Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/08069/2018

THE IMMIGRATION ACTS

Heard at Cardiff CJC	**Decision & Reasons Promulgated**
On 21st February 2019	**On 15th March 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

AVAN [M]
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Laura Gardner (Counsel)
For the Respondent: Mr Chris Howells (HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge C H O'Rourke, promulgated on 30th July 2018, following a hearing at Columbus House in Newport on 26th July 2018. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Iraq, a female, and was born on 3rd April 1988. She has a husband and two children in the UK who are all British citizens and are all resident in this country. She appealed against the decision of the Respondent refusing her claim for asylum, being dated 18th June 2018.

The Appellant's Claim

3. The essence of the Appellant's claim is that due to her marital situation, and coming from the Kurdish region, she is at risk of "honour-based" violence and she cannot rely on the protection of the authorities there. She comes from Erbil. This is in the KRG. She is a Muslim. She has a fear of her father. He has mistreated her on account of the Appellant's relationship with her husband which has not been accepted. There had been an escalating threat of violence over time. Her father had decided that the shame of divorce, if the Appellant were to be divorced from her husband, would be better than the shame of being abandoned by her husband, who had taken her children and gone to the UK without her.

The Judge's Findings

4. The judge had little hesitation in rejecting the Appellant's asylum claim based upon "honour-based" violence. Detailed and lengthy reasons were given for this (see paragraph 23). In short, the judge concluded that the Appellant's husband had returned to the UK with both their children, despite the younger child being only about 11 months old at the time. He had done so rather than leave the children with their mother, the Appellant, and this indicated that there was a "pre-arranged plan for the Appellant to join them in the UK, not related to any alleged 'escalation' of hostility from her father" (see paragraph 23(v)).

5. That left the question of the Appellant's appeal under Article 8, and the judge held, that with the asylum claim having fallen away, the public interest in favour of immigration control, as mandated by Section 117B could not be overlooked because it must be given significant weight in the proportionality exercise. It was a matter of choice for the children's parents, whether they should return with the Appellant back to Iraq, or stay with their father in the UK. If, on the other hand, the children did not wish to be separated from their mother, then "it would be reasonable for them to accompany her to the KRG" (see paragraph 29(iii)).

6. The appeal was dismissed.

7. The grounds of application suggest that the judge erred in law in two vital respects. First, that under Regulation 16 of the Immigration (European Economic Area) Regulations 2016, evidence has to be shown of "strong reasons" as to why the children should be separated from the Appellant. The judge ought to have considered Regulation 16. The fact that the Secretary of State had not made a specific decision in this regard was not a reason not to consider it given that this was a One-Stop Procedure appeal.

8. Second, that the judge had failed, in relation to Article 8 ECHR, to have regard to the Secretary of State's policy and the relevant case law on this issue. The judge identified Section 117B(6) of the 2002 Act. However, what was overlooked there was that this makes it quite clear that in the case of a person who is not liable to deportation, then the public interest "does not require the person's removal" where two conditions are satisfied. The first of these is that there is a genuine and subsisting parental relationship with the qualifying child. The second is that it would not be reasonable to expect the child to leave the United Kingdom. In this case, both the children were qualifying child. They were British citizens. Parliament had indicated that the public interest did not require the removal of a person who has a genuine and subsisting parental relationship with a child where it is not reasonable to expect the child to leave. Although the judge stated (at paragraph 28(vi)) that the Secretary of State's representative at the hearing had accepted that the children are not required to leave the UK, it did not mean that the judge could then in turn say that it was open to the children to leave with their Appellant mother if they so wished. The Secretary of State's own policy makes it clear that British children cannot be expected to leave the UK.

9. On 4th September 2018 permission to appeal was granted on the basis that it was unclear why the judge refused to consider the Appellant's removal might breach the 2016 Regulations. Furthermore, the judge had not identified "powerful reasons" being needed to justify that it was reasonable to expect a British citizen child to leave the UK. The 2016 Regulations were mentioned in the Grounds of Appeal. Therefore, a decision should have been made by the judge in relation to them. Moreover, the judge considered and gave reasons why there were no "powerful" reasons. Nevertheless the point was arguable.

10. A Rule 24 response dated 2nd October 2018 makes it clear that the judge did not address Regulation 16. However this did not make any material difference to the outcome of the decision. This is because the Appellant could not succeed under Regulation 16 and in particular Regulation 16(5). British citizen children could continue to reside in the UK with their father, if the Appellant was removed from the UK.

Submissions

11. At the hearing before me on 21st February 2019, Miss Gardner, submitted that there were two issues before this Tribunal. First, that Regulation 16 should have been considered. It is not enough to say that the Appellant would have failed, in any event, under Regulation 16(5), as maintained in the Rule 24 response, if it is not even clear that Regulation 16 as a whole has been considered in the first place. What is important about Regulation 16(5) is the principle that the children would not be able to reside in the UK without their mother, and this needed a consideration for the simple reason, that although their father had left Iraq to bring the children to the UK, when the youngest was only 11 months old, this was a matter of just four months. As against that, what was now being said was that if the

Appellant mother was to leave the UK and return back to Iraq, this would be for a much longer period, and at a time when the children had grown up somewhat, and the period of separation was likely to be protracted and indeterminate.

12. Second, the other issue was the decision in relation to Article 8, in relation to two British citizen children, both of whom were qualifying children, neither issue of which was in dispute. Under Section 117B(6) there had to be "strong reasons" for suggesting that children should be removed from the jurisdiction in those circumstances.

13. For his part, Mr Howells relied upon the Rule 24 response. He made the following two submissions. First, that the judge did not consider Regulation 16, but that this was not a material error, because the Appellant would not have been able to succeed under Regulation 16(5) in any event, given that there was another carer, namely, the children's father, who could look after the two young children, if the mother were to be removed.

14. Second, that the judge's findings are summarised at paragraph 28(c) when he makes it clear that returning back to Iraq:

> "... would be a choice for their parents, with either the children returning with their mother, or as entire family to the KRG, or remaining in their father's sole care in UK, as they have done before, until their mother can comply with entry clearance requirements."

15. In reply, Miss Gardner submitted that the Appellant's father had left Iraq with the two children, to come to the UK in December 2017. Just four months after that, the Appellant, their mother, came to the UK. In these circumstances, it cannot realistically be maintained that the situation here is the same as what it was before. The fact remains that as was made clear in **MA (Pakistan) [2016] EWCA Civ 705**, there have to be:

> "Powerful reasons why, having regard in particular to the need to treat the best interests of the children as a primary consideration, it may be thought that once they have been in the UK for seven years, or are otherwise citizens of the UK, they should be allowed to stay ..." (see paragraph 44 of that decision).

Error of Law

16. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. First, there is the simple point that if the Appellant had argued in the grounds of application that Regulation 16 of the 2016 Regulations fell to be applied, in relation to two British citizen children, who were so young that they were dependent upon their mother, who was their carer, then that provision had to be in terms considered. It was not. Unless it was considered, one could not properly decide whether the application would fail under Regulation 16(5).

17. Second, the decision by the judge, particularly in circumstances where the Secretary of State had already accepted that the children would not be expected to leave the UK, was contrary to the Home Office's own policy for British citizen children. Moreover, the provisions of Section 117B(6) of the 2002 Act was such that the Appellant could succeed under the Immigration Rules, because she was not liable to deportation, and had a genuine and subsisting parental relationship with a qualifying child, with respect to whom it was not clear at all whether it would be reasonable to expect such a child to leave the United Kingdom. The matter has simply not been properly explored.

18. The whole question of whether the children can properly be expected to leave the UK, in circumstances where they are British citizen children and settled here, needs further examination. The children's "best interests" would not be met here if they were to return with their mother to Iraq and their father to remain in this country, and this cannot just be described as "her husband's choice" (see paragraph 29(iii)).

Notice of Decision

19. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision shall be set aside. I remake the decision on the basis of Practice Statement 7.2(a) and remit this matter back to the First-tier Tribunal to be determined by a judge other than Judge C H O'Rourke.

20. An anonymity direction is made.

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.

21. This appeal is allowed.

Signed Date

Deputy Upper Tribunal Judge Juss 13th March 2019