Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: OA/08879/2015**

THE IMMIGRATION ACTS

Heard at Bennett House, Stoke	**Decision & Reasons Promulgated**
On 2nd June 2017	**On 20th June 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

BS
(ANONYMITY DIRECTION MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – AMMAN

Respondent

Representation:

For the Appellant: Mr S Park of Dicksons Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against the decision of Judge O'Hagan of the First-tier Tribunal (the FtT) promulgated on 7th November 2016.

2. The Appellant is a male Iraqi citizen born 1st December 1999. He is now 17 years of age.

3. The Appellant applied for entry clearance to enable him to join his father, to whom I shall refer as the Sponsor, and who is settled in the United Kingdom.

4. The application was refused on 12th May 2015. The Respondent considered paragraph 297 of the Immigration Rules. The Respondent noted the Sponsor left Iraq in February 2000, approximately three months after the Appellant was born. The Appellant had been in the care of his grandparents since 2002. The Respondent was not satisfied that the Sponsor has had sole responsibility for the Appellant's upbringing, and the application was refused with reference to paragraph 297(i)(e). The Appellant appealed to the FtT, and the hearing took place on 11th October 2016. The FtT heard oral evidence from the Sponsor. The FtT took into account that there had been a previous appeal hearing in 2012, in which it was found that the Sponsor had not had sole responsibility for the Appellant's upbringing. The FtT in October 2016 made the same finding, having considered further evidence. The FtT also found that there were no serious and compelling family or other considerations which made exclusion of the Appellant undesirable and therefore the requirements of paragraph 297(i)(f) were not satisfied.

5. The FtT went on to consider Article 8 of the European Convention on Human Rights (the 1950 Convention) outside the Immigration Rules and concluded that the Respondent's decision to refuse entry clearance was proportionate.

6. The Appellant applied for permission to appeal to the Upper Tribunal. The grounds seeking permission are set out below;

> "The learned judge erred in his determination and reasons;
>
> (a) On six occasions he refers to the male appellant as female: paragraphs 30, 33 (x 2), 37 (x 2) and 41. Justice must be seen to be done. However these errors suggest a serious lack of care in considering the facts and evidence of the case and possibly a cut and paste approach.
>
> (b) In paragraphs 39-41 he appears to hold himself out as a medical expert based partly upon his experience as a judge in a Social Entitlement Chamber. As such he exceeds his authority and jurisdiction as a judge and goes beyond the matters of which he is entitled to take judicial notice.
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> It is further averred that he has failed to take into account the different circumstances of northern Iraq including significantly lower life expectancies and has based some of his findings upon medical practices of western Europe, and that (paragraph 40) he has misread the medical evidence that the Appellant's grandfather could not walk 'for long periods'.
>
> (c) He was wrong to consider the security problems and lawlessness in the relevant area of northern Iraq as at August 2016. The correct time would have been in the first half of 2015 (the date of the application's subsequent refusal (12/5/2015)) when the region was considerably more dangerous.
>
> (d) Paragraph 42 suggests that a finding that Article 15(c) of European Council Directive 2004/83/EC of 29th April 2004 is met is required for

the Appellant to prove that there are serious and compelling ... other considerations which make the exclusion of the Appellant undesirable. Such an approach places an excessive burden upon the Appellant. Further he has failed to take account of FCO's advice against travel in the area.

(e) He has failed to take into account;

(i) the fact that the Sponsor has decided that the Appellant (his dependent son) should join him in the United Kingdom is indicative of him having sole responsibility for the Appellant's upbringing, such a decision being the most important affecting his life;

(ii) the Sponsor's evidence that his parents demurred to him in matters relating to the Appellant's upbringing and the fact that they did not wish to take responsibility for the Appellant, that being the Sponsor's duty;

(iii) the cultural values of northern Iraq which lead to the Appellant's mother severing links with him and abandoning responsibility for him once she had remarried and had a second family (paragraph 33(iii) (iv)).

(f) (Paragraph 41) Having found 'he will need guidance and support as he moves from childhood to adulthood' he has failed to explain adequately why the Sponsor, who is his closest family member actively involved in his upbringing, should not be best placed to do that, and why the presumption in favour of the parent should be overlooked in favour of the Appellant's elderly and infirm grandparents who support the Appellant's application to join his father".

7. Permission to appeal was granted by Judge of the FtT E S Martins and I set out below, in part, the grant of permission;

2. The grounds assert that the error of the judge in mistaking the Appellant's gender shows a lack of care in considering the facts and evidence in the appeal. It is also submitted that the judge appeared to hold himself out as a medical expert, based partly upon his experience as a judge in the Social Entitlement Chamber and so exceeded his authority. The judge is said to have erred, in considering matters beyond the date of the ECO's decision and failed to take into account, the different circumstances of northern Iraq. The judge is said to have placed a heavier burden than required on the Appellant, in assessing whether there are serious and compelling circumstances in his case.

3. The assertions made in the grounds are evident on the face of the decision and disclose an arguable error of law.

4. All grounds are arguable.

5. An arguable error of law is shown.

8. Following the grant of permission the Respondent lodged a response pursuant to rule 24 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

It was contended that the FtT had directed itself appropriately, although the author of the rule 24 response conceded that she had not seen the FtT decision which was not attached to the grant of permission.

9. Directions were issued making provision for there to be a hearing before the Upper Tribunal to decide whether the FtT decision contained an error of law such that it should be set aside.

The Upper Tribunal Hearing

10. Mr Bates indicated that he had seen the FtT decision, and would be making submissions to the effect that the FtT had not materially erred in law.

11. I then heard oral submissions on behalf of the Appellant. Mr Park submitted a further copy of the Foreign and Commonwealth Office travel advice on Iraq last updated on 14th September 2016 which contained a map showing where the Appellant lived in northern Iraq.

12. By way of oral submissions Mr Park relied upon grounds (a) – (f) of the application for permission to appeal.

13. In brief summary Mr Bates contended that the FtT decision showed no material error of law. The FtT had applied the correct standard of proof, considered all material evidence, and applied the appropriate case law.

14. While it was accepted that the FtT had mistakenly referred to the Appellant as a female on occasions, it was submitted that this did not amount to a material error, and the FtT had not exceeded its authority, when the judge had made reference to sitting as a judge in the Social Entitlement Chamber. Mr Bates submitted that the FCO travel advice relates to British citizens intending to travel in that part of Iraq, and not to residents who have always lived in that area. Mr Bates submitted that there was no independent background evidence to undermine the FtT findings.

15. Mr Park then made oral submissions in response, reiterating and expanding upon grounds (a) – (f) of the application for permission to appeal. In conclusion Mr Park referred to MM (Lebanon) [2017] UKSC 10, pointing out that the Supreme Court found that the Immigration Rules and IDIs failed to take proper account of the duty regarding the welfare of children set out in section 55 of the Borders, Citizenship and Immigration Act 2009. Mr Park accepted that because MM (Lebanon) was decided in February 2017, this point had not been raised in the application for permission to appeal and neither the Tribunal nor the Respondent had been given prior notice that reference would be made to MM (Lebanon).

16. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

17. I do not find that the FtT materially erred in law. I will address the grounds of appeal in the order in which they are set out in the application for permission;

(a) It is correct that the FtT made some references to the Appellant as a female in four paragraphs. Overall the vast majority of references to the Appellant refer to him as a male. It is clear that the FtT was aware that the Appellant is a male Iraqi citizen. The errors as to gender may not create a good impression on the reader, but, without more, they do not indicate a serious lack of care in considering the facts and evidence, nor do they indicate a "cut and paste" approach.

(b) I do not find that the FtT Judge held himself out as a medical expert. He has commented upon observations made by medical colleagues. It may have been more appropriate for this to have been mentioned at the hearing, to give the Appellant's representative an opportunity to respond, but I do not accept that the comments made in paragraphs 39-41 demonstrate that the judge exceeded his authority and jurisdiction, and I do not find a material error of law disclosed in this ground.

(c) In my view the FtT was not wrong to consider the security problems at August 2016. I do not agree that the correct time would have been in the first half of 2015. This is an appeal against refusal of a human rights claim. The FtT is entitled to consider the evidence at the date of hearing.

(d) I do not accept that paragraph 42 indicates that the FtT erred in law. In that paragraph the FtT considered the evidence, finding that the evidence was indicative of "a reasonably functional civil society in operation". The FtT also found that the evidence "points to the existence of a functioning health infrastructure. It is clear from the evidence that there is a functioning education system". The FtT also found the evidence indicated functioning commerce. I find that the FtT took an appropriate approach to considering whether there were any serious and compelling family or other considerations which made exclusion of the Appellant undesirable. The FCO travel advice is of limited value, as this is advice to British citizens intending to travel in Iraq, and does not relate to Iraqi citizens who have always lived in that area.

(e) I find no merit in this ground. The fact that the Sponsor has decided that the Appellant should join him in the United Kingdom is not indicative of him having sole responsibility for his upbringing. The FtT took into account the Sponsor's evidence, and in my view took into account all material evidence. The FtT was obliged to consider the Devaseelan principles and did so at paragraphs 28 and 29. In my view the FtT was correct in recording at paragraph 29 that;

> "I was being asked to do the very thing that Devaseelan says I should not do; to consider arguments intended to undermine the earlier judge's decision".

(f) I do not accept that the FtT has failed to provide adequate reasons in paragraph 41. The decision needs to be read as a whole. This was an appeal against refusal of a human rights claim. An important issue when considering the appeal, was to consider whether paragraph 297 was satisfied. The FtT analysed all material evidence and found that paragraph 297(i)(e) and (f) were not satisfied, and adequate reasons were given for those conclusions. That was not the end of the matter, as the FtT went on to consider Article 8 outside the Immigration Rules. Although setting out at paragraph 48(ii) that T (Jamaica) [2011] UKUT 483 (IAC) was authority for stating that section 55 of the Borders, Citizenship and Immigration Act 2009 does not apply to children seeking entry clearance to the United Kingdom, the FtT also considered the guidance in Mundeba [2013] UKUT 88 (IAC) at paragraph 34. This confirms that when an Entry Clearance Officer is assessing an application under the Immigration Rules, there must be an assessment of the child's welfare and best interests. The Supreme Court found in MM (Lebanon) that the IDIs in their current form do not adequately fill the gap left by the rules, they are defective and need to be amended in line with the principles established by the ECtHR. The section 55 duty stands on it own and it should be clear from the rules themselves that it has been taken into account.

18. I do not find MM (Lebanon) demonstrates an error of law in the FtT decision. The FtT in relation to Article 8 found that family life exists between the Appellant and Sponsor and that the Respondent's decision interfered with that family life. The FtT then considered proportionality. The FtT took into account that the Appellant had always lived in Iraq, that his strongest ties and attachments are in Iraq, and this includes ties with his grandparents. The FtT had already found that there were no serious and compelling family or other considerations which made exclusion of the Appellant undesirable.

19. Having found that the requirements of paragraph 297 could not be satisfied, and recognising that that was not the end of the matter, the FtT carried out an appropriate proportionality exercise, and was entitled to conclude that the Respondent's decision was proportionate.

Notice of Decision

The making of the decision of the FtT did not involve the making of a material error of law such that the decision must be set aside. I do not set aside the decision. The appeal is dismissed.

Anonymity

No anonymity direction was made by the FtT. I make an anonymity direction because the Appellant is a child. Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings. This direction is made pursuant to rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed Date 6th June 2017

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed Date 6th June 2017

Deputy Upper Tribunal Judge M A Hall