Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/04066/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 14th January 2020	**On 7th April 2020**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

KRC
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms S Anzani, Counsel instructed by Morgan Pearse Solicitors
For the Respondent: Mr P Singh, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Iraq. On 3rd November 2011 she married her husband [SA], in Sulaymaniyah, Iraq. SA was born in Sulaymaniaah, but acquired British Citizenship following a consideration of his case under the 'legacy programme'. He had travelled to Iraq several times before his marriage to the appellant. On 23rd May 2014, the appellant arrived in the UK with leave to enter as a spouse valid until 16th January 2017. On 26th December 2016, she made an application for further leave to remain as the spouse of a British citizen. Her application was refused by the

respondent for reasons set out in a decision dated 21st February 2017. Her appeal against that decision was dismissed by First-tier Tribunal Judge Oxlade for reasons set out in a decision promulgated on 15th August 2019.

2. I pause to record that the appellant and her partner have a child, [LA], who was born on 1st September 2017, and is a British citizen. That was plainly a development that had not been considered by the respondent but was addressed by First-tier Tribunal Judge Oxlade.

3. The appellant accepts she cannot satisfy the eligibility requirements for leave to remain as a partner set out in Appendix FM because the minimum income requirement is not met. Her case before the FtT, is summarised at paragraph [14] of the decision of First-tier Tribunal Judge Oxlade:

> "The argument would be that whilst the appellant could not meet the Rules – for want of the financial requirements being met – the Appellant would rely on EX1(a) and (b), namely that the appellant has a genuine and subsisting parental relationship with a British child and that it would "not be reasonable to expect the child to leave the UK", and in the alternative that there were "insurmountable obstacles to family life" with the British partner continuing outside the UK when applying EX2 being "very significant obstacles".

4. Both the appellant and her husband gave evidence. Their evidence is set out at paragraphs [16] to [27] of the decision. The judge's findings and conclusions are set out at paragraphs [38] to [55] of the decision. The judge found that paragraph EX.1.(b) does not apply for the reasons set out at paragraph [40] of the decision. The judge noted there was no evidence which could reasonably sustain a finding that the appellant, her husband, and son would endure insurmountable obstacles to their family life continuing in Iraq. The judge noted the appellant and her husband are Iraqi nationals with a right to live in Iraq and there is no evidence that if their son does not yet have an Iraqi passport, he could not obtain one. The judge rejected the claim made by the appellant's partner that he has lost his ties to Iraq. The judge then turned to consider whether EX.1.(a) applies and at paragraph [42] noted that the issue in the appeal is whether EX.1.(a)(ii) is met, namely whether it would be reasonable to expect the child to leave the UK taking into account the best interests of the child as a primary consideration. At paragraph [45], the judge stated:

> "The appellant's son's immediate best interests are likely to be for nothing to change, for the parents to continue to live together in the UK, in their current home, with the arrangements as they stand. There is no suggestion that he is anything other than healthy and happy."

5. In considering the best interests of the child, LA, the judge also noted that it is manifestly not in his best interests to have parents who do not speak sufficiently good English to assist him in his education, to secure work and to operate as a working family; without good help at home his ability to progress his education could be harmed, as is his image of adults making a healthy contribution to society. At paragraphs [51] and [52], the judge said:

> "51. If he [the appellant's son] were to return with the mother only, then she is the primary carer and he primarily *(sic)* attached to her, as he is only two and will primarily look to her, there is unlikely to be any problem or significant problem. There is no reason to say that there will be any lasting damage. She has family there, has lived there until quite recently, and I find – being from a close-knit family, would have support there. The appellant's husband could elect to return with them as family, and work there, and support them there in Iraq. In the alternative, he could remain in the UK and work, to meet the £18,600 threshold as he has done before. He would have to find work, be in the job for six months, and then make the application. It is not an unreasonable timescale. The Appellant's son does not have a private life outside the family and will be able to make relationships with family there, until he returns.
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> 52. The mother made it clear that the husband and child should not be separated, that the family should not be separated; the father said the same thing, and though they had not discussed it, the child would stay with him in the UK. There was no suggestion that he was not capable; indeed he is "hands-on" as they share night "duties", he takes care of their son for some time each week for her to have a break, and she stopped breast-feeding over a year ago. He would have to manage work and their son, but they have family support here, as her brother lives close by, they see each other and are a supportive family, and there I (sic) every reason to conclude that for a period of time they would all manage. This is not a case where her removal would severe *(sic)* the relationship; it would interrupt it, but not severe *(sic)* it."

6. The judge noted LA is not in school and his parents are not from different countries such that they would be unable to live together in Iraq. The judge found that the best interests of the child are not outweighed by the public interest in immigration control. She concluded that it would not be unreasonable for the appellant to be expected to leave the UK either with or without LA, and the refusal of leave to remain does not amount to a disproportionate interference with the Article 8 rights of the family.

The appeal before me

7. Although set out as a number of grounds of appeal, in summary, all the grounds concern the assessment by the judge of the question that arises when a Tribunal is considering whether Section EX.1.(a) of Appendix FM applies. That is, whether it is reasonable to expect the child to leave the UK. It is said that in JG (s 117B(6):

"reasonable to leave" UK) Turkey [2019] UKUT 00072, the Tribunal held that the assessment should be taken on the basis that the child would leave the UK, and the Tribunal should consider whether that is reasonable. The applicant claims the proposition applies with greater reason here where the appellant's conduct stands in sharp contrast to the conduct of the appellant in JG. Although the appellant's child is younger, the public interest in her removal "is significantly less". The appellant claims that although the judge accepts the child's best interests would be for both parents to reside in the UK in the short term, the judge erroneously assumed that health and education provision in Iraq is as good or better than it was before the war, without any direct evidence. Furthermore, in considering the best interests of the child the judge had regard to the conduct of the parents and found that a child whose parents have limited English cannot excel in education, without any evidential basis for such a finding. The appellant claims the judge erroneously considered the public interest as set out in s117B of the 2002 Act to be relevant to the question as to whether it is reasonable to expect the child to leave the UK. Finally, it is said that the question of whether the appellant can apply for entry clearance is irrelevant because if removal of the appellant is disproportionate overall, it cannot be considered proportionate simply because of the possibility of an application for entry clearance.

8. Permission to appeal was granted by Upper Tribunal Judge Reeds on 2nd December 2019.

9. At the hearing before me, Ms Anzani confirmed the central issue was whether it is reasonable for the child to leave the UK. She submits the judge accepts at paragraph [45] that the child's immediate best interests are likely to be for nothing to change and for the parents to continue to live together in the UK with the arrangements as they stand. The judge states at paragraph [46] that the longer term interests may be better served in the UK than Iraq, but there is nothing to indicate strongly one way or another. She submits that at paragraph [47], the judge perversely concludes that it is manifestly not in the child's best interests to have parents who do not speak sufficiently good English to assist him in his education, to secure work, and to operate as a working family. She submits that this is not a case where the family is not working. The judge refers to the evidence confirming the appellant's husband works on a part time basis, but is not earning sufficient to meet the minimum income requirement. Ms Anzani submits the matters referred to by the judge at paragraph [47] such as the parents inability to speak sufficiently good English and to secure work, as being contrary to the best interests of the child is without any evidential foundation, and in all the circumstances, perverse. Ms Anzani submits the appellant's husband had resided in the UK for 19 years at the time and he had been

in work for several years, albeit, in recent times, he had worked part-time. The focus should have been upon the central question of whether it is reasonable to expect the child to leave the UK and at paragraphs [47] to [49], the judge's focus is upon other matters relevant to the public interest without addressing that central issue.

10. Ms Anzani submits this is not a *Chikwamba* case, and the appellant does not claim it would be disproportionate to expect her to return to Iraq to make an application for entry clearance in the usual way. The appellant could not satisfy the minimum income requirement and so it could not be said that an application for entry clearance would almost inevitably succeed, such that the public interest did not require the appellant to return to Iraq to make an application. Here, at the very least, any separation would be for several months whilst the necessary evidence was secured to support an application for entry clearance, there could be no certainty that such evidence would become available. Ms Anzani submits it was perverse for the judge to conclude that the family would manage for a period and the removal would interrupt the relationship, but not sever it.

11. In reply, Mr Singh submits the judge properly reminded herself at paragraph [44] that the first consideration is the child's best interests. At paragraph [45], the judge considered the child's immediate best interests and at paragraph [46] considered the best interests over the longer term. He submits that the observations made by the judge at paragraphs [47] to [49] must be read with paragraphs [44], [45] & [46]. He accepts the wording adopted by the judge is strange, but, he submits, the judge is essentially saying the parents would be able to assist the child better in Iraq because they will be able to speak the language, and it will be easier for the father to secure employment. The judge is balancing the position of the child in the UK viz-a-viz life in Iraq. Mr Singh agrees with Ms Anzani that the core issue was whether it is reasonable to expect the child to live with his parents in Iraq. He submits the judge found the appellant could remain in the UK with his father or could live in Iraq either with his mother, or with his mother and father together. No matter what choice is made by the family as to their living arrangements, it is not unreasonable to expect the child to leave the UK. The judge was saying at [47] that the best interests of the child could be met by living in Iraq. On the facts, the child could do better in a family environment in Iraq. Mr Singh submits the decision that it is reasonable to expect the child to leave the UK and that the removal of the appellant is not disproportionate to the Article 8 rights of the family, was a decision that was open to the judge.

Discussion

12. It is common ground between the parties that the central issue in the appeal is whether it would be reasonable to expect the child, LA, to leave the UK. It is to be noted that the question of whether it is "reasonable" to expect a child to leave the UK as set out in paragraph EX.1 of the rules, arises in other places too. It is identical to that set out in section 117B(6) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") taken with the definition of "qualifying child". The question again is what is "reasonable" for the child. It is now well established that the best interests of a child must be made on the basis of the facts as they are. Here, the appellant has no right to remain in the UK, whereas her partner and child are British citizens.

13. In JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 the Upper Tribunal held that section 117B(6) of the Nationality, Immigration and Asylum Act 2002 requires a court or tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so. In SSHD v AB (Jamaica) & AO (Nigeria) [2019] EWCA Civ 661, the Court of Appeal held that for the purposes of s.117B(6), the public interest did not require a person's removal where that person has a genuine and subsisting parental relationship with a child and it would not be reasonable to expect the child to leave the United Kingdom. Whether there was such a parental relationship depended on the individual circumstances of the case, and it was not a requirement of s.117B(6) for there to be a realistic prospect of the child leaving the UK as a consequence of the person's removal. The question whether it is reasonable to expect the child to leave the United Kingdom is a simple one, that must be addressed taking into account the best interests of the child as a primary consideration.

14. Here, the judge found the child's immediate best interests are likely to be for nothing to change. She found that in the longer term, although the child's best interests may be better served in the UK than in Iraq, there is nothing to indicate strongly one way or another. The judge noted the child is in good health and is not yet in education in the UK. The judge also noted the appellant and her husband grew up in Iraq and are educated, healthy and have family there. The point made by the judge is that in the longer term there is nothing to suggest that the child's best interests are better served in the UK than in Iraq. I have carefully considered what is said by the judge at paragraphs[47] to [49] of the decision, and although I accept that the matters referred to by the judge are irrelevant to the central question as to whether it is reasonable to expect the child to leave the UK, much of what is said by the judge is relevant to the

general public interest consideration that the judge was required to have regard to under s117B of the 2002 Act. Any error is in my judgment, immaterial.

15. The ultimate question is whether it is reasonable to expect the child to follow the appellant to Iraq. There was quite simply no evidence before the Tribunal to establish that it would be unreasonable to expect the child to leave the UK either permanently, or temporarily. There was little evidence of substance to establish that there would be difficulties faced by the appellant, her partner and their child in continuing their family life together outside the UK, in Iraq. The fact that the appellant's partner may not wish to leave the United Kingdom, is entirely a matter of choice.

16. In my judgement, paragraphs [40] and [51] read together make it clear the judge concluded that it would be reasonable to expect the child to leave the UK. The judge noted the appellant has family in Iraq where she has lived until quite recently and she would have support there. It would be open to the appellant's husband to return with them as a family and work there and support them in Iraq. Alternatively he could remain in the UK and work, so that he can meet the minimum income requirement to support an application, as he has done before. The judge noted at [54], that this is not a case where the child is already in school or part of a family unit where the parents are from different countries and could not elect to return together, or do not have family support.

17. As the Court of Appeal said at [18] of Herrera v SSHD [2018] EWCA Civ 412, it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence. The assessment of such a claim is always a highly fact sensitive task. The FtT judge was required to consider the evidence as a whole. Although I accept the decision could have been better expressed, it is not a counsel of perfection. Still less should it provide an opportunity to undertake a qualitative assessment of the reasons to see if they are wanting, perhaps even surprising, on their merits.

18. Having carefully considered the decision of the FtT judge, it was in my judgement open to the Judge to conclude that it is reasonable to expect the child to leave the UK. It was in my judgment open to the judge to conclude in the end that the requirements for leave to remain as a partner set out in Appendix FM are not met by the appellant. The only ground of appeal available to the appellant was that the respondent's decision is unlawful under s6 of the Human Rights Act 1998. The ultimate issue is

whether a fair balance has been struck between the individual and public interest, giving due weight to the provisions of the Rules. Read as a whole, it was in my judgement open to the judge to conclude that the removal of the appellant would not be a disproportionate interference with the Article 8 rights of the family for the reasons given.

19. It follows, that the appeal is dismissed.

Notice of Decision

20. The appeal is dismissed, and the decision of First-tier Tribunal Judge Oxlade stands.

Signed Date 14th March 2020

Upper Tribunal Judge Mandalia