Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01276/2013

THE IMMIGRATION ACTS

Heard at Stoke	**Determination Promulgated**
on 12th May 2014	**on 25th July 2014**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ADNAN KADIR KARIM
(Anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr O'Ryan instructed by Paragon Law.
For the Respondent: Mr McVeety Senior Home Office Presenting Officer.

DETERMINATION AND REASONS

1. This is an appeal against a determination of a panel of the First-tier Tribunal composed of First-tier Tribunal judge V Osborne and Mrs Bray JP who in their determination promulgated on 19th February 2014 dismissed the Appellant's appeal against the refusal of the Secretary of State to revoke a deportation order made against him on 3rd April 2013.

Background

2. The Appellant is a national of Iraq born on the 11th July 1978. He left his home country in or around 1999 as a result of alleged fear of ill treatment at the hands of his father or by others at his father's instigation. He travelled to the United Kingdom and claimed asylum but before his claim was determined he was convicted at the Worcester Crown Court on 17th May 2004 on three counts of manslaughter for which he was sentenced to 5 years imprisonment. There was no appeal against conviction or sentence.

3. As a result of his conviction the Appellant was notified of his liability to be deported and invited to make additional submissions. He was held in immigration detention following completion of his custodial sentence although released on bail in December 2006. The Respondent subsequently served a fresh notice of decision to make a deportation order which was accompanied by a letter setting out the reasons for refusing his asylum claim. He lodged an appeal against that decision on 21st July 2008 which was dismissed. Then Senior Immigration Judge Taylor found a material error of law in the First-tier Tribunal determination on 15th January 2009 but dismissed the appeal. Application for leave to appeal to the Court of Appeal was refused on 21st May 2009 at which point the Appellant became appeal rights exhausted.

4. On 18th August 2010 further representations were made for the deportation order to be revoked as the Respondent had not removed the Appellant. This was followed by yet more submissions on 7th September 2012 which were refused on 26th March 2013 on the basis that although the appeal had failed no deportation order had yet been signed. There was therefore nothing to revoke and so the submissions were considered by reference to paragraph 353 of the Immigration Rules and rejected as not being a fresh claim. A JR application was issued to challenge the Respondent’s decision not to treat the matter as a fresh claim although by that date the deportation order had been signed. The Appellant therefore lodged a fresh application for revocation which was refused by letter dated 14th October 2013 which triggered the appeal considered by the First-tier panel.

5. The panel rejected the Appellant's protection claim based upon the adverse credibility findings of the previous First-tier Tribunal, the findings of Senior Judge Taylor, and the refusal of permission to appeal by the Court of Appeal, and noted that there was nothing in the evidence that caused them to find that those determinations and judgments should be interfered with and that although the Appellant did not concede the issue of whether he would be at risk on return it does not appear that substantive submissions were made by his representative relating to this matter, leading to the conclusion that the protection elements must be dismissed on all grounds [17-26].

6. The panel then considered the claim based upon Article 8 and specifically focusing upon the relationship between the Appellant and his wife of nearly five years. The panel record in paragraph 30 that Counsel for the Appellant had accepted that paragraph 339 (a) and (b) did not apply due to the length of his sentence and so relied upon 390A which provides that in such circumstances it will only be in exceptional circumstances that the public interest in maintaining deportation will be outweighed by other factors [30].

7. The panel clearly considered the nature of the family relationship within the United Kingdom including the family circumstances. They noted that the Appellant told his wife about his precarious immigration situation during the early stage of their relationship [34] although her evidence was that she did not think too much about it. The extended family are also referred to in the determination and the panel record submissions made in which they were asked to take into account the various changes which had occurred in the life of the Appellant and his wife in the intervening years between the determination of Immigration Judge Chambers and the appeal hearing [39].

8. The panel note in paragraph 42 of their determination that the Respondent herself had accepted that it was "not reasonable" for the Appellant's wife to leave the United Kingdom as set out in paragraphs 104-106 of the refusal letter. In relation to the risk of reoffending the panel note the Appellant’s assertion that he is at a low risk of re-offending although also find this to have been undermined by the fact he was convicted of an offence of driving without insurance since released from custody [45].

9. In paragraph 46 of the determination the panel state:

> 46. In reaching our final conclusions we have no hesitation in stating that if this appeal related to the Appellant alone we would have found that there were no reasons for us to interfere with the decision of the Secretary of State to remove the Appellant to Iraq. The offence he committed was a particularly serious one and we find that he has persistently minimised his role in what happened to the extent that even taking into account the delays which have occurred in reaching a final conclusion we could not say that there were any exceptional circumstances which applied to his case alone.

10. In paragraph 48 the panel found that the circumstances of his wife could be said to be exceptional and found they was satisfied she had good personal reasons for saying that she would not go to Iraq with her husband, although they must analyse that response with care in determining how much weight they should give to her circumstances

in the proportionality exercise. The panel proceeded to examine such issues [49-52] before concluding in paragraph 53:

> 53. Overall we are satisfied that the Respondent's interest in deporting the Appellant from the United Kingdom is, in the circumstances of his case compelling. Although we have taken full account of the circumstances of his wife as we find them to be, we are not satisfied that they are such as to place their family life in jeopardy. We remind ourselves that Article 8 does not give a couple the right to dictate where they should enjoy their family life together and for the reasons we have given we are satisfied that it is open to the Appellant's wife to make the choice to move to Iraq to be with her husband without their Article 8 rights being infringed. For the reasons we have given we find the appeal must be dismissed.

11. Permission to appeal was granted on the basis it was said to be arguable for the reasons asserted in the grounds challenging the determination that the panel might have failed properly to take into account relevant matters and evidence in the proportionality exercise including, whether in the circumstances, it was reasonable to expect the Appellant's wife to accompany him to Iraq.

Error of law finding

12. Before the Upper Tribunal Mr O'Ryan submitted that the Secretary of State accepted that it was wrong to go behind any concession. He submitted that part 13 of the Immigration Rules applies to deportation cases and contains a complete code and that the case of Huang sets out the legal test that should be applied when undertaking a proportionality assessment. He submitted that the effect on the Appellant's wife was considered and as a result it accepted it was not reasonable to expect her to go to Iraq. The panel make a note of this in the determination but it is asserted it should have been properly considered.

13. Mr O'Ryan also submitted that there was an issue regarding the time the Appellant has been in the United Kingdom which is relevant to the proportionality of the disruption of his family life since the matter was considered by Judge Taylor. The Appellant has remained with his wife, has not been removed, and it was submitted less weight should therefore be given to the legitimate aim relied upon.

14. Mr O'Ryan also referred to the fact that a certificate to enable the Appellant to marry had been granted and in relation to the event that led to the Appellant's conviction, it was once again submitted that the Appellant was not culpable or responsible and that the matter was no more than an accident. It was also submitted that there was further

evidence from the wife relating to her health condition and that her sister has had a heart transplant since the last hearing. There is a close relationship with other extended family members and Mr O'Ryan submitted that had the panel considered such evidence they would have made a different decision to allow the appeal. When pressed upon the nature of the error he was alleging the panel made Mr O'Ryan stated that the error was as to the weight given to the evidence as a result of the failure to consider relevant elements of the skeleton argument.

15. I accept there has been delay in the conduct of this matter as demonstrated by the chronology set out above. On behalf of the Secretary of State it was submitted such delay was only for two years as the four year period was due to litigation including the Appellants own judicial review application. I find the panel were fully aware of the period of any delay and their treatment of this element of the chase has not been shown to be tainted by any material legal error.

16. I also note that the Appellant before this Tribunal continued to attempt to absolve himself of any responsibility for the offence for which he has been convicted and sentenced and which involved the death of three individuals. The Appellant was convicted by a court of law in accordance with the relevant legal principles against which he did not appeal. Not only was this a serious incident but he was discovered by the police to have been driving without insurance on another occasion after his release from custody which appears to be indicative of the Appellant's attitude towards the law and members of society in general.

17. The panel's findings in relation to the protection elements of the appeal are wholly sustainable and no legal error has been proved in relation to the same.

18. In relation to the submission that the principles set out in Huang take precedence, whilst this may have been the position prior to the amendment of the Immigration Rules on 9th July 2012 this is not the situation appertaining at the date of the hearing before the panel. Part 8 of the Rules was amended to contained, with immediate effect, the Secretary of State's view (as approved by Parliament) as to how Article 8 shall be assessed in a deportation case. In a case involving the revocation of a deportation order paragraph 390 states that the application must be considered in light of all the circumstances including (i) the grounds on which the order was made, (ii) any representations made in support of revocation, (iii) to the interests of the community, including the maintenance of effective immigration control, and, (iv) the interests of the applicant, including any compassionate circumstances. As the Appellant claims that his deportation will be contrary to the UK's obligations under Article 8 it was necessary to consider paragraph 398 and 399 and 399A which

the panel did. As it was accepted that the requirements of these paragraphs could not be met or applied, the Rules provide that it is only in the exceptional circumstances that the public interest in maintaining the deportation will be outweighed by other factors.

19. The key finding of the panel was that the Appellant had failed to establish that such circumstances existed. Guidance on the correct interpretation of the terminology has been provided in the case of MF (Nigeria) [2013] EWCA Civ 1192 in which the main issue concerned the position when the appellant could not succeed substantively under paragraphs 398 or 399 of the rules on a deportation and the determinative question is whether there are "exceptional circumstances" such that the public interest in deportation is outweighed by other factors. The Court of Appeal accepted a submission for the SSHD that "the reference to exceptional circumstances serves the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who do not satisfy paras 398 and 399 or 399A. It is only exceptionally that such foreign criminals will succeed in showing that their rights under article 8(1) trump the public interest in their deportation" (paragraphs 39 and 40). The Court went on to say: "In our view, [this] is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal" (paragraph 42). Although the Court disagreed with the Upper Tribunal in MF's case on the question of form, it did not disagree in substance (paragraphs 44 and 50). It differed from the Upper Tribunal in considering that the Rules did mandate or direct a decision maker to take all relevant criteria into account (paragraph 44). Accordingly, the new rules applicable to deportation cases should be seen as "a complete code ... the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence" (ibid). "Even if we were wrong about that, it would be necessary to apply a proportionality test outside the new rules as was done by the Upper Tribunal. Either way, the result should be the same". What the Court said about the test of "insurmountable obstacles" can be seen as obiter but it did say that if that means "literally obstacles which it is impossible to surmount, their scope is very limited indeed. We shall confine ourselves to saying that we incline to the view that, for the reasons stated in detail by the UT in Izuazu [[2013] UKUT 00045] at paras 53 to 59, such a stringent approach would be contrary to article 8".

20. In **Kabia (MF: para 298 - "exceptional circumstances") 2013 UKUT 00569 (IAC)** it was held that: (i) The new rules relating to article 8 claims advanced by foreign criminals seeking to resist

deportation are a complete code and the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence: MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 at para 43; (ii) The question being addressed by a decision maker applying the new rules set out at paragraph 398 of HC 395 in considering a claim founded upon article 8 of the ECHR and that being addressed by the judge who carries out what was referred to in MF (Article 8 - New Rules) Nigeria [2012] UKUT 393 (IAC**)** as the second step in a two-stage process is the same one that, properly executed, will return the same answer; (iii) The new rules speak of "exceptional circumstances" but, as has been made clear by the Court of Appeal in MF (Nigeria)**,** exceptionality is a likely characteristic of a claim that properly succeeds rather than a legal test to be met. In this context, "exceptional" means circumstances in which deportation would result in unjustifiably harsh consequences for the individual or their family such that a deportation would not be proportionate".

21. No legal error is proved in relation to the fact a certificate of approval to marry was issued as following challenges to previous refusals to issue such certificates in the High Court the Secretary of State cannot now say who can and cannot get married. There is no legal power to prevent issuing such certificates and so the fact a certificate is issued cannot be determinative in an appeal.

22. It is clear that there has been a period of delay not wholly as a result of the failure by the Secretary of State. There is already a deportation order in force and it is important to remember that this is a revocation application. The panel directed themselves as to the issues they need to consider including the nature of the relationships with family members in the United Kingdom.

23. The panel specifically found that the Appellant's wife was aware of his precarious immigration status and indeed specifically find that if this was a case involving the Appellant alone they would have had no hesitation but to dismiss the appeal. They considered and addressed the issues surrounding the family members following which the panel decided that the decision was proportionate as the family could return to live in Iraq.

24. In relation to the concession in the refusal letter, at paragraph 104 the decision maker states:

As a British citizen, it would not be reasonable to expect your client's wife to accompany her husband to Iraq. However, it would be open to her to do so should she so wish. Whilst you submit that your client's wife is suffering from depression at the prospect of her separation from her husband, it is considered that as a British citizen she could continue to access

the services provided by the National Health Service should she requires them. She would also continue to have the help and support of her family members who are resident in the UK.

25. It is accepted as a general principle that a legal error can be made by going behind the concession without advising the parties and hence enabling them to make representations. Whether the decision was one that was probably open to the panel for them to make on the facts depends whether, if the family was to be split, this would result in unjustifiably harsh consequences for the individuals or their family such that deportation would not be proportionate. Having considered the facts of this case in detail I make the following findings:

a. That the panel clearly considered all the evidence they were asked to consider with the degree of care required in an appeal of this nature, often referred to as that of anxious scrutiny.

b. That the panel gave adequate reasons for their findings on relevant issues which enables a reader of the determination to understand how they arrived at the conclusions they did.

c. That the finding that it was open to the Appellant's wife to return to Iraq with her husband may appear on a first reading to be contrary to the concession made by the Secretary of State that it is not reasonable for her to do so, but no such finding contrary to any concession has in fact been made. In paragraph 53 of the determination the panel state "we are satisfied that is open to the appellant's wife to make the choice to move to Iraq with her husband without article 8 rights being infringed". This in fact mirrors the decision maker's view that whilst it may not be reasonable as the wife as a British citizen cannot be compelled to leave, that is a choice open to her.

d. That even if this is, in reality, a family sitting case it has not been shown on the evidence that the effect of removing the Appellant alone to Iraq and leaving his wife and other family members in the United Kingdom will result in unjustifiably harsh consequences. It is accepted that there will be consequences and that the Appellant and his wife may consider them to be harsh but the facts of this case fail to establish that any such consequences cannot be justified. The Appellant is the subject of an automatic deportation order which requires the Secretary of State to remove him from the United Kingdom as a result of his acts of criminality and conviction for three counts of manslaughter. This is a very serious case and one which, when considering all the factors that need to be considered by the Rules, it cannot be said that

the finding the appeal should be dismissed is one outside the range of findings that the panel were entitled to make on the facts.

e. The appellant has failed to discharge the burden of proof upon him to show that (i) the relative weight attached to the evidence was not a matter for the panel, (ii) that their conclusions are perverse, irrational, or contrary to the law and evidence, or (iv) that any legal error material to the decision to dismiss the appeal has been made.

26. It cannot be legal error to fail to consider issues that arise after the hearing such as the Appellant's wife's sister's deteriorating medical condition. If this has occurred that will be a matter upon which advice can be taken although as the position in law is that the deportation order should remain even if this family are split the Appellant's wife will be available to care for her sister with other family members together with the health professional services in the United Kingdom, if required.

Decision

27. **There is no material error of law in the First-tier Tribunal Judge's decision. The determination shall stand.**

Anonymity.

28. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005. I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 4th July 2014