Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00652/2013

THE IMMIGRATION ACTS

Heard at Stoke on Trent	**Determination Promulgated**
On 15 October 2013	**On 25 October 2013**
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Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

H O K
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mrs K Heath, a Senior Home Office Presenting Officer
For the Respondent: Mr J Howard, instructed by Fountain Solicitors

DETERMINATION AND REASONS

1. The respondent, H O K is a citizen of Iraq. I shall refer hereafter to the respondent as "the appellant" as he was before the First-tier Tribunal and to the Secretary of State for the Home Department as the respondent.

2. On 14 March 2013, a decision was made to make a deportation order in respect of the appellant. The appellant appealed against that decision to the First-tier Tribunal (Judge Frankish) which, in a determination promulgated on 23 May 2013, allowed the appeal on human rights grounds (Article 3 ECHR). The Secretary of State now appeals, with permission, to the Upper Tribunal.

3. The appellant had appealed to the First-tier Tribunal on asylum grounds and also on Article 3/8 ECHR grounds. The appellant claimed to fear persecution and ill-treatment in Iraq because he had worked as an alcohol and pornography importer and a *fatwa* had been issued against him by his local mosque. The First-tier Tribunal recorded the evidence which had been submitted to it [8] and noted also the immigration history of the appellant [3] and the litigation history of his appeals [11-12]. The Tribunal made no findings of fact on the evidence. At [13], the Tribunal wrote:

> "At the outset of the hearing, we enquired of Mr Evans [the Presenting Officer] whether the situation had changed since the hearing of 5 September 2012. He said not and the respondent was still not effecting enforced returns to Iraq, just as she does not do to Zimbabwe. We acceded to his proposal that he take further advice from a senior officer as to whether further information was available as to the respondent's position. On resuming, Mr Evans indicated there no further information was forthcoming. Further inquiry elicited a response but it was a matter of difficulty in obtaining paperwork and nothing to do with the respondent agreeing that it was dangerous to return. He accepted the appellant had no travel document such as a passport of his own."

4. The Tribunal then went on to set out a lengthy quotation from *HM and Others (Article 15(c))* [2012] Iraq CG UKUT 409 (hereafter HM2) In particular, the following passage was highlighted [head note, v]:

> *Regarding the issue of whether there would be a risk of treatment contrary to Article 3 ECHR arising from returns from the UK to Baghdad International Airport (BIAP):*
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> *a. If a national of Iraq who has failed to establish that conditions inside Iraq are unsafe is compulsorily returned to Baghdad International Airport (BIAP) on either a current or expired Iraqi passport, there is no real risk of detention in the course of BIAP procedures (except possibly in respect of those who are the subject of a judicial order or arrest warrant). Nor is there such a risk if such a person chooses to make a voluntary return with a laissez passer document which can be issued by the Iraqi embassy in the UK.*
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> *b. If, however, such a person is compulsorily returned to BIAP without either a current or expired Iraqi passport, he may be at risk of detention in the course of BIAP procedures and it cannot be excluded that the detention conditions might give rise to a real risk of treatment contrary to Article 3 ECHR. Such a risk is however, purely academic in the UK context because under the current UK returns policy there will be no compulsory return of persons lacking such documents.*

5. The Tribunal went on to say at [16]:

> In the light … of **HM** above, we indicated to [the appellant's counsel] that, without hearing evidence, we were of the view that Article 3 is engaged and there was no purpose to be served in proceeding further in respect of asylum and Article 8. He confirmed that he was content with such an approach. Mr Evans made no representations that the matter should proceed to a full hearing. Accordingly, we find that deportation would amount to a breach of Article 3 in the light of the generalised risk in the country situation as it is accepted to be at present. Irrespective of our finding, a renewed decision to remove would have given rise to renewed right of appeal in any event. Anonymity is obviously appropriate.

6. The grounds of appeal complain that the Tribunal failed to determine the appeal on asylum and human rights grounds. The grounds at [5] submit:

> It is submitted the panel have erred in relating this appellant's risk top the general country situation (sic). The Upper Tribunal have found in the latest CG case that currently there was no risk of ill-treatment or the need of humanitarian protection because of the current country situation. The failure to acknowledge the country's situation brings the panel into material error.

7. The grounds of appeal go on to quote *HM2* [325]:

> But all this is, and is likely to continue to be, academic since, in light of the evidence from the respondent relating to new procedures in force since October 2011 regarding minimum acceptable documents – there is no real risk (except possibly in respect of those who are the subject of a judicial order or arrest warrant) that an Iraqi national who has failed to show he is in need of international protection and who faces compulsory return would face detention either at the police station used by BIAP or anywhere else, since in effect they would have been pre-cleared and/or because they are in possession of a current or expired Iraqi passport or (if a voluntary returnee) a laissez passer document and so would be allowed to proceed from the airport without any detention. Of course, it is implicit in the Secretary of State's position that for so long as Iraqi asylum seekers who have failed in their international protection claims lack relevant documentation they will not be the subject of any attempts to enforce their removal; but we remind ourselves that such a scenario does not make their removal contrary to either the Refugee Convention or the Human Rights Convention: see e.g. *MS (Palestinian Territories)* [2009] EWCA Civ 17, [30]; *CG (suspension of removal-lawfulness-proportionality)* Zimbabwe [2010] UKUT 272, *SC (Article 8 – in accordance with the law)* Zimbabwe [2012] 00056 (IAC). Whilst our Article 3 ECHR assessment must consider the consequences of removal on a hypothetical basis, that must have regard to the realities of the procedures relating to documentation.

8. I do not consider that Mr Evans, the Presenting Officer before the First-tier Tribunal, can be said to have actively consented to the course of action proposed by the Tribunal. I accept that he may have made "no representations" but I do not consider that he conceded the appeal or any part of it. I accept that it may be difficult for a Presenting Officer, faced with a Tribunal which announces that it intends to allow an appeal, to challenge that decision and insist that all the grounds of appeal should be addressed. Further, I am not persuaded that Mr Howard's agreement to the course of action proposed necessarily removed from the Tribunal the obligation to determine "any matter raised as a ground of appeal" (see Section 86, Nationality,

Immigration and Asylum Act 2002). In any event, the Tribunal did not record that the appeal on asylum Article 8 grounds had been withdrawn and it did not determine the appeal on those grounds.

9. Mrs Heath accepted that, if the Tribunal's decision to allow the appeal on Article 3 ECHR grounds were not disturbed, then any error of law perpetrated by the Tribunal in failing to determine the appeal on all grounds was unlikely to be so serious as to justify the setting aside of the determination. The problem, however, is that I do not find the Tribunal's determination of the appeal on Article 3 ECHR grounds to be sound in law. I make that finding for the following reasons. The Tribunal has focused upon the position of Iraqi nationals returning without relevant documentation and the risk which they might encounter as a consequence. What the Tribunal has completely failed to do is to engage with the last sentence of the country guidance provided by *HM2* at B(v)(b) ("*Such a risk is however, purely academic in the UK context because under the current UK returns policy there will be no compulsory return of persons lacking such documents")*. I find that the Tribunal has failed to engage with *HM2* with what it says at [325]) (see above). The position of an appellant facing practical admission problems to his home country was also stated in MS *Palestinian territories* [2009] EWCA Civ 17 at [27-30]:

> 27. This is a formidable argument, but in my judgment it fails for three basic reasons. The first, is the absence of removal directions from being included in immigration decisions. That much is common ground, even if the reason for that exclusion is not. Since removal directions are not themselves an immigration decision subject to appeal, it would be in principle anomalous to allow *future* removal directions which have not even yet been made to be challenged as part of the statutory appeal scheme under the 2002 Act: and to do so not for any reason which relates to the immigration decision itself, or its consequences, but for an entirely separate reason which relates solely to the lawfulness of the removal directions themselves.
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> 28. Secondly, that is what the jurisprudence on the 2002 Act has consistently said, and in *GH and MA* that jurisprudence is of this court and binds us. The reasoning of those cases is that the *proposed* country of destination is needed in order to focus the issues which might arise for the purpose of an applicant's asylum and human rights claims. Those claims have to be examined against the background of return to a particular country or territory. It is because such proposed destinations relate to "removal…in consequence of the immigration decision" (ground (g)), that the proposals have to be examined as part of the appeal process to such immigration decisions themselves. Beyond that, however, the jurisprudence accepts that removal directions cannot by themselves be challenged by appeal under the 2002 Act.
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> 29. Thirdly, the 2003 Regulations, which are the linchpin of Mr Seddon's argument, only speak of a "proposed" destination ("the country or territory to which it is proposed to remove the person"). That is the sense in which the notice of decision to remove specifies a named country against the rubric "Removal directions". However, a proposed destination is not the same as a destination to which the Secretary of State has *decided* to remove the applicant, and may not even amount to a destination to which the Secretary of State *intends* to remove the applicant. The word "proposed" seems to me well suited to the situation being contemplated, whereby a destination for return is proposed to provide a focus for an applicant's asylum or human rights claims, but in circumstances where, as some cases have demonstrated, the Secretary of States specifies a country which reflects the applicant's case

about his origins even when that case is disputed and has been rejected by the Secretary of State: see this court's recent decision in *MA (Somalia) v. Secretary of State* [2009] EWCA Civ 4 (15 January 2009). It follows, in my judgment, that the (in any event) future removal directions cannot be an inherent part of the immigration decision in question.

30. Moreover, these conclusions are to my mind all consistent with the nature of removal directions themselves. They are very much the creature of the time when they are given. They may change with changing circumstances and of course with findings which emerge from the appeal process itself. The Secretary of State may have to think again about a destination for removal. In this case, the Secretary of State may consider whether he should seek removal to France, from where MS came illegally to this country (being within Schedule 2's "a country or territory in which he embarked for the United Kingdom"). The essential decision, meanwhile, is the immigration decision or decisions pursuant to which an applicant's asylum or human rights claims (or other claims within the immigration rules) have been adjudicated, and by which, where entry has been illegal, the Secretary of State must be entitled to decide to remove the illegal entrant. If that removal thereafter turns out to be, for other reasons, lawfully and practically impossible, that is another question which has to be dealt with at that time

10. The failure of the Tribunal to engage with the elements of the jurisprudence to which I have referred before it allowed the appeal under Article 3 ECHR amounts, in my opinion, to an error of law such that the determination falls to be set aside. The next Tribunal will need to determine the appeal on asylum and Article 8 ECHR grounds in addition to Article 3. In so far as it made any, the findings of fact of the First-tier Tribunal are not preserved. At the next hearing, it is may be necessary to hear oral evidence and to consider updated country evidence. That is a task which it is more appropriate for the First-tier Tribunal to undertake and consequently I direct that the decision be remade in the First-tier Tribunal.

DECISION

11. This appeal is allowed. The determination of the First-tier Tribunal promulgated on 23 May 2013 is set aside and no part of that determination is preserved. The appeal is remitted to the First-tier Tribunal (not Judge Frankish) to remake the decision on asylum, human rights and humanitarian protection grounds.

Signed Date 23 October 2013

Upper Tribunal Judge Clive Lane