 11 May 2005 [B1-] who found that the Appellant's account of events in Iraq was a fiction, and that he had lied about his age, and was an adult when he had claimed asylum. Appeal rights were exhausted in June 2005 [13-6].
3. In 2006 the Appellant made his first application for voluntary assisted removal to Iraq [G9 #35].
4. In September 2006 the Appellant was stopped by the police when driving a motor vehicle. He was found to have no driving licence or valid motor insurance, and to be in possession of a forged identity document in a name that was not his own. When his home was searched further documents were found that indicated he had been working illegally using a false identity [G3 #5]. As a result, on 29 September 2006 the Appellant was convicted of two offences concerning the possession of forged identity documents, one offence of obtaining a pecuniary advantage by deception, and one offence of the wilful obstruction of a police officer. He was sentenced to two consecutive terms of six months immediate detention in a Young Offenders Institute on the basis of the date of birth that had been rejected by Immigration Judge Camp. Two further terms were to be served concurrently. [E1]
5. On 15 March 2007 the Appellant was notified of the Respondent's intention to make a deportation order in relation to him. He lodged no appeal against that decision.

6. On 9 November 2007 the Appellant was tried by a jury and convicted of a serious sexual assault upon a female. He was sentenced the same day to an immediate term of two years detention in a Young Offenders Institute. He was required to sign the sex offenders register for ten years and recommended for deportation. Again, this was done on the basis of the date of birth that had been rejected by Immigration Judge Camp [F1]. The circumstances of this offence were that he had taken a young woman to his home, had then despite her resistance forcibly removed her trousers, and placed his penis between the tops of her thighs and masturbated himself to ejaculation.
7. In 2008 the Appellant made a second application for voluntary assisted removal to Iraq [G9 #35].
8. On 6 November 2008 the Respondent decided to make a deportation order against the Appellant, and this prompted an appeal that was heard and dismissed by decision of a panel chaired by Immigration Judge Hodgkinson of 1 April 2009 [G1-]. The panel noted that the Appellant denied that he had ever met his victim, denied that any sexual assault had ever taken place, claimed that he had been wrongly convicted of the offence of sexual assault, and that he had made a number of serious allegations about the conduct of his criminal trial – but that he had lodged no appeal against his conviction [G5 #14, #49]. The panel concluded that in the circumstances there were serious concerns over the level of risk posed by the Appellant to the public.
9. The Tribunal also noted that the Appellant did not seek to pursue the original protection claim dismissed by Judge Camp as a fiction, but now advanced an entirely new protection claim based upon the assertion that he had lived in Iraq in Kirkuk, and that he was at risk of harm in Kirkuk from his own cousin who, as a local powerful al Qaeda leader, had tried to recruit the Appellant into that organisation, and when that effort had failed had tried to murder him [G5 #15]. This claim was rejected as a fiction, inconsistent with the original claim, and inconsistent with the applications he had made for voluntary return to Iraq in 2006 and 2008 [G9 #32]. The appeal appears to have been advanced and considered on the basis that return would be to a home area of Kirkuk, and that the KRG was under consideration only as an area for potential relocation: for no reason that we can discern there was no reference to the original claim that he had been born in Chamchamal, or had lived there.

10. A Deportation Order was made in relation to the Appellant and served upon him on 7 July 2009 [H1].
11. On 23 July 2009 the Appellant made his third request for voluntary assisted removal, requesting that he be removed from the UK to Suleymanyeh [M3]. An attempt to physically remove the Appellant to Iraq in the company of others on 15 October 2009 failed when the Iraqi authorities refused to accept the evidence relied upon for the Iraqi nationality of the majority of passengers upon arrival at Baghdad airport [K8 #25].
12. On 27 March 2011 the Appellant's eldest daughter was born to his partner, Ms N, a British citizen [I1].
13. In May 2011 the Appellant lodged submissions as to why the deportation order should be revoked, and on 12 October 2012 the Respondent refused to revoke the deportation order. In the course of this decision the Respondent specifically noted the information the Appellant had given at his screening interview as to where he was born and grew up, and from where his identity card was issued to him. The Respondent took the point that his "home area" was Chamchamal, and the Suleymanyeh governate [K19]. The Appellant's appeal against that decision was heard and dismissed by decision of 22 January 2013 of a panel chaired by Judge Grimmett [M2-]. It was noted that the Appellant now denied having ever been tried for an offence of sexual assault, and, maintained that he had never met the victim. The conclusion was that he did not accept his offending behaviour, did not show any insight into it, or remorse for it [M6 #13].
14. The Appellant accepted then that he and his partner, Ms N, were aware that he was subject to a deportation order when they commenced their relationship. Although there was a child of that relationship born on 27 March 2011, and his partner suffered from depression and had learning difficulties, the Tribunal concluded that her evidence did not establish the Appellant's claim that she would be unable to care for the child on her own in the event of his deportation, or with the assistance of the large extended family of which she was a part.
15. The Tribunal specifically rejected the Appellant's claim to have lost all contact with family members in Iraq. Whilst the Respondent did not dispute that some had been killed in a random bombing, the Appellant's claim that his father had disappeared and that he had lost contact with his uncle was rejected as untrue in the context of his dishonesty, and an absence of any evidence to show he had made any effort to contact his

family. The Tribunal also noted that he did not face a real risk of indiscriminate violence in Suleymanyeh [M10 #27].

16. On the 7 March 2018 the Appellant's younger twin daughters were born to his partner Ms N. The twins were born prematurely.
17. A series of further representations were made on behalf of the Appellant in an effort to get the Respondent to make a fresh decision which would either result in the revocation of the 2009 deportation order, or, carry further appeal rights. Eventually this led to the decision to refuse a protection and human rights claim of 28 August 2018 [Y1-].
18. The Appellant's appeal against this decision was heard and dismissed on asylum and humanitarian protection grounds, but allowed on Article 3 and Article 8 grounds by a decision of First tier Tribunal Judge VA Cox of 21 March 2019.
19. The Appellant has lodged no appeal against that decision, but the Respondent was granted permission to appeal it by decision of 19 June 2019 of Upper Tribunal Judge Hanson because it was considered arguable (a) that the Judge's approach to the assessment of the weight that could be given to the Appellant's bald denial of an ability to acquire Iraqi identity documents was flawed, and, (b) that the Judge's approach to the test posed by section 117C(5) was also flawed.
20. No Rule 24 Notice had been lodged in response to the grant of permission to appeal, although Ms Warren's skeleton argument lodged today is intended to serve that purpose. Neither party has applied pursuant to Rule 15(2A) for permission to rely upon further evidence. Thus the matter came before us.

<u>The Article 8 challenge</u>

21. The Judge's decision contains no express reference to section 117C(5), or to the structured approach required by section 117C to the assessment of the proportionality of the refusal to revoke the deportation order. Nor is there reference to the current relevant jurisprudence.
22. It may be that having given his reasons for his decision to allow the appeal on Article 3 grounds the Judge felt it unnecessary to rehearse in detail what he plainly considered to be an alternative limb to the human rights appeal before him, that he was approaching only on a "belt and braces" basis. That does not we fear absolve him of the need to set out with clarity his approach to the statutory framework, and his findings of fact, by reference to the relevant jurisprudence.

23. Having said that, it was not in dispute before the Judge that the Appellant had a genuine parental relationship with his three children. Each of them is a "qualifying child" because they are British citizens. Nor was it in dispute that the Appellant had a genuine and subsisting relationship with Ms N, a "qualifying partner" because she is a British citizen.
24. The focus of the Article 8 appeal, since the Appellant's longest sentence was to a two year term of detention in a YOI, was upon whether he could bring himself within Exception 2, as set out in section 117C(5). Exception 1 plainly had no application to him given his immigration history.
25. Whilst the Judge failed to make an express reference to Exception 2, or to section 117C(5) in the course of his decision, it is accepted before us that this would not, of itself, establish a material error of law, if, when read as a whole it could be discerned from his decision that he had the correct principles in mind and had made the necessary findings of fact. In so saying we would wish to give no encouragement to a practice that fails to follow the statutory framework with clarity and makes clear to the reader what principles are being applied.
26. We are satisfied that the decision contains no express finding that the effect of the Appellant's deportation upon either Ms N, or, upon either of his daughters would be unduly harsh.
27. However, the Judge did note that it was accepted by the Respondent before him that it would be unduly harsh to require either of the children to live in Iraq [111]. He also considered [107-10] the report of the independent social worker, Mr Horrocks, that was before him [SB1-]. He concluded that whilst deportation would by its very nature often involve the separation of a person from family members in the UK, the circumstances of this family were such that the consequences of deportation would be rather greater. He concluded that it was likely that the children would in consequence find themselves being removed from the care of both their parents and losing contact with all of their birth family [112].
28. This conclusion was plainly rooted in the Judge's analysis that whilst the couple could cope at present with the care of their three children as a result of the significant levels of assistance that they were receiving from social services, Ms N would be unable to do so alone in the event of the Appellant's deportation. The level of support available to the couple from within Ms N's extended family had not proved in the past to be sufficient on its own to meet the children's needs. Mr

Avery accepted before us that this was a finding that was open to him on the basis of Mr Horrocks' report.

29. Although the Judge did not expressly refer to it, Mr Horrocks' report had confirmed that Ms N (who has learning difficulties and mental health difficulties) was once again pregnant, and was therefore facing a situation in which she would shortly be a single parent with three children under the age of two, and, an elder seven year old child (herself with some form of learning difficulty) that Ms N could not control. As to the elder child, Mr Horrocks had noted that her behavioural difficulties and temper tantrums were such that neighbours had called the police to the family home on a number of occasions. The extent of her learning difficulties had yet to be assessed or diagnosed, but Mr Horrocks had observed that there was a pattern of learning difficulties within the female members of Ms N's family (at least her mother and her aunt) which had led him to speculate that there could be a genetic element.

30. It was his observation during the home visit that the Appellant undertook the majority of the parental interactions with the children. He considered that the loss of the Appellant from the family would leave Ms N unable to cope, with a major downturn in the family's ability to function and in the quality of physical and emotional care provided to the children so that an intervention by social services would be almost inevitable.

31. The Judge looked to what might happen when the Appellant's deportation occurred, and concluded that the members of Ms N's extended family would be unable themselves to either offer Ms N sufficient support to allow her to cope with the three children alone, or, a long term home suitable for the children. Thus social services would be forced to intervene. Those findings were plainly open to him on the evidence, as Mr Avery accepts.

32. Mr Horrocks' view was that it was likely that social services intervention would lead to some if not all of the children being taken into the care of the local authority. His opinion was that they would suffer developmental harm, and that they could require long term permanent care arrangements outside the family home [SB21 4.24]. He noted that Ms N shared this opinion [SB22 4.27]. He concluded that any deportation of the Appellant would adversely affect Ms N's mental health difficulties through the loss of her partner, and her support in caring for the children, so that she would become overwhelmed by the demands upon her. His

opinion was that she lacked the capacity to function effectively as a single parent [SB23 5.2].

33. The Judge appears to have interpreted Mr Horrocks' report as containing the expression of an opinion that the children would not only be adopted, but placed for adoption separately, so that the effect of the Appellant's deportation would be a loss of contact not only with each birth parent, but also each sibling. We can find no foundation for that in the report, and Ms Warren did not seek to persuade us that there was. Nevertheless, even with the Judge's references to adoption excised, we accept that there was a proper evidential foundation for a finding that the effect upon Ms N, and upon each of the children, of the Appellant's deportation would be "unduly harsh", so that Exception 2 was made out. We did not understand Mr Avery to argue otherwise.

34. Read as a whole we are satisfied that although the Judge's approach lacked focus and the proper structure when the decision is read as a whole it is plain that his finding was that Exception 2 was made out. There was a proper evidential foundation for that finding, and his reasons can be discerned, so that they meet the test of adequacy. We therefore reject the Respondent's challenge pursuant to grounds two and three to the Judge's decision to allow the Appellant's Article 8 appeal on the basis of the "family life" he enjoys with Ms N and his three children as disclosing no material error of law that requires this decision to be set aside and remade. If we were to make the Article 8 decision on the evidence that was before the Judge, we would also have reached the conclusion that Exception 2 was made out as a result of the severity of the likely effects of the Appellant's deportation upon the three children which go well beyond those which might ordinarily be anticipated as a result of the deportation of a child's father. Thus notwithstanding the clear public interest that would otherwise exist in his deportation he would be one of those individuals that Parliament has concluded should not be deported; section 117C(5).

<u>The Article 3 challenge</u>

35. It was common ground before us that if this was our finding in relation to the Article 8 challenge then it would not be necessary to remit the Article 3 appeal for rehearing afresh in the event that we were satisfied the Judge had fallen into material error of law in his approach to the evidence requiring that decision to be set aside. It was also common ground that the Appellant would receive no benefit from the nature of the grant of

leave to remain that would result from either his appeal succeeding on Article 3 or Article 8 grounds; since he would be granted short periods of limited leave to remain in either event.

36. In the circumstances we can set out our conclusions in relation to the Article 3 challenge relatively briefly. We are satisfied that the Judge did fall into material error in a number of ways, and that his conclusion that the Appellant faced a real risk of a breach of his Article 3 rights in the event of return to Iraq is hopelessly flawed and must be set aside.

37. The common theme in this relatively unstructured decision is a failure to engage adequately with the full details of the immigration history, the Appellant's resort to dishonesty whenever he perceived that it suited him to do so, and, all of the adverse findings made by the Tribunal in the past in relation to the Appellant's evidence. These should have been set out properly and then taken by the Judge as his starting point in the event the Appellant offered new evidence on any issue that had previously been resolved against him, so that the Judge properly applied, and could be seen to be applying the principles set out in Devaseelan. Instead, although he gave himself a suitable self- direction to the effect that the only change in circumstances since the 2013 decision had been the passage of time, and the birth of the twins, we are satisfied that the Judge clearly failed to follow it [82].

38. We note that the Judge proceeded on the basis that the Appellant's evidence had been consistent on at least the issues of his date of birth, and the location of his "home area" [29]. As to the date of birth, that observation rather missed the point. However consistently the Appellant had declared a given date as his date of birth, it was one that had been specifically rejected as untrue in 2005, and there is no record of the Appellant offering any evidence that would have allowed that finding to be re-opened and re-made; certainly the Judge did not identify any within his decision. As to the location of the Appellant's "home area", self-evidently from the immigration history set out above the Appellant had been inconsistent about this. Chamchamal and Kirkuk are different towns, and the former is not a suburb of the latter. Indeed, the Judge records the Appellant's acceptance of this, and his placement of Chamchamal in the province of Suleymanyeh in his decision, but then fails to follow through the implications of that admission [51], and fails to consider the Appellant's acceptance that his identity card was issued to him in Chamchamal.

39. Although neither party argued the appeal as an example of a man for whom return to Iraq was not feasible, and self-evidently the Iraqi authorities had in 2009 provided travel documents for the abortive chartered flight, the Judge's approach also appears to have been that it was impossible for the Appellant to obtain any documents. No such finding had previously been made. We are not persuaded that there was a proper evidential foundation for such an approach on his part.
40. Crucially in our judgement, there was a failure by the Judge to properly engage with the fact that the Appellant originally claimed to have been born, and to have grown up in Chamchamal. The Judge may not have been assisted by the way in which either party had prepared, or was presenting, the appeal, but Chamchamal is a town which at all material times has been sited within the KRG; liveuamap.com. As the Appellant accepted it lies within the province of Suleymanyeh [82].
41. Had the Judge been in any doubt as to the true locations of the places previously mentioned in the Appellant's evidence then the appeal should have been stood down whilst the parties either reached agreement on the matter, or, identified the evidence that they wished to rely upon in order for him to resolve it. There would have been nothing improper in the Judge and the parties looking together at a reliable mapping site such as liveuamap.com or googleearth, to narrow the issue or to seek to resolve it, if necessary, by allowing the Appellant to give oral evidence by reference to the detailed maps in use. A suggestion such as that offered to us by Ms Warren that a Wikipedia entry of unknown provenance and some ambiguity should take precedence over a reliable mapping service should never have been made, or, accepted. In an extreme case, the Judge may have been required to consider whether the requirements of procedural fairness necessitated a longer adjournment and further evidence.
42. The Appellant had never claimed that his birth was unregistered, and he had accepted in 2005 that he had been issued with an identity card, and that this had been issued to him in Chamchamal. Whether the family book into which the Appellant's birth would have been entered was held in Chamchamal, or in Suleymanyeh, we can identify no cogent reliable evidence that was before the Judge to suggest that it was ever held in Kirkuk. The Judge made no reference to the location or existence of the family book, or the ability of the

Appellant to retain a proxy to access it, but to the extent that the Judge did have its existence and location in mind at all, we can only infer that he was proceeding on the assumption that it was located in Kirkuk and was inaccessible to the Appellant. Put simply such an approach was not open to him on the evidence.

43. If the Appellant had lived in Chamchamal then he would upon return to the KRG be legitimately able to claim to be a returning resident of the KRG. The Judge failed to engage with this too.

44. This flawed approach also appears to have fed into the Judge's consideration of both the ability of the Appellant to find shelter and support with family in the KRG in the event of return there, and his ability to offer to the Iraqi authorities family members who could vouch for his identity in the course of any re-documentation that was genuinely necessary. (None would be necessary if the Appellant's original genuine identity card was in truth available to him through contact with his family in Iraq.) The towns within the KRG have not been subject to the internal armed conflict within Iraq that has more recently affected the city of Kirkuk. If any of the Appellant's family were originally based in Chamchamal (and he has consistently admitted to an uncle there) then there is no obvious reason why they should have relocated. The same point can be made about his early claim to have fled a risk of harm to the home of an aunt in Ranya. Although there was never any need for him to flee, that account locates family in that town. A town of that name lies within the KRG roughly midway between Erbil and Suleymanyeh.

45. Nor did the Judge adequately engage with the Tribunal's previous express rejections of the Appellant's claim that he had lost contact with all members of his family in Iraq and was wholly unable to resume contact with them. The Tribunal had previously noted the Appellant's failure to provide any evidence that he had taken reasonable steps to contact members of his family living in Iraq, and we can identify nothing in the evidence placed before the Judge to suggest there had been any material change in that respect.

46. It is also a fair criticism of the Judge's reasoning that his findings in relation to the Appellant's evidence have the appearance of inconsistency. He concluded that the Appellant was maintaining a fictitious account in support of support of an asylum claim and dismissed this ground of appeal as a result [82]. It is difficult to see how this adverse finding fed into the Judge's acceptance of the Appellant's bald assertion that he had lost contact with

all members of his family, including the maternal uncle who had been in the UK in 2005 [37], and since he would be unable to re-document himself in the event of return to the KRG he would thus be destitute and at real risk of a breach of his Article 3 rights. That is particularly so when one reflects upon the fact that the claim to have lost contact with the entire family was expressly rejected by the Tribunal in 2009 and 2013, and, the fact that the Appellant has made three separate applications for assisted voluntary removal to Suleymanyeh.

47. In the circumstances, and as set out above, we are satisfied that the Judge did fall into material error of law when he allowed the appeal on the Article 3 ground. As noted above, the parties were agreed that we did not need to re-make the decision ourselves on this ground, or, remit the appeal to the First-tier Tribunal to do so, in the event the Appellant succeeded in his human rights appeal on the Article 8 ground. We are not required by statute or the procedure rules to re-make a decision (or a part of a decision) which we have set aside: the provision is permissive. For that reason, we decline to re-make or to remit the decision upon the Article 3 ground. The human rights appeal is allowed on the Article 8 ground alone.

DECISION

The Determination of the First Tier Tribunal which was promulgated on 21 March 2019 contained no material error of law in the decision to allow the Appellant's human rights appeal on Article 8 grounds and that decision is accordingly confirmed.

The decision to allow the Appellant's human rights appeal on Article 3 grounds is set aside for material error of law. The parties are agreed that in the circumstances there is no need for that ground of appeal to be reheard, and that aspect of the decision remade.

Direction regarding anonymity – Rule 14 Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until the Tribunal directs otherwise the Appellant is granted anonymity throughout these proceedings. No report of these proceedings shall directly or indirectly identify him or the children. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to proceedings being brought for contempt of court.

Signed

Deputy Upper Tribunal Judge JM Holmes
Dated 24 July 2019