Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/10275/2017

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 11 December 2018	**On 21 December 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

S I K
[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: Mr Mark Schwenk, Counsel instructed by Parker Rhodes Hickmotts
Solicitors
For the respondent: Mr Myroslav Diwnycz, a Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity order
The Upper Tribunal has made an anonymity order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or

indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

1. The appellant appeals with permission against the decision of the First-tier Tribunal dismissing her appeal against the respondent's decision to refuse her international protection under the Refugee Convention, humanitarian protection, or leave to remain in the United Kingdom on human rights grounds. The appellant is a citizen of Iraq, of Kurdish ethnicity.

Background

2. In 2012, the appellant became engaged to marry a man of Iraqi origin, who was settled in the United Kingdom. He had been naturalised a British citizen the previous year after spending 15 years in the United Kingdom. The appellant has siblings in Iraq, and cousins in the United Kingdom.

3. They married in Iraq in April 2012 and after 6 weeks, the husband returned to the United Kingdom to apply for entry clearance for his wife to join him there. He could not find suitable employment and the entry clearance application was not made.

4. The husband moved back to Iraq in January 2014. From February 2014 they lived together in Iraq in a home of their own. In April 2015, the appellant gave birth to their son, a British citizen by birth because of his father's nationality. In September 2015, the husband returned to the United Kingdom to renew his British passport. He had not felt well in Iraq, so he also sought medical advice and was diagnosed with what is described as 'blood cancer'. He remained in the United Kingdom for treatment, in hospital for 5 to 6 months, and in the spring of 2016 he was in remission, so he was able to visit the appellant and his son in Iraq, but only to stay for 20 days because treatment was continuing and he needed to be in the United Kingdom to receive it.

5. The appellant and their son remained in Iraq, living with the husband's uncle until September 2015, when the husband's health deteriorated again, and the uncle paid for the appellant and the child to travel to the United Kingdom to join him. The child was desperate to see his father, and her husband wanted to see them both.

6. The appellant said that she had lost her Iraqi passport but was able to travel on a document which the uncle placed in her bag. She has not sought to replace the passport, although there would be no risk to her in doing so in the United Kingdom. The appellant arrived in the United Kingdom on 20 September 2016 and claimed asylum on arrival.

7. A week later, the appellant heard from the uncle that her brothers were not happy that she had left Iraq to be with her husband and had threatened to kill the appellant. It is her case that she has not heard from her husband's uncle since then.

8. The husband has now recovered and is working again. The appellant has remained in the United Kingdom. Her immigration status has always been unlawful or precarious, but her son is a qualifying child.

First-tier Tribunal decision

9. The First-tier Judge was not satisfied that the claimed threat from the appellant's brother was credible; Iraqi cultural norms required the appellant to live with her husband's family, and she had done just that, rejoining her husband in the United Kingdom when it was possible to do so. The Judge found that the threat part of the account shifted over time and was not credible, also that she claimed asylum on arrival, a week before the threat was said to have been made via the uncle.

10. The Judge accepted the limited evidence of the husband's illness and remission, the marriage in Iraq, and the husband's subsequent attempt to obtain entry clearance for her as his wife, followed by their living together in Iraq in their own home.

11. The Judge found that the family had originally planned to live in Iraq together and had even identified a family home in which to do so, before the husband's illness. The husband now being in remission, the First-tier Judge considered that they could properly return to Iraq and continue with their planned life together.

12. The Judge did not consider that the best interests of the appellant's child were such as to outweigh the United Kingdom's right to control immigration. If the husband did not return to Iraq with his family, then now that he could work again, an application could be made for her to come to the United Kingdom with entry clearance as his spouse. The Judge considered the asylum claim to be 'a flagrant attempt to circumvent the Immigration Rules for entry clearance as a spouse'. If the appellant was required to leave the United Kingdom, the appellant's husband could care for the British citizen child, who was not yet 4 years old.

13. The First-tier Judge dismissed the appeal on all grounds. The appellant appealed to the Upper Tribunal.

Permission to appeal

14. Permission to appeal was granted, based on the best interests of the appellant's three year old son and on a challenge to the Judge's reasoning on the asylum claim. When granting permission to appeal, Judge Bird considered that the findings of fact were adequately reasoned but did not expressly exclude the reasons challenge from the grant of permission.

15. The focus of the grant of permission was the appellant's child:

> "4. …It is arguable that the Judge has made an error of law in her consideration whether it would be unreasonable to expect the appellant's British citizen child to relocate with her to Iraq or whether it would be in the best interests of the child to be separated from his mother. An arguable error of law has been made in the consideration of the law applicable – the Judge has considered whether there would be 'insurmountable obstacles' rather than the question of reasonableness."

16. The last point in [4] of the grant of permission is erroneous: the question of insurmountable obstacles was considered at [34] in the First-tier Tribunal decision, but the reasonableness question was considered separately at [37].

Rule 24 Reply

17. The respondent filed a rather sparse Rule 24 Reply:

> "2. The respondent opposes the appellant's appeal. In summary, the respondent will submit *inter alia* that the Judge of the First-tier Tribunal directed himself [sic] appropriately. The Judge does in fact find [37] that it would be reasonable to expect the appellant's child to leave the United Kingdom with her; the correct test is applied."

18. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

19. I heard oral submissions from Mr Schwenk and Mr Diwnycz.

20. For the appellant, Mr Schwenk relied on *Safi* [2018] UKUT 388 (IAC) and *Ferrer* [2012] UKUT 00305 (IAC) to establish that, absent any specific limitation on the grounds of appeal all grounds were arguable. I accept that such is the correct approach.

21. Mr Schwenk relied on evidence about honour crimes in Kurdistan, to be found in the respondent's *Country Policy and Information Note on Kurdish 'Honour' Crimes* of August 2017, in particular at 5.1.3, 7.2.1-7.2.4 and 7.2.8, and on the Canadian IRB Note on *Honour-based violence in the Kurdistan region; state protection and support services available to victims* of 15 February 2016. Women in Kurdistan were required to be obedient to social norms.

22. As regards the situation of the child, Mr Schwenk relied on the decision of the Supreme Court in *KO (Nigeria) & Ors v Secretary of State for the Home Department (Respondent)* [2018] UKSC 53, handed down on 24 October 2018, at [10]-[11]. The First-tier Judge had not had the benefit of the guidance hterein given but Mr Schwenk argued that the reasons for not placing determinative weight on the best interests of the appellant's British citizen child as expressed in the decision imported blame for his mother's immigration history and were unlawful. *KO* was arguable inconsistent with the 'powerful reasons' guidance given by the Court of Appeal in *MA*

(Pakistan) & Ors, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Anor [2016] EWCA Civ 705 at [44], and in *MT and ET* (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 88(IAC) and the respondent's own instructions to caseworkers.

23. Mr Schwenk asked me to allow the appeal and to remit the appeal to the First-tier Tribunal for the proper test to be applied.

24. For the respondent, Mr Diwnycz accepted that the appellant had not simply followed the uncle's instructions. In her witness statement at [6] it was clear that she also wanted to come to the United Kingdom, but the uncle had assisted her. He asked me to agree with the observation in the grant of permission that the reasons challenge on the asylum appeal was unarguable and the appellant's evidence concerning the claimed threats against her was lacking in credibility.

25. The appellant had embellished her account in order to remain in the United Kingdom. She could not meet the entry clearance requirements for a spouse, and she knew it. The decision of the First-tier Judge did not blame the child and was *KO (Nigeria)* compliant. The decision should be upheld.

26. I reserved my decision, which I now give.

Analysis

27. I begin with the asylum claim. I have reviewed the passages in the UKBA and CIRB documents to which I was referred. The sequence of events was that the appellant claimed asylum before the alleged threats had even been made, and further, that in living with a member of her husband's family and then coming to join him in the United Kingdom, she was compliant with social norms in Kurdistan. There is no merit whatsoever in the reasons challenge on the asylum claim.

28. As regards the challenge to the decision based on the best interests of the appellant's child, I note that he is still very young. In *MT and ET,* the Upper Tribunal held that:

> "*1. A very young child, who has not started school or who has only recently done so, will have difficulty in establishing that her Article 8 private and family life has a material element, which lies outside her need to live with her parent or parents, wherever that may be. This position, however, changes over time, with the result that an assessment of best interests must adopt a correspondingly wider focus, examining the child's position in the wider world, of which school will usually be an important part.*"

That is precisely the situation of this child.

29. Nor can it be said that the Judge overlooked the reasonableness test, or that he punished the child for the mother's immigration history. The decision in this appeal is compliant with the *KO (Nigeria)* 'real world' test. The child is old enough to live with either parent and the appellant mother

has no basis of stay in the United Kingdom. It is a matter for the appellant and her husband where they choose to make their family life, and with which of them the child lives. The 'powerful reasons' test in *MA (Pakistan)* was expressly rejected in that decision: although at [44] Lord Justice Elias (with whom Lady Justice King and Sir Stephen Richards agreed) indicated that for himself, he would prefer to apply the 'powerful reasons' approach, he recognised that in *MM (Uganda) & Anor v Secretary of State for the Home Department* (Rev 1) [2016] EWCA Civ 617, another panel of the Court of Appeal had reached the contrary conclusion and he did not seek to distinguish that approach, which was approved in *KO (Nigeria).*

30. For all of the above reasons, I dismiss the appellant's appeal and uphold the decision of the First-tier Tribunal.

DECISION

31. For the foregoing reasons, my decision is as follows:
The making of the previous decision involved the making of no error on a point of law
I do not set aside the decision but order that it shall stand.

Date: 12 December 2018 Signed Judith AJC Gleeson Upper Tribunal Judge Gleeson