IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHA

Case No: UI-2023-002279

First-tier Tribunal No: PA/04308/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 20 December 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IJA
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr C Bates, Senior Home Office Presenting Officer
For the Respondent: Ms L Mair, counsel instructed by The UK Law Firm

Heard at Manchester Civil Justice Centre on 6 December 2023

DECISION AND REASONS

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or any family member. Failure to comply with this order could amount to a contempt of court.

Introduction

1. I preserve the anonymity direction previously made in this appeal.

2. The Secretary of State for the Home Department brings this appeal but, to avoid confusion, the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Abebrese, promulgated on 18 June 2023, which allowed the Appellant's appeal on article 8 ECHR grounds.

Background

3. The Appellant was born on 03/02/1991 and is a national of Iraq.

4. The appellant arrived in the UK on 2 December 2007, as an unaccompanied asylum seeking child, The Appellant's previous asylum claim was refused on 17 March 2010 and his appeal was dismissed on 13 May 2010.

5. The Appellant and his British partner have been cohabiting since July 2021. They have a one year old son born in April 2022. The Appellant has been diagnosed by a psychiatrist as suffering from a severe depressive disorder; a severe anxiety disorder; and PTSD.

6. On 12 November 2019 the appellant was convicted at Manchester Crown Court for contraventions of the Misuse of Drugs Act 1971 (production of a controlled class B drug and possession of a controlled class A drug). On 08 January 2020 the appellant was sentenced to 2 years imprisonment for those offences.

7. On 26/08/2020 the respondent made a Deportation Order in accordance with section 32(5) of the UK Borders Act 2007 on conducive grounds. The appellant was also served with a notice under section 72 of the Nationality Immigration and Asylum Act 2002 and offered an opportunity to rebut the presumption that his crime was particularly serious and that his continued presence in the UK constitutes a danger to the community.

8. On 01/09/2020 the respondent refused the appellant's protection and human rights claim and adhered to a deportation order made against the appellant on 26/08/2020.

The Judge's Decision

9. The Appellant appealed to the First-tier Tribunal. In a decision promulgated on 18/04/2023, First-tier Tribunal Judge Abebrese ("the Judge") allowed the Appellant's appeal on article 8 ECHR grounds.

10. Grounds of appeal were lodged by the respondent, and on 17/05/2023 First-tier Tribunal Judge Lodato gave permission to appeal stating

> 2. It is argued in the grounds of appeal that the judge did not, as he was bound to do, treat a previous determination as his starting point before concluding that the appellant would encounter very significant obstacles to integration in Iraq. There is force to this argument in view of the fact that the very brief determination contains no analysis of the previous determination or the findings of fact which were reached against the appellant which may have had a bearing on this issue. Beyond asserting that the appellant would encounter difficulties on return, it is difficult to discern the basis on which it was found that the appellant would meet the very significant obstacles threshold in accordance with settled authority. It is further argued that the judge did not provide adequate reasons for concluding that the appellant had rebutted the s.72

presumption which operated against him in light of his serious offending. This is arguable as it is difficult to identify any consideration of whether the appellant had committed a serious crime and represented a danger to the community of the UK. The judge does not reach a conclusion on this foundational question and proceeds to summarily consider and reject the protection grounds. While it might be suggested that any failure to consider the application of the s.72 presumption was academic in light of the rejection of the merits of the protection case, this arguably goes to whether the appeal was anxiously scrutinised. All grounds may be argued.

The Hearing

11. For the respondent, Mr Bates moved the grounds of appeal. He reminded me that the appeal concerns a deportation order, and that the Judge allowed the appeal on article 8 ECHR grounds. He told me that the Judge does not refer to section 117C of the 2002 Act, and, when setting out the burden and standard of proof, the Judge refers solely to the appellant's protection claim and makes no reference to deportation.

12. Mr Bates took me to [24] of the decision, where the Judge allows the appeal finding that compelling circumstances exist. He told me that that is the wrong test; the test in section 117C is "*very* compelling circumstances". He emphasised one word from the test (*very*) and told me the difference between the wording in s.117C and the words used by the Judge has great significance.

13. Mr Bates told me that the Judge makes no findings about section 72 of the 2002 Act. He said that the Judge did no more than summarise the competing arguments in relation to section 72, and then failed to resolve the matter by making findings of fact. Mr Bates acknowledged that section 72 relates to a protection claim, but said that the Judge's failure to deal with section 72 is a material error of law because findings in relation to section 72 are an essential component of the article 8 proportionality exercise.

14. Mr Bates took me to [22] of the decision and said that, there, the Judge's consideration of paragraph 276 ADE(1)(vi) of the immigration rules is difficult to follow. In any event he said that the Judge should have been considered section 117C(iv) of the 2002 act.

15. The appellant's appeal against refusal of asylum was dismissed by the First-tier Tribunal in 2010. Mr Bates told me that the Judge makes no reference to Devaseelan 2002 UKIAT 00702,, and so failed to take guidance in law to identify his starting point. The Judge does not identify reasons for departing from the First-tier Tribunal's decision in 2010 and makes findings contrary to the First-tier Tribunal's findings in 2010 without explaining why.

16. At [24] of the decision the Judge finds that the respondent's decision has unduly harsh consequences for the appellant's partner and child, both of whom are British citizens, but the Judge reaches those conclusions without properly considering the exceptions to deportation, and without considering what would happen if the appellant's partner and child left the UK with the appellant. Mr Bates emphasised that section 117 "unduly harsh" test refers to unduly harsh

consequences for the appellant's partner and child, not unduly harsh consequences for the appellant.

17. Mr Bates told me that the Judge's decision is inadequately reasoned, that the Judge took incorrect guidance in law, and the Judge did not consider the statutory framework for assessing proportionality. He asked me to set the decision aside and to preserve two findings

(i) that the appellant has a genuine and subsisting relationship with his partner and child, both of whom are British citizens.

(ii) That the appellant will not be a risk on return to Iraq.

18. For the appellant, Ms Mair adopted the terms of both her rule 24 note and the appeal skeleton argument which was before the First-tier Tribunal. She said that the submissions made for the respondent were attempts to argue matters which the respondent had not put before the First-tier Tribunal.

19. Ms Mair told me that section 72 of the 2002 Act was adequately considered by the Judge. She took me through the documentary evidence placed before the Judge, and told me that the Judge makes a specific finding that the appellant rebuts the section 72 presumption.

20. In the alternative, Ms Mair told me that, because the Judge did not allow the appeal on protection grounds, any inadequacy in his consideration of section 72 is not material because s.72 relates only to the protection appeal.

21. Ms Mair told me that the Judge had detailed submissions about the Devaseelan guidelines, and that the Judge's findings related to the relationship between the appellant's partner and their child, which did not exist when the First-tier Tribunal considered the appellant's appeal against refusal of the asylum claim in 2010. Ms Mair told me that the Judge's findings were entirely consistent with the Devaseelan principles, and his findings related to facts and circumstances which have arisen in the last few years, not facts and circumstances existing 2010.

22. Miss Mair focussed on the Judge's article 8 assessment found in [21] and [24] of the decision. She asked me to consider the documentary evidence, which includes a report from an independent social work dealing with the impact of separation on the child of the appellant and his partner. She took me to [24] where the judge says that the exception to deportation is met.

23. Ms Mair said that the decision does not contain an error of law and urged me to dismiss the respondent's appeal.

24. In the alternative Miss Mair said that if I find a material error of law I should preserve the Judge's findings at [18], [19], & [21] of the decision in their entirety.

Analysis

25. Since the amendments made to sections 82 and 84 of Nationality Immigration and Asylum Act 2002 (in October 2014) there has been no direct

right of appeal against the decision to deport a non-EEA national, and no ground of appeal on the basis that the decision of the SSHD has not been made in accordance with the Immigration Rules. The Article 8 challenge only lies against the decision SSHD is deemed to have made to refuse a human rights application when deciding to make a deportation order, and not to the deportation order itself.

26. In the context of a protection or revocation of protection appeal the First-tier Tribunal must begin its deliberation by considering the application of section 72 of Nationality Immigration and Asylum Act 2002.

27. In Mugwagwa (s.72 – applying statutory presumptions) Zimbabwe [2011] UKUT 00338 (IAC) it was held that

> The First-tier Tribunal (Immigration and Asylum Chamber) is required to apply of its own motion the statutory presumptions in s.72 of the Nationality, Immigration and Asylum Act 2002 to the effect that Art 33(2) of the Refugee Convention will not prevent refoulement of a refugee where the factual underpinning for the application of s.72 is present even if the Secretary of State has not relied upon Art 33(2) and s.72.

28. At [3] of the decision, the Judge records that the respondent's decision is certified under section 72 of the 2002 Act. At [7] the Judge notes that the grounds of appeal challenge the section 72 presumption.

29. The only other place the Judge mentions Section 72 is a brief summary of the submissions made by counsel for the appellant at [17] of the decision. The Judge does not consider section 72. The Judge makes no findings in relation to section 72. That is an error of law.

30. The failure to consider section 72 of the 2002 Act is a material error of law because section 72 requires consideration of whether or not the appellant is a risk to the public in the UK. It cannot be said that the balancing sheet approach to assessment of article 8 proportionality has been correctly carried out if the assessment of the risk created by a foreign criminal is not factored into that assessment. The Judge's decision neither assesses that risk nor weighs any such risk in the proportionality balancing exercise.

31. Parliament requires the First-tier Tribunal to adopt a structured approach to Article 8. The structure is found in sections 117A-117D of Part 5A of the Nationality Immigration and Asylum Act 2002. Those statutory provisions offer a complete code which properly followed, whatever the ultimate decision may be, will result in a fully Article 8 compliant decision. There is no scope for consideration of Article 8 on Razgar principles outside the statutory code. A First-tier Tribunal decision should refer only to the statutory code (unless it could be demonstrated that the Immigration Rules added something to the analysis required by the statutory code).

32. The Judge's consideration of the appellant's article 8 ECHR grounds of appeal are devoid of consideration of section 117A to 117D of the 2002 Act.

33. The Judge's findings of fact are restricted to [18] to [20] of the decision. From [21] to [24] of the decision the Judge sets out his conclusions. The Judge's

conclusions are made without any reference to the correct burden and standard of proof. [8] of the decision sets out the burden and standard of proof in protection appeals only.

34. The Judge's findings between [19] and [21] are superficial and inadequately reasoned. Those findings are not then filtered through section 117C of the 2002 Act to reach the conclusions found between [21] and [24].

35. The appellant was sentenced to a period of imprisonment of less than 4 years. The questions the Judge should have addressed are does Exception 1 (section 117C(4)) or Exception 2 (section 117C(5)) apply?

36. At [24] the Judge finds that Exception 2 applies, but he does not give reasons for that finding. All the Judge says is

> it would be in the circumstances be unduly harsh and I accept the evidence provided to the tribunal on this point.

37. Exception 2 is focused on the family life relationships the appellant relies upon. There must be a genuine and subsisting relationship with a qualifying person as defined in section 117D(1). The focus of the "unduly harsh" test is entirely upon the effect on the qualifying person of either the separation from the appellant if they stay in the UK, or the consequences of following the appellant upon deportation.

38. At [18] the Judge finds that the appellant has a genuine relationship with his British partner and their child. At [23] the Judge finds that the appellant's partner and child are settled in the UK and that the child is extremely young. The Judge finds the appellant's partner is employed and her family live in the UK. Having made those findings, the Judge does not explain why those findings make separation caused by deportation unduly harsh. All the Judge says about the alternative scenario of accompanying the appellant to Iraq is that it would be "*extremely disruptive*".

39. The Judge has not reached a decision by applying section 117C of the 2002 Act. That is a material error of law.

40. It is obvious from a straightforward reading of the Judge's decision that the Judge does not take guidance from Devaseelan. It is equally obvious that the Judge does not explain how he felt able to depart from the findings made in 2010 that the appellant is in contact with his family in Iraq and has access to his CSID.

41. Failure to follow the Devaseelan guidelines is another error of law.

42. Individually and cumulatively, the errors of law are material because they go to the heart of the article 8 proportionality assessment. I therefore set the decision aside.

43. I am asked to preserve certain findings of fact but I do not preserve any findings of fact because the decision has been reached without taking correct guidance in law. The decision has been reached by failing to consider the

structure set out in section 117A to 117D of the 2002 Act, which means the decision has been reached by applying an incorrect test.

44. Ms Mair eloquently referred me to her appeal skeleton argument and directly relevant documentary evidence which was before the First-tier Tribunal. That evidence includes the evidence of an independent social worker considered the interests of the appellant's child. The judge makes no reference to Section 55 of the Borders, Citizenship and Immigration Act 2009. An objective reader would not know that any of that evidence was placed before the Judge by reading the Judge's decision alone.

45. Ms Mair's thorough appeal skeleton argument sets out the matters which the Judge should have considered, but did not. Ms Mair's appeal skeleton argument contains the guidance in law that the Judge should have followed (but did not).

46. The errors of law are material errors of law. I therefore set the decision aside.

Remittal to First-Tier Tribunal

47. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

> (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or
>
> (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

48. I have determined that the case should be remitted because a new fact-finding exercise is required. None of the findings of fact are to stand and a complete re hearing is necessary.

49. I remit the matter to the First-tier Tribunal sitting at Manchester to be heard before any First-tier Judge other than Judge Abebrese.

Decision

The decision of the First-tier Tribunal is tainted by a material error of law.

The Judge's decision dated 18 April 2023 is set aside.

The appeal is remitted to the First-tier Tribunal to be determined of new.

Signed Paul Doyle Date 12 December 2023

Deputy Upper Tribunal Judge Doyle