IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/38131/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th May 2015	**On 20th May 2015**

Before

THE HONOURABLE MR JUSTICE EDIS
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WAFAA MAHMOOD SHUKUR AL-OBAIDI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms. E. Savage, Home Office Presenting Officer
For the Respondent: Ms. L. Targett-Parker, Counsel instructed by Farani Javid Taylor, Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State (SSHD) against a decision of the First-tier Tribunal, Judge Paul of the First-tier Tribunal, which was promulgated on 23rd December 2014, following a hearing on 18th December 2014. By that decision, the FTT Judge allowed an appeal by Mrs. Al-Obaidi on human rights grounds against a decision of the SSHD

dated 3rd September 2013 to refuse her application for Leave to Remain (LTR).

2. A preliminary issue arises as to whether the appeal is in time, or whether an extension of time is required. The decision was promulgated on the on the 23rd December 2014 and received by the SSHD on the 24th, Christmas Eve. Rule 33 of **The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014/2604** provides in relation to the giving of written notice of appeal against a decision on the First Tier Tribunal:

> "(2) Subject to paragraph (3), an application under paragraph (1) must be provided to the Tribunal so that it is received no later than 14 days after the date on which the party making the application was provided with written reasons for the decision."

3. Rule 11 deals with calculating time under the Rules and says

> ***'11.— Calculating time***
>
> (1) An act required or permitted to be done on or by a particular day by these Rules, a practice direction or a direction must, unless otherwise directed, be done by midnight on that day.'

4. The SSHD gave notice of appeal on 7th January 2015, and time expired at midnight on that day. Accordingly the SSHD was not out of time and the application for extension made on her behalf out of excessive caution is unnecessary.

The Facts

5. Mrs. Al-Obaidi is a citizen of Iraq who originates from Falujah. On 12th November 2010 she married a British national in Syria. Her husband is employed by the University of Bedford as an academic. From 2006 until the Summer of 2012 he was working in that capacity in Oman and lived with his wife in that country after their marriage. He then returned to the UK.

6. On the 5th November 2012 she applied for LTR on the basis of her relationship with her partner and on the basis of her private life. She had arrived in the United Kingdom on the on 9th July 2012 from Oman on a family visit visa. She had not made an out of country application for a spousal visa because that could only be made in her country of origin, Iraq, and she was in Oman. She told the FTT in her witness statement that she could not return to Iraq to make that application because it was not safe for her to do so. Her family in Iraq will kill her if they can, she says, because she married a British citizen and they now regard her as a traitor and an enemy to the Iraqi people. She says that the last time she visited her family she was subjected to beating and tortured by being burnt on her back with cigarettes. On the 16th October 2012 she was examined by a doctor in the United Kingdom who found marks which were consistent with having been caused in this way.

7. The chronology is important. At the time of the decision of the SSHD, Mrs. Al-Obaidi was not pregnant and the couple had no children. In the 15 months between the date of the decision of the SSHD and the FTT hearing, a child was born. He was born on the 7th July 2014 very prematurely at 27 weeks gestation. He was not discharged from hospital until the 9th December 2014, still very much under weight. Therefore, by the time of the hearing of her appeal, the whole case had changed. The FTT had to take into account the interests of a child, who is a British citizen and who is dependent on the NHS because of his continuing vulnerability. He is entitled to care from the NHS. Because this is an in country appeal, the FTT was required to consider the position as it was at the date of the hearing and was not limited to considering the circumstances appertaining at the date of the decision of the SSHD.

8. The decision of the SSHD was that Mrs. Al-Obaidi could not be granted LTR as a partner because she was in the United Kingdom as a visitor, and is thus excluded by Appendix FM R-LTRP 1.1 and E-LTRP.2.1. The SSHD then considered whether she could be granted LTR under paragraph EX.1 of Appendix FM and found that she could not. This was because first she had no children in the UK, and secondly because there were no insurmountable obstacles preventing Mrs. Al-Obaidi and her husband from continuing their relationship in Iraq. The application under Appendix FM therefore was refused. The claim based on private life was determined under Rule 276ADE and rejected because she had only been in the United Kingdom for a matter of weeks at the date of her application, rather than 20 years as required by the Rule. The SHD decided that no exceptional circumstances existed and refused to grant LTR under Article 8 of the EHCR without giving reasons.

9. It is unnecessary to consider the initial refusal of the SSHD further, because, as we have said, the case has changed utterly since then.

Mrs. Al-Obaidi's case as advanced before the FTT

10. The case was argued on the basis of a concession that Mrs. Al-Obaidi did not qualify under the partner route for the reasons given by the SSHD in the original decision which are summarised above. It was, however, now submitted that the usual consequence of that failure, namely removal to the country of origin where an out of country application as the wife of one British citizen and mother of another might be made, should not follow because there are exceptional circumstances and further, that it would be disproportionate to the public interest in the maintenance of effective immigration controls and therefore would violate her right to a family and private life. The matters relied upon were the fact that the child could not be expected to travel to Iraq and needs his mother; that she should be expected to travel to Iraq because of the dangerous state of affairs in that country generally and the specific hostility for her family to her; and the fact that he husband is well able to maintain his family financially.

The submissions of the SSHD at the FTT

11. It is worth setting out the extract of the Decision of the FTT dealing with this in full:-

> "15. Mr. Clarke submitted that, essentially, deception had been used in this case and that that was a highly material factor in the proportionality assessment having regard to the need to maintain firmer and proper immigration control. It was also submitted that, as the baby could not be breast-fed and was relying on a formula, it would not be impractical for the appellant to return to either Oman, Syria/Iraq and make an out-of country application to be admitted back into the UK. It appeared that, on the basis of the husband's personal circumstances, that application would be successful.
>
> "16. Mr. Clarke referred to the case of *Harrison* at paragraph 63 and also to the Human Rights case of *Omoregie* at paragraphs 62-68. He submitted that these all went to the question of whether or not the manner in which the appellant had come to this country was something that should be taken into account in the proportionality assessment.

The Decision

12. The FTT Judge accepted the evidence of Mrs. Al-Obaidi's husband and found that it was plain that circumstances conspired to mean that he had to come back to the UK in 2012 and that presented immediate difficulties as far as his wife concerned, having regard to the circumstances that existed in Iraq. By this finding, he sought to place in context the "deception" which led Mrs. Al-Obaidi to enter the UK as a visitor when in fact she intended to stay here with her husband. The finding means that the Judge accepted that she would have been in danger if she had returned to Iraq which was the only place where she could make the appropriate out-of-country application. This was not because of the danger posed by her family, because the Judge made no finding about the allegation of torture, noting that this was not an asylum case. The finding rested on the general dangers in that country.

13. The Judge then said this:-

> "21. The trump card in this case is that the family has a baby and all the medical evidence suggests that this baby is in need of special care. The medical evidence provided shows this in some detail. It would be utterly impractical, having regard to the baby's age and health, to expect the mother to go to another country to make an application which (it is plain to me) would succeed. The reason for that is that the new provisions of FM provide financial thresholds and other requirements for such an application to succeed which, in my view, it is plain –given the right advice – the appellant would be able to make successfully. Having regard to that, and indeed to the general principles set out the case of Chikwamba, I do not consider it proportionate in this case to require the appellant to leave the country. All the evidence suggests that this family's baby will need careful treatment for the foreseeable future and

that would be put severely at risk if the appellant were to have to leave the country at this stage."

The SSHD's Grounds of Appeal

14. The SSHD puts forward two grounds:-

a. Trump Card It is submitted that the FTT Judge erred in law by finding that the child was a trump card, which is contrary to the decision of the Supreme Court in *ZH (Tanzania) v. SSHD* [2011] which contains the following paragraph

> "41 The first error may well have been due to the way the mother's case was presented to the Court of Appeal. It was submitted that the fact that the children were British citizens who had never been to Tanzania trumped all other considerations: para 16. That was, as the court recognised, to press the point too far. But there is much more to British citizenship than the status it gives to the children in immigration law. It carries with it a host of other benefits and advantages, all of which Baroness Hale JSC has drawn attention to and carefully analysed. They ought never to be left out of account, but they were nowhere considered in the Court of Appeal's judgment. The fact of British citizenship does not trump everything else. But it will hardly ever be less than a very significant and weighty factor against moving children who have that status to another country with a parent who has no right to remain here, especially if the effect of doing this is that they will inevitably lose those benefits and advantages for the rest of their childhood."

b. Public Interest

i. It is contended that the decision of the FTT Judge contained no proper balancing of the public interest, and no recognition of the weight to be afforded to section 117B(1) of the Nationality, Immigration and Asylum Act 2002 which by amendment with effect from 28th July 2014 contains the following relevant provisions

> **117A Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), *"the public interest question"* means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

Reliance is also placed on Sabir (Appendix FM – EX.1 not free standing) [2014] UKUT 63 at paragraph 33 where the Upper Tribunal said

> "33. The public policy of requiring a person to apply under the Immigration Rules from abroad is not the only matter weighing in the SSHD's side of the balance. There are cogent reasons for requiring the claimant to return to Pakistan to make an application for entry clearance and I conclude it would be proportionate for her to dos so. The claimant

> arrived in the UK as a visitor. She does not meet the requirements of the Rules and it was clear at the time of the marriage that she could not do so; she would be expected to leave the UK and return to Pakistan to make an application for entry clearance absent circumstances such that such a course of action would be unreasonable or harsh, contrary to her right to respect for her family and private life. The likelihood or otherwise of her being able to meet the requirements of the Rules for entry clearance is not a relevant consideration – see SB (Bangladesh) v SSHD [2007] EWCA Civ 28."

Oral Submissions of SSHD.

15. Ms. Savage, who appeared before us on behalf of the SSHD, submitted in addition to the two substantive grounds that the FFT Judge had failed to give adequate reasons for the decision not to prefer the public interest in the proportionality exercise. She further submitted that the family life in the UK was developed while Mrs. Al-Obaidi's immigration status was precarious, although we noted that section 117B(5) places particular weight on this aspect in the context of private life claims, and family life claims are not given this statutory weight. She submitted that the whole family could return to Iraq and submitted that this distinguished the case from *Chikwamba v. SSHD* [2008] 1 WLR 1420 where that was not an option. We expressed at the hearing a little surprise at that submission, on the facts of this case, but we do not doubt that it may in other cases have significant traction.

Oral Submissions on behalf of Mrs. Obaidi

16. These were substantially based on a helpful skeleton argument by Ms. Targett-Parker which is on the file and we will not repeat its contents here. In brief, she submitted

    a. That the "trump card" was not the child's nationality, as in *ZH (Tanzania)* but his state of health. It is submitted that the Judge made this quite clear in the first sentence of paragraph 35, quoted above.

    b. That the Judge made a reasoned decision and applied the well-known dictum of Baroness Hale in *ZH (Tanzania)* at paragraph 34:-

    > "Further, it is clear from the recent jurisprudence that the Strasbourg court will expect national authorities to apply article 3.1 of UNCRC and treat the best interests of a child as "a primary consideration". Of course, despite the looseness with which these terms are sometimes used, "a primary consideration" is not the same as "the primary consideration", still less as "the paramount consideration".

    c. That in regarding the prospects of success in the out-of-country application from Iraq as relevant, the Judge was doing no more than accepting the submission made on behalf of the SSHD by Mr. Clarke recorded at paragraph 15 of the decision, which we have set out at paragraph 11 above.

d. In the event that the decision is to be re-made, it is submitted that there are no factual issues and the matter can be determined on the basis of the FTT's findings of fact. The claim continues to be advanced outside the Rules on the basis of Article 8.

Discussion and Decision

Trump Card

17. We agree with Ms. Targett-Parker that the first sentence of paragraph 21, which we repeat here for convenience, shows that the Judge did not mean that the existence or nationality of the child was a "trump card" (the prohibited reasoning), but that the exceptional factor which merited this description was his need for special care. The Judge said

> "The trump card in this case is that the family has a baby and all the medical evidence suggests that this baby is in need of special care."

which could hardly be plainer.

18. We respectfully suggest that the use of the phrase "trump card" is shorthand which might give a misleading impression and is best avoided. In any proportionality assessment there will be factors going in both directions and the tribunal must assess the weight of each on the facts of the particular case and decide where the balance lies. A trump card, in a game, is one which defeats all others, whatever their value, because it has a special power under the rules of the game. There is no equivalent in a proper proportionality assessment. What the Judge clearly meant by this expression was that he had considered the relevant factors and decided that the needs of the vulnerable child were decisive because he gave them significant weight.

Public interest

19. It appears to us that no magic formula is required to demonstrate that the Judge has addressed the public interest in effective immigration control. Having said that, it will avoid reasons-based challenges if the Judge does identify the factors in favour of refusing an application in the wider public interest and explains why, in a particular case, they do or do not outweigh the right to family and/or private life relied upon. An express reference to section 117B of the 2002 is not mandatory, but is good practice. Here, there was no such reference and we have therefore scrutinised the decision with particular care to ensure that the public interest was properly balanced. As will appear, that section actually provides the answer to this case although not in the way suggested by the SSHD.

20. The Judge relied upon *Chikwamba* [2008] 1 WLR 1420 which is a decision all about proportionality and the public interest. The headnote reads as follows:

> "On the claimant's appeal—
>
> *Held* , allowing the appeal, that, while the maintenance and enforcement of immigration control was a legitimate aim of the Secretary of State's policy in relation to article 8 family life claims, an article 8 appeal should

> not be dismissed routinely on the basis that it would be proportionate and more appropriate for the applicant to apply for leave from abroad; and that to remove the claimant to Zimbabwe where conditions were harsh and unpalatable and disrupt her family life would violate her and her family's article 8 rights and was not justified by the need for effective immigration control."

21. That simple proposition has been explained most recently in the decision of the Upper Tribunal in *R (Chen) v. SSHD* [2015] UKUT 189 whose headnote, so far as relevant reads:-

> "(i) Appendix FM does not include consideration of the question whether it would be disproportionate to expect an individual to return to his home country to make an entry clearance application to re-join family members in the U.K. There may be cases in which there are no insurmountable obstacles to family life being enjoyed outside the U.K. but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate. In all cases, it will be for the individual to place before the Secretary of State evidence that such temporary separation will interfere disproportionately with protected rights. It will not be enough to rely solely upon the case-law concerning *Chikwamba v SSHD [2008] UKHL 40* .
>
> (ii) Lord Brown was not laying down a legal test when he suggested in *Chikwamba* that requiring a claimant to make an application for entry clearance would only "comparatively rarely" be proportionate in a case involving children (per Burnett J, as he then was, in *R (Kotecha and Das v SSHD* [2011] EWHC 2070 (Admin)).
>
> (iii) In an application for leave on the basis of an Article 8 claim, the Secretary of State is not obliged to consider whether an application for entry clearance (if one were to be made) will be successful. Accordingly, her silence on this issue does not mean that it is accepted that the requirements for entry clearance to be granted are satisfied."

22. It is inconceivable that the Judge could have had in mind *Chikwamba* without appreciating that the proportionality exercise under Article 8 required a balance between the public interest and the rights of an applicant who was being required to return to the country of origin to make an out-of country application. The SSHD's representative asserted that the application in Iraq was likely to succeed and relied upon that fact which was, therefore, common ground both as to its relevance and accuracy. If, as is now contended, the SSHD thereby invited the FTT to err, she cannot now rely on the error on appeal. That is not conducive to the maintenance of an effective immigration control system which requires a consistency of approach. An appellate tribunal has power to allow a party to change its approach and to make points on appeal which are precisely the opposite of those made below, but it is to be exercised only for good reason. No such reason exists here.

23. The Judge then went on to conclude that it was not practical to expect the mother to go to Iraq, where she would be in danger, and to leave her frail baby behind. Given that it was agreed that the trip would probably be pointless because she would succeed in obtaining her

spousal visa if she applied properly for it, this was a valid consideration. The belated reliance of the SSHD before us on appeal on *SB (Bangladesh) v. SSHD* [2007] EWCA Civ 28 does not change the matter, and not only because we would not allow the SHHD to withdraw the concession made below that the prospects of success were (a) relevant and (b) strong. That decision was cited with approval as to part of its reasoning in *Chikwamba* where the House of Lords agreed with the Court of Appeal that it would be bizarre if an applicant with a weak claim to re-entry might more readily be granted LTR than one whose claim was strong. However, the House of Lords did not exclude the prospects of success on the re-entry application from its decision in the case. To that extent *SB (Bangladesh)* was not applied. Lord Brown, with whom all other members of the committee agreed, said this in deciding the case at paragraph 46 (we have emphasised the sentence which, if the SSHD's submission is right, contains the prohibited reasoning):-

> "46 Let me now return to the facts of the present case. This claimant came to the United Kingdom to seek asylum, met an old friend from Zimbabwe, married him and had a child. He is now settled here as a refugee and cannot return. *No one apparently doubts that, in the longer term, this family will have to be allowed to live together here.* Is it really to be said that effective immigration control requires that the claimant and her child must first travel back (perhaps at the taxpayer's expense) to Zimbabwe, a country to which the enforced return of failed asylum seekers remained suspended for more than two years after the claimant's marriage and where conditions are "harsh and unpalatable", and remain there for some months obtaining entry clearance, before finally she can return (at her own expense) to the United Kingdom to resume her family life which meantime will have been gravely disrupted? Surely one has only to ask the question to recognise the right answer."

24. It appears to us that the evidence in the present case shows that precisely the same considerations apply, with the additional factor of the existence of the vulnerable child to which we will return. The present case is to that extent stronger than *Chikwamba*. In *Khizar Hayat v The Secretary of State for the Home Department* [2011] UKUT 00444 (IAC), the Court of Appeal at paragraph 30 considered the relevance of a failure by an applicant to make an application for entry clearance in his home state to the Article 8 assessment. It held that where the Secretary of State had no sensible reason for insisting on the application of the policy on the facts of an individual case, the failure to make the out-of country application for Entry Clearance should cease to be a relevant Article 8 consideration. Circumstances which would be relevant to this assessment would include the prospective length and degree of disruption of family life. The length of the disruption is governed by the prospects of success in the supposed out-of-country application. It is not necessary for us to decide whether the authorities mean that it is not possible to contend that an applicant with a weak case for re-entry should be granted LTR on that ground, but that an applicant with a clear case may rely on that fact as relevant to the

Article 8 assessment. It means that the length of the disruption will be short, but pointless.

25. We accept without hesitation that the maintenance of effective immigration controls is in the public interest. We would have accepted this with equal certainty even if Parliament had not put the matter beyond doubt in section 117B of the 2002 Act. Part of that interest is served by removing people to their country of origin if the Rules require their applications for LTE to be made there. Otherwise, those who obtain entry to the UK by ruse, or at least who enter under one route and are seeking to remain under another, are advantaged over those who seek to comply with their obligations properly. This is not in the interests of a fair system and unfair systems are likely to be ineffective which is not in the public interest. Further, the policy has the effect of providing a powerful incentive to those wishing to come here to comply with the Rules. However, *Chikwamba* as subsequently explained, shows that where there is evidence in a particular case that insisting on applying that policy will cause hardship without any corresponding benefit, then it can and should be relaxed.

26. The SSHD was, of course, not able to have regard to her duty under section 55 of the Borders, Citizenship and Immigration Act 2009 when making the original decision, although she has been able to do so when deciding what submissions to make to the FTT, in deciding whether to appeal and in deciding what submissions to make to us. This provides:-

> ***'55 Duty regarding the welfare of children***
>
> (1) The Secretary of State must make arrangements for ensuring that—
>
> > (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom'

27. Finally, and importantly when weighing the public interest we recall the terms of section 117B(6) of the 2002 Act:-

> '(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> > (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
> >
> > (b) it would not be reasonable to expect the child to leave the United Kingdom.'

28. This child is a "qualifying child" because he is a British citizen, see the definition in section 117D. This appeal would not have been given permission, in our judgment, if the Judge had referred to this provision, and added the italicised words below to the last sentence of his decision. This is an illustration of the salutary practice of specifically considering sections 117A-D wherever they apply. Sometimes they

contain the answer, which can be clearly and briefly stated by reference to the will of Parliament.

> "All the evidence suggests that this family's baby will need careful treatment for the foreseeable future and that would be severely at risk if the appellant were to have to leave the country at this stage. *It is obviously not reasonable to expect this vulnerable child who is entitled to care from the NHS to leave the United Kingdom and take his chances in Iraq. Accordingly, the public interest, by statute, does not require the removal of his mother either, see section 117B(6) of the 2002 Act."*

29. No doubt the Judge thought that, on his findings of fact, the need for the child to remain went without saying. For this reason, we consider that there is no error of law in the decision which applied the correct principles. In fact, it is a stronger case than he said it was because of the 2002 Act as amended and section 55 of the 2009 Act. Additional reasons would not have illustrated any weakness of the decision, rather the reverse. We accept that it might have been better phrased in the respects we have identified, but that is no reason for setting it aside. The function of reasons is to enable the parties, and the public, to know why one party won and the other lost. The SSHD lost in this case because after her initial decision was taken a very premature baby was born in the UK and it was not reasonable to expect the child (and therefore the mother) to go to Iraq while his mother made an out-of-country application which, by agreement would have very strong prospects of success which were relevant. This appeal is dismissed.

30. We add that if we had set aside the decision for want of reasons or other legal error we would ourselves have re-made the decision and upheld the result. Our reasoning sufficiently appears above.

Notice of Decision

The appeal is dismissed

No anonymity direction is made.

Signed Date

Mr Justice Edis

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Mr Justice Edis