Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07101/2016

THE IMMIGRATION ACTS

Heard at North Shields	**Determination Promulgated**
On 27 April 2017	
Prepared on 3 May 2017	**on 11 May 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE JM HOLMES

Between

R. M.
(ANONYMITY DIRECTION MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Ms Cleghorn, Counsel instructed by Duncan Lewis & Co Solicitors
For the Respondent:	Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant, a citizen of Iraq, entered the United Kingdom illegally and claimed asylum on 24 May 2014. That application was refused on 6 August 2004, and the Appellant's appeal against that decision was dismissed by decision of an Adjudicator promulgated on 17 December 2004 [E1].

2. On 31 July 2007 the Appellant lodged further submissions. Before they were considered or determined by the Respondent, the Appellant was convicted on 4 September 2009 of an offence of possession of a sharply pointed blade in a public place, so that on 23 October 2009 he was sentenced to an immediate term of thirty months imprisonment. He was as a result served with a notice of liability to deportation which prompted further submissions to the Respondent on 28 February 2011 and 20 December 2011. At the same time the Appellant was convicted of another offence, but that second conviction was overturned upon appeal and thus no more need be said about it.
3. On 30 March 2012 the Appellant was served with a deportation order and the reasons for the decision to make it. His appeal to the First tier Tribunal ["FtT"] against that decision was dismissed by decision promulgated on 18 July 2012 [N1]. Although granted permission to appeal to the Upper Tribunal his challenge based upon the approach taken by the FtT to the fact that the second conviction had been quashed, and section 72 of the 2002 Act, was dismissed by decision of a Vice Presidential panel promulgated on 14 May 2013 [Q1].
4. The Appellant then submitted further representations on 11 July 2013 which were treated as an application to revoke the deportation order. That was refused on 25 February 2014, and the application was certified as clearly unfounded by reference to section 94 of the 2002 Act. On 15 April 2014 he submitted further representations, which were rejected on 27 May 2014. Yet further representations were submitted on 17 October 2014 and 5 May 2016, and these prompted a formal decision to refuse a protection and human rights claim on 28 June 2016.
5. It was the decision of 28 June 2016 that was the subject of an appeal to the FtT on 10 November 2016, and which was allowed on Article 8 grounds by decision promulgated on 19 January 2017 because of the Appellant's mental health, the other grounds having been dismissed.
6. Of 8 February 2017 the Respondent was granted permission to appeal to the Upper Tribunal on the basis it was arguable the FtT had erred in its approach to the Article 8 appeal. Having dismissed the Article 3 appeal because the relevant high threshold was not met, and since there was no reference to the guidance to be found in GS (India) & Others v SSHD [2015] EWCA Civ 40, it was considered arguable the Article 8 appeal had

been allowed on the basis of an impermissible comparison between the health services available in Iraq with those available in the UK.

7. The Appellant has filed no Rule 24 Notice in relation to the grant of permission to the Appellant, and has lodged no cross-appeal, and has made no application to adduce further evidence to the Upper Tribunal.
8. Thus the matter comes before me.

The Appellant's protection claim

9. The Judge delivered his decision in advance of the guidance to be found in BA (Returns to Baghdad) Iraq CG [2017] UKUT 18. It is plain from the Tribunal file that the appeal was not advanced on the basis that the Appellant faced a risk of harm in Baghdad simply as a Sunni Kurd; no evidence or submissions to that effect having been advanced to the FtT. Indeed the Judge records that Ms Cleghorn (who also appeared below) expressly declined to pursue any argument by reference to the Refugee Convention.
10. The Judge cannot be criticised for failing to deal with matters that were not advanced before him, and in any event no cross appeal has been raised in the light of BA. I refused Ms Cleghorn's unparticularised oral application to lodge an application for permission to cross appeal out of time, made during the course of her submissions in response to those of the Respondent. No good reason was offered for the Tribunal to extend time for such an application, and it was quite clear that no thought had been given in advance of the commencement of the hearing to whether such an application should be made, or indeed to what the grounds for such an application might be.
11. The only risk of serious harm identified by the Appellant to the Adjudicator in 2004 arose because he had claimed that his family was involved in a blood feud with another family. Both families were said to be based in Kirkuk, the city the Appellant had always identified as his home. The Appellant's evidence in relation to the alleged blood feud was rejected as untrue in 2004, but the FtT, correctly, felt obliged to deal with this issue once again because it was a matter raised once more by the Appellant in the course of his evidence. Once again the account of a blood feud was rejected as untrue [42-5]. The Appellant identified no other risk of persecution for a Refugee Convention reason to the FtT.
12. Through his representatives the Appellant did argue that Kirkuk remained, at the date of hearing in November 2016, one of those areas within Iraq that was subject to

a state of internal armed conflict, so that there were substantial grounds for believing that any civilian returned there would be at real risk of harm simply by their presence, for the purposes of a claim to humanitarian protection. It would appear from the Tribunal file that the Judge was not alerted, by either party, to the existence of the August 2016 COI reports that indicated that although this was undoubtedly once true of Kirkuk, it was no longer the position generally in Kirkuk by the date of the hearing.

13. Whilst that is a matter of concern, I am satisfied that nothing turns on it because the Judge concluded that he was bound to take as his starting point the conclusion of the FtT in 2012, as confirmed by the decision of the Upper Tribunal in 2013, that the Appellant was excluded from a grant of humanitarian protection as a result of the operation of section 72 of the 2002 Act, following his sentence to a term of thirty months imprisonment, and the failure to rebut the presumptions therein. Having examined the evidence before him the Judge concluded that he was not satisfied that he should revisit the previous findings of the Tribunal and reach any contrary view. Thus he proceeded on the basis that the Appellant had been convicted of a particularly serious crime, and, that he was a danger to the community. Neither party suggests he made any error in reaching that conclusion.
14. As a result of the available evidence upon the issue of the Iraqi identity documents held by the Appellant and his ability to obtain the issue of further documents the Judge went on to conclude that the Appellant's return to Iraq was not feasible.
15. Thus, for all these reasons, the humanitarian protection ground of appeal that was advanced before the FtT was dismissed.
16. The claim that the Appellant faced a real risk of a breach of his Article 3 rights was also dismissed. The claim based upon a blood feud having been rejected as untrue, the second limb to the Article 3 claim was the Appellant's current mental health and the foreseeable consequences of cessation or interruption to the treatment he enjoyed in the UK.
17. That second limb to the Article 3 claim was also rejected following an analysis of the medical evidence that had been placed before the FtT (which included the evidence that the Appellant had not engaged with the counselling treatment that had been offered to him, although he was said to be taking the medication prescribed to him) in the light of the guidance to be found in N v UK [2008]

47 EHRR 39 and Paposhvili v Belgium (Appn 41738/10, 13.12.16).

18. In the course of reviewing the medical evidence the FtT accepted that the Appellant did suffer from a significant mental illness for which he was receiving treatment, and that there was a real risk given the state of healthcare in Iraq, and his lack of documentation, and his vulnerability, that he would be unable to access appropriate treatment in Iraq even if it were available. An inability to access treatment upon return would be likely to cause his health to deteriorate. Additionally the humanitarian problems faced by IDPs would be magnified given his vulnerability and the social stigma attached to mental illness [60]. Nevertheless, on the available evidence, it was concluded that the Appellant's position did not pass the high Article 3 threshold because any deterioration would not be serious, rapid, and irreversible, resulting in intense suffering [62].
19. Again neither party suggests the Judge made any error in reaching that conclusion.

The Appellant's Article 8 claim

20. The Judge rejected as untrue the Appellant's claim made in the course of his evidence that he was genuinely in a committed relationship with the British citizen he identified [65-6]. In doing so the Judge noted the absence of any evidence, written or oral from the individual in question. There was no other basis advanced to the Judge upon which the Appellant claimed to have established "family life" in the UK for the purposes of Article 8.
21. It followed therefore that any Article 8 claim could only succeed on the basis of the right to respect for the Appellant's "private life". That begged the question of what its true nature and strength was. Although the Appellant had asserted in his witness statement of 1 November 2016 that he had developed a "very strong private life" in the UK I am satisfied that he entirely failed in his evidence before the FtT to identify in the proper level of detail its nature. There was no material therefore upon which the Judge could have concluded that it had any particular substance beyond the treatment he was receiving for his mental health.
22. Indeed I am satisfied that the Appellant's case was advanced quite baldly in this respect. It is however possible to identify that once his claim to have a girlfriend was rejected, the Appellant's case in relation to his "private life" was in reality limited to his mere

presence in the UK for 13 years, and, the medical treatment he continued to receive from time to time for his mental health in the form of the prescribed medication which he took. There was no evidence of any close relationship with a counsellor, because the Appellant had not engaged with counselling. Nor did the evidence extend to demonstrating a close relationship with, or regular attendance upon, a general practitioner. Nor did the evidence identify any friend(s) upon whom he depended for support when his mood was low, or when the symptoms of his mental illness affected him.

23. The Judge noted that the Appellant's presence in the UK had throughout been unlawful, deriving as it had from an illegal entry in May 2004, and that although his presence in the UK had endured for 13 years, that period did not amount to half of the Appellant's life.

24. In all the circumstances the Judge concluded, undoubtedly correctly, that the Appellant derived no benefit from either paragraph 399 or 399A of the Immigration Rules [68].

25. The Judge made no reference to section 117A-D of the 2002 Act, and the clear public interest in the Appellant's removal, in the course of his decision. That was undoubtedly an error, because both section 117B(4) and section 117C(3) applied to the Appellant; even if it were not material because the Judge can be taken to have had the correct principles in mind from his reference to paragraphs 398, 399 and 399A of the Immigration Rules.

26. The result of the application of section 117B(4) and section 117C(3) was that Parliament had directed that little weight was to be given to any "private life" the Appellant had established whilst present unlawfully. Since the Appellant had not established that either Exception 1 or Exception 2 applied to him, the public interest required his deportation. That could not however be the end of the matter, since "little weight" is not to be equated with "no weight".

27. The relevant medical evidence placed before the FtT were the two reports dated 6 August 2014, and 28 December 2015, of Dr Quinton Deely, a Consultant Psychiatrist. Although Ms Cleghorn asserted in the course of her submissions to me that this was not evidence that had been relied upon by the Appellant in support of his appeal, it is, as I pointed out to her, impossible to reconcile that assertion with the fact that the 2015 report was served upon the FtT by fax from his solicitors on the day of the hearing, and the 2014 report

was served upon the Respondent in the course of the submissions made on his behalf on 5 May 2016 [V1].

28. Again, although Ms Cleghorn asserted in the course of her submissions to me that these were reports prepared upon the Appellant at the instigation of the Respondent as part of her duty to assess the Appellant's suitability for detention, it is impossible to reconcile that assertion with the introductions to the two reports, which make it quite clear that Dr Deeley was instructed on the Appellant's behalf to offer his opinion evidence as part of the preparation for a claim for damages by way of compensation for the decline in mental health the Appellant claimed had resulted from one or more periods of immigration detention (as opposed to his imprisonment), and, in an effort to prevent any further period of immigration detention.

29. It is in my judgement quite clear from those reports that Dr Deeley was not informed in the course of his instructions on behalf of the Appellant that the FtT had rejected as untrue the Appellant's claim to be involved in a blood feud with the family of his sister's husband. Equally it is quite clear from those reports that Dr Deeley did not attempt to undertake any analysis of the medical facilities the Appellant might be able to access in the event of his future deportation to Iraq. Contrary to Ms Cleghorn's submissions, Dr Deeley did not offer evidence upon whether anti psychotic medication was available either in Iraq generally, or, in Baghdad in particular. (I am satisfied that there was no obvious need to consider the availability of counselling because Dr Deeley recorded that the Appellant had not engaged with such treatment when it had been offered to him in the UK.)

30. Dr Deeley's opinion was that the focus of the Appellant's paranoid psychotic was upon UKBA, and in consequence upon those individuals he perceived to be its officers and agents. The Appellant claimed to believe that UKBA had planted a device in his head, and, that UKBA were seeking to provoke and humiliate him to the point that he became so mentally unwell that he would kill himself. That begged the question of how he would respond after removal to Iraq. This was not an issue that Dr Deeley engaged with in the first report. The extent to which he did so in the second report is limited to the short conclusion that because the Appellant believed he would face a murder attempt in a blood feud, the anxiety and sense of helplessness associated with his removal would most likely cause his condition to deteriorate.

31. There is no criticism on the part of the Judge in the course of his decision to the approach taken by Dr Deeley to the information available, and the Respondent for her part does not seek before me to criticise the Judge's thorough analysis of the medical evidence that was placed before him.
32. It was common ground before the FtT that failure of a protection claim on health grounds under Article 3 did not necessarily entail failure of a claim on health ground under Article 8, and the Respondent's challenge does not suggest otherwise. Not every action which adversely affects moral or physical integrity will interfere disproportionately with the right to respect to private life guaranteed by Article 8, although mental health must be regarded as a crucial part of private life, since the preservation of mental stability is an indispensable precondition to effective enjoyment of the right to respect to private life; Bensaid v UK [2001] 33 EHRR 205.
33. It is however instructive to recall that Mr Bensaid was unable to demonstrate a violation of his Article 8 rights in the event of his removal from the UK to Algeria as a result of any likely future deterioration in his serious psychotic illness of schizophrenia. That conclusion was reached despite the fact that the condition was managed in the UK by medication, and his claim that it would relapse in the event of his removal, and that he would be unable to access the same level of medical care in Algeria so that any relapse would not be adequately treated. His ability in practice to access within Algeria the same drug he received in the UK, and which he would need to continue to access in Algeria to avoid deterioration in his condition was said to be imponderable. Thus the effect of the removal was said to be highly likely to result in a deterioration in his mental health, but even so his circumstances did not result in a breach of his Article 8 rights.
34. As explained in GS, and in MM (Zimbabwe) [2012] EWCA Civ 279, once an Article 3 claim based on health grounds has failed, an Article 8 claim based on health grounds cannot prosper without some separate or additional factual element sufficient to engage Article 8. Thus, a claim based simply upon the inadequacy of the medical facilities available in the country of return is bound to fail. It is the acknowledged failure of the Judge to make reference to this jurisprudence that is said by the Respondent to demonstrate the error of law in the approach to the Article 8 claim that requires me to set aside the decision and to remake it.

35. I note that Ms Cleghorn on behalf of the Appellant argues that the failure is immaterial, and in the alternative that there should be a remittal to the FtT for the appeal to be reheard in its entirety. Neither argument has merit. It is quite plain from the submissions made that the ambition is simply to reopen the Article 3 appeal. There is no need to make any further findings of primary fact in relation to the Article 8 appeal, the decision can be remade on the basis of the unchallenged findings of fact of the FtT.
36. The rationale for the application of Article 8 to mental health cases was identified in GS as "*the preservation of mental stability is an indispensable precondition to effective enjoyment of the right to respect for private life*". The reasoning identified in Bensaid being that mental stability is integral to an individual's identity and/or their ability to function socially as a person. In MM it was noted that since the decision in Bensaid it was not possible to identify any example of a successful Article 8 claim in a mental health case, following failure of an Article 3 claim. I take that however to be a comment in relation to the outcome of the proportionality balancing exercise, rather than a comment upon whether Article 8 was in principle engaged by the particular circumstances of any individual claimant.
37. The claimant in MM had a history of serious mental illness, and he too had been diagnosed with a psychotic illness, most likely schizophrenia. With a break in the continuity of the treatment he received in the UK there was a substantial risk of relapse, and with each relapse his baseline level of functioning would deteriorate. Thus the prognosis upon deportation to Zimbabwe was considered to be extremely poor because he would receive neither appropriate medication, nor support. The Tribunal was not satisfied that he had established "family life" in the UK, and identified his "private life" as not arising because of work friendships or social ties, but because of his dependency upon family members, his clinicians, and prescribed medication as a result of his illness. Thus the Tribunal turned to the question of proportionality, recognising that this was a deportation case, and so balancing his interests against the legitimate public interest in the prevention of crime, rather than simply in the maintenance of effective immigration controls.
38. There are in my judgement two potential points of distinction in principle between the position of this Appellant and that of the claimant in MM. Both suggest

however that the balance of proportionality in this case is tipped more in favour of deportation than it was in MM. First the Judge found the Appellant had failed to rebut the presumptions that he had been convicted of a particularly serious crime, and, that he posed a danger to the community. No such findings were made in relation to the claimant in MM. Second, the evidence did not establish that the Appellant's illness was pivotal to, or a central cause of his offending, whereas that was the position of the claimant in MM.

39. In MM the Court of Appeal concluded that the Upper Tribunal had erred not in the approach taken to whether Article 8 was engaged as a result of the "private life" of the claimant, but the Upper Tribunal had erred in then becoming diverted from an important aspect of the issue of whether it was proportionate to deport, through a failure to engage with the evidence that the offending was the result of the illness. That had resulted in a failure to reach clear conclusions upon whether there was a continuing risk of further offending, given the illness was well controlled by the medication he had subsequently received. That is not the position in this case, as the Judge's findings in relation to section 72 of the 2002 Act identified.

40. In MM attention was drawn to the jurisprudence that emphasised how exceptional the circumstances would have to be before a disproportionate breach of Article 8 was established, with the caution that it was not easy to think of a foreign health care case that could succeed under Article 8 if it had failed under Article 3. The "*no obligation to treat*" principle had to apply equally to Article 8 cases as it did to Article 3 cases. In my judgement these comments go to the proper approach to be taken to the issue of proportionality, and not merely to the issue of whether or not a claimant established that Article 8 was engaged. Thus Moses LJ concluded;

> "*The only cases I can foresee where the absence of adequate medical treatment in the country to which a person is to be deported will be relevant to Article 8, is where it is an additional factor to be weighed in the balance, with other factors which by themselves engage Article 8. Suppose, in this case, the appellant had established firm family ties in this country, then the availability of continuing medical treatment here, coupled with his dependence on the family here for support, together establish "private life" under Article 8. That conclusion would not involve a comparison*

between medical facilities here and those in Zimbabwe. Such a finding would not offend the principle expressed above that the UK is under no obligation to provide medical treatment here when it is not available in the country to which the appellant is to be deported."

Conclusions

41. The Judge did fall into error in the approach taken to the Article 8 claim in a manner that requires me to set aside that aspect of his decision, and remake it. I do so on the assumption that Article 8 is probably engaged as a result of the Appellant's "private life" in the UK, although it is difficult to identify any aspect to that "private life" beyond his mental health and the medication he is prescribed for that illness, coupled with his thirteen year residence in this country.
42. I note that the Appellant's "private life" has been formed following illegal entry, and that the Appellant has always been in the UK unlawfully. In the light of the unchallenged findings that this was a particularly serious crime, and that the Appellant constitutes a danger to the community, it is plain that it continues to be the case that Parliament has directed that the public interest requires his deportation. This is not a case in which the offending was a feature of the illness, or one in which the treatment the Appellant has accepted has removed the risk of further offending.
43. After taking full account of the guidance to be found in particular within MM and Bensaid I am satisfied that the decision to deport was not disproportionate and the Article 8 appeal must be dismissed. That is the only aspect of his decision with which I am seized, and the Judge's conclusions in relation to the other grounds of appeal therefore stand.

Deputy Upper Tribunal Judge JM Holmes
Dated 3 May 2017