Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04474/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 March 2019	**On 28th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE APPLEYARD

Between

M S F H H
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Jegarajah, Counsel.
For the Respondent: Mr S Whitwell, Home Office Presenting Officer.

DECISION AND REASONS

1. The Appellant is a citizen of Iraq who applied for entry clearance to the United Kingdom on the ground of family life. The Respondent considered the application against the requirements EC-P.1.1 of Appendix FM of the Immigration Rules HC395 (as amended). The application was refused and the Appellant appealed.

2. Following a hearing, and in a decision promulgated on 17 December 2018, Judge of the First-tier Tribunal Keane dismissed the Appellant's appeal.

3. He sought permission to appeal which was granted by Judge of the First-tier Tribunal Cruthers on 21 January 2019. His reasons for so granting were: -

> *"1. This appeal – against a spouse entry clearance refusal decision dated 25 January 2018 – stands dismissed by a decision of First-tier Tribunal Judge Keane. Having assessed the evidence, the judge concluded that the appeal did not succeed through the application of article 8 of the European Convention on Human Rights.*
>
> *2. In deciding that a grant is appropriate here (but without restricting that grant), I offer the following comments:*
>
> *- paragraphs 11 to 15 of the grounds suggest that the judge should have found that the appellant met the relevant requirements of the immigration rules. But it appears that at the hearing on 23 October 2018 Counsel for the appellant was notable to put forward an argument as to how the appellant met / meets the requirements of the immigration rules - see paragraphs 5 and 6 of the decision under consideration*
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> *- however, it seems to me that paragraphs 7 to 10 of the grounds are arguable in that is it arguable that the judge materially applied a test of "precariousness" – a test that arguably has no relevance in out of country appeals (such as this one) (see the judge's paragraphs 11 on). In addition, referring to paragraphs 16 to 19 of the grounds, it may be arguable that if the judge's reasoning was based on the perceived reasonableness of the appellant's spouse ("the sponsor") and their son relocating to Iraqi Kurdistan, then that reasoning is not sustainable (cp, for example, paragraph 44 of* ***KO and others [2018] UKSC 53, 24 October 2018)****.*
>
> *3. Overall, there is sufficient in the grounds to make a grant of permission appropriate. But the appellant and sponsor should not take this grant of permission as any indication that the appeal will ultimately be successful."*

4. Thus, the appeal came before me today.

5. The Appellant's Sponsor was present at today's hearing. At the outset Ms Jegarajah asked if she could draw my attention to recent developments in that the Sponsor gave birth to the Appellant's child on 3 February 2019. That child remains an inpatient in a neo-natal specialist care facility and as of today, the child's ill-health remains undiagnosed. Further the Sponsor continues to work on a part-time basis. It was Counsel's intention to persuade me that Judge Keane had materially erred in his decision and to remake that decision today allowing the appeal and taking into account further evidence in relation to the Appellant's new-born child. That evidence was contained within a bundle which she asked me to consider both at this juncture and again prior to my rising to consider whether or not the Judge had in fact materially erred as asserted. On both occasions I rejected the bundle of evidence as it did not go to the immediate issue before me as to whether or not there was a material error within Judge Keane's decision.

6. The background to this appeal is that the Appellant is an Iraqi Kurd and qualified veterinarian. He met the Sponsor in May of 2017. In November of the same year an application was made for entry clearance to the United Kingdom under Appendix FM to the Immigration Rules to join his wife in the United Kingdom. The entry clearance officer

found that £2000.00 of the funds were not properly evidenced. There was a further issue concerning the absence of a valid medical certificate in relation to screening for active pulmonary tuberculosis. However, this issue was resolved at the hearing by an unequivocal concession that appropriate medical evidence had then been presented. Beyond the issue of the Appellant's inability to meet the financial requirements of the Immigration Rules the appeal was also considered under Article 8 of the European Convention on Human Rights. The Appellant's first child was born on 23 January 2018 and at the date of hearing was 9 months old. One of the issues central to this appeal is the fact that the Appellant's Counsel, Mr S Canter, at the First-tier Tribunal hearing conceded that the Appellant could not meet the requirements of the Immigration Rules. It is recorded within paragraph 5 of the Judge's decision as follows: -

> *"… Mr Main further submitted that the Appellant had not satisfied the eligibility financial requirement of the applicable Immigration Rules at the date when the application for entry clearance was made and Mr Canter agreed with such a submission."*

7. The grounds seeking permission to appeal are three-fold. It is asserted that the Judge has applied the "fundamentally wrong test" at paragraph 11 of his decision. It states there: -

> *"11. It is necessary for me to arrive at a finding whether the instant appeal disclosed a precarious family life. I find that the instant appeal did disclose a precarious family life. The appellant has at no time had a right to reside in the United Kingdom. The appellant and Mrs Kerim commenced a relationship, which became a marital relationship, at a time when each knew, or surely should be taken as having known, if they had averted their minds to the matter, that their family life insofar as it concerned a prospect of living together in the United Kingdom was precarious because the appellant did not have a right to reside in the United Kingdom."*

I have deliberately set out this paragraph in full so that the reference to a "precarious family life" is seen within the context it was written. Ms Jegarajah submitted that the question of precariousness of family life simply does not arise in an entry clearance case of this kind where the applicant for entry clearance is seeking lawful permission to the United Kingdom under the Immigration Rules. Accordingly, she contended that Judge Keane's reference to **R (on the application of Agyarko) (Apellant) v SSHD (Respondent) [2017] UKSC 11** had no bearing. The Judge has further erred at paragraph 12 of his decision in considering the question of proportionality in the context of the maintenance of effective immigration control. However, the Appellant is not an immigration offender nor a person who has had or has leave to remain of any kind. For this reason, Ms Jegarajah asserts that the Judge's "reasoning is profoundly flawed".

8. Mr Whitwell submitted that the reference to "precariousness" was not made in the context of section 117B of the Nationality, Immigration and Asylum Act 2002. He submitted that the Judge had not erred as asserted by his opponent.

9. Dealing firstly with this ground I find that it is quite simply not made out. On reading the Judge's decision as a whole it is plain that at no point in time does he have in mind the issue of "precariousness" in the context put forward by Ms Jegarajah and consequently it cannot be said that there has been an application of the "fundamentally wrong test". The Judge is not seeking to apply a test that has no bearing on entry

clearance cases. He is looking at the family life of the Appellant and coming to a conclusion that was open to be made on the evidence regarding its very nature. He has come to that conclusion in the setting of the entire factual matrix, including Counsel's concession as to the ability of the Appellant to meet the Immigration Rules, and within the required balancing exercise finding, as he did, that exceptional and compassionate circumstances were not established in this appeal.

10. Secondly, it is submitted that the Judge erred in not making findings in respect of the appeal under the Immigration Rules. The application was made when the Sponsor was nine months pregnant and the Judge has failed to recognise the Sponsor's advanced pregnancy which should have lead the Judge to conclude that it would be fair and just to apply evidential flexibility in respect of omissions within the evidence. The Judge has failed to make findings in respect of these issues.

11. Mr Whitwell submitted that it was unnecessary for the Judge to set out these issues given the concession that was made by the Appellant's Counsel at the hearing as detailed earlier in my decision.

12. The simple fact is that the Judge cannot be said to have materially erred by accepting this concession. The Appellant was represented by Counsel at the hearing. He had his instructions which were conveyed to the Judge who in the circumstances had no alternative but to accept the concession and move on to consider the appeal outside the Immigration Rules. In the circumstances the Judge cannot be criticised (even if it was open to him) for failing to apply evidential flexibility and for factoring into his balancing exercise the Appellant's inability to satisfy the requirements of the Immigration Rules.

13. Finally, Ms Jegarajah submits that the Judge's decision is irrational in that it expects a British citizen and her son to live in Kurdistan. She refers in her grounds to paragraph 109 of the R (**MM (Lebanon)) v SSHD [2017] UKSC 10** and 67 of **Agyarko** and asserts that in light of those decisions the entire paragraph 12 of Judge Keane's decision "falls away". In a case where there is a British citizen child there is no question of the mother and child relocating. British citizenship itself constitutes insurmountable obstacles to relocation. This is a case where a family are to be permanently separated. The Sponsor meets the financial threshold and the Appellant has been separated from his child for a year since birth. Given the Supreme Court's declaration that the spouse visa rules are unlawful in respect of Section 55 of the BOIC 2009, there is recognition of this in this appeal as the pregnant Sponsor is expected to meet the financial threshold when pregnant. She has taken up two jobs to support the Appellant. This, it is submitted, amounts to good reason as to why the appeal should be allowed with a direction that entry clearance be granted forthwith.

14. Mr Whitwell submitted that being a British citizen is no obstacle to relocation as can be seen by the very facts in this appeal where the Appellant and his Sponsor were able to meet up in Turkey (and where Ms Jegarajah informed me the Appellant's second child had been conceived).

15. Like the first two grounds there is no merit in this one either. There is no irrationality in the Judge's decision. He was entitled to find, as he did, that there were no insurmountable obstacles to relocation and that the Appellant's family life could be

conducted in Iraq (or indeed elsewhere) there was evidence that the Sponsor had not lost all connection with that country including the fact that she had returned there on four occasions and was able to speak Kurdish Sorani. Given the Judge's findings in relation to the failure of the Appellant to be able to meet the Immigration Rules the conclusion that he came to in relation to Article 8 was open to be made. It has been adequately reasoned.

16. There is here no material error of law.

Notice of Decision

In those circumstances the decision of Judge Keane is not set aside.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their 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.

Signed Date 25 March 2019

Deputy Upper Tribunal Judge Appleyard