IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002169
First-tier Tribunal No: HU/52705/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 13 August 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

Z N S
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr W M Bhebhe of Njomane Law
For the Respondent: Senior Home Office Presenting Officer

Heard at Field House on 25 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant without that individual's express consent. Failure to comply with this order could amount to a contempt of court.

3. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Sweet promulgated on 12/05/2023, which dismissed the Appellants' appeals on all grounds.

Background

4. The appellant is a citizen of Iraq who was born on 03/03/1993. In October 2021 the appellant applied for leave to remain in the UK as the spouse of a Syrian national with leave to remain in the UK as a refugee.

5. On 13/04/2022 the Respondent refused the Appellant's application.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Sweet ("the Judge") dismissed the appeal against the Respondent's decision.

7. Grounds of appeal were lodged and on 19/06/2023 First-tier Tribunal Judge Mills gave permission to appeal stating, inter alia

> 2. The appellant is a citizen of Iraq, who entered the UK as a visitor and has sought leave to remain on the basis of her marriage to a Syrian national who has been recognised as a refugee in the UK. The couple had a child shortly before the hearing, who has a pending application for leave to remain in line with her refugee father. The respondent expressly gave consent for the new matter of the birth of the child to be considered by the Tribunal as part of this appeal.
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> 3. The grounds of the application for permission, which are excessively lengthy and unfocussed, contend that the Judge has erred in dismissing the appeal in a number of ways, the two most significant of which are as follows:

a. Proceeding on the mistaken basis that the appellant's counsel had conceded that the immigration rules could not be met and only the higher threshold for Article 8 claims outside of the rules was applicable:

b. Through failure to give adequate reasons.

4. I consider the challenge makes out at least one arguable error of law in the Judge's decision, the reasoning being arguably inadequate in the context of the family situation as described above.

The Hearing

8. For the appellant, Mr Bhebhe moved the grounds of appeal. He told me that the focus in this appeal is that the appellant's husband is a Syrian refugee. It is accepted that the appellant and her husband now have a child who was born in February 2023. The child is a Syrian national. At the date of decision, the child's application for refugee status in line with the appellant's husband was outstanding. It is now accepted that the appellant's child has been granted refugee status.

9. Mr Bhebhe told me that the fact that the appellant's partner and child are refugees is sufficient to establish insurmountable obstacles to establishing family life in Iraq. He told me that the Judge's proportionality assessment is flawed because the Judge failed to recognise insurmountable obstacles to family life continuing and made a finding that the appellant and her partner can live together in Syria, which is wrong because the appellant's husband is a refugee from Syria.

10. Mr Bhebhe asked me to set the Judge's decision aside.

11. For the respondent, Mr Wain said that the decision does not contain material errors of law. He referred me to paragraphs 23 to 25 of the appellant's skeleton argument and told me that the what was put to the Judge was that there are no obstacles to family life continuing in Iraq and that the immigration rules are not met. Mr Wain said this appeal was argued on article 8 ECHR grounds outside the rules only.

12. Mr Wain told me that at [12] and [13] of the decision the Judge acknowledges that the appellant's daughter was born in February 2023, and although no reference is made to section 55 of the Borders, Citizenship and Immigration Act 2009, he said that the Judge's overall consideration clearly took account of the interests of the appellant's daughter as a primary consideration. He told me that at [12] and [13] of the decision the Judge considers whether or not there are exceptional circumstances which would

cause unduly harsh consequences to flow from the respondent's decision. The Judge considers the appellant's husband's refugee status, the financial threshold, and section 117B factors which fall in the appellant's favour, but, having considered those matters, found that there was no reason for the appellant not to go back to Iraq to apply for entry clearance.

13. Mr Wain asked me to dismiss the appeal.

14. Both Mr Bhebhe and Mr Wain agreed that the child of the appellant and her husband is a Syrian national who, since the date of the Judge's decision, has been recognised as a refugee in the UK .

Analysis

15. The appellant applied for leave to remain in the UK as the spouse of a Syrian man recognised as a refugee, who now has limited leave to remain in the UK until 2024. The appellant's husband was granted refugee status in 2007. He has a UK travel document which is renewed every 2 ½ years . The respondent refused the application because the appellant's husband's income fell slightly short of the financial threshold and because the appellant cannot meet the immigration rules because she is present in the UK as a visitor. The respondent accepts that the appellant has a genuine and subsisting relationship with her husband and daughter, but says there are no insurmountable obstacles to family life continuing in Iraq.

16. Between [2] and [10], the judge sets out the background to the case and the procedural history before the First-tier Tribunal. The Judge's findings of fact are found at [11] and [12] of the decision.

17. The Judge's findings at [11] concern the appellant's husband. At [12] the Judge make findings about the appellant's intentions when she arrived in the UK.

18. At [13] the Judge says that the appellant's representative conceded that the appeal

> could only proceed under article 8 ECHR

The same representative appeared before me and said that he did not restrict submissions to article 8 outside the immigration rules. He told me that appendix FM and paragraph EX.1 have always been relevant considerations in this appeal because it was argued that there are insurmountable obstacles to family life continuing in Iraq.

19. [13] of the decision is the only place that the Judge gives reasons. The Judge's reason for refusing the application is that the appellant can now meet the immigration rules, so she can return to Iraq to make an application for entry clearance from there.

20. The Judge's findings of fact are inadequate. There is no consideration of section 55 of Borders, Citizenship and Immigration Act 2009. Only one sentence is given to the birth of the appellant's daughter, and there is no consideration of what is to happen to that child. There is no meaningful consideration of the impact removal might have on the appellant's husband and daughter, nor is there consideration of the inability of the appellant's Syrian husband and Syrian daughter to follow the appellant to Iraq.

21. At [2] the Judge records that the respondent accepts there is a genuine and subsisting relationship with the appellant's partner. Although [11] to [13] is intended to be a proportionality exercise, the Judge does not even make the fundamental finding that article 8 family life exists.

22. The article 8 proportionality exercise requires the Judge to consider the following separate questions:

> (i) Does family life, private life, home or correspondence exist within the meaning of Article 8
> (ii) If so, has the right to respect for this been interfered with
> (iii) If so, was the interference in accordance with the law
> (iv) If so, was the interference in pursuit of one of the legitimate aims set out in Article 8(2); and
> (v) If so, is the interference proportionate to the pursuit of the legitimate aim?

And that is what the Judge did not do.

23. In MK (duty to give reasons) Pakistan [2013] UKUT 00641 (IAC), it was held that (i) It was axiomatic that a determination disclosed clearly the reasons for a tribunal's decision. (ii) If a tribunal found oral evidence to be implausible, incredible or unreliable or a document to be worth no weight whatsoever, it was necessary to say so in the determination and for such findings to be supported by reasons. A bare statement that a witness was not believed or that a document was afforded no weight was unlikely to satisfy the requirement to give reasons.

24. The decision is tainted by a material error of law. I therefore set the Judge's decision aside.

Remaking the appeal decision

25. Although the Judge's fact-finding exercise was inadequate. There are sufficient undisputed facts to enable me to substitute my own decision.

26. The undisputed facts in this case are

(a) The appellant is an Iraqi national who was born on 3 March 1993. The appellant married her husband at the end of November 2020 in Iraq.

(b) The appellant's husband was born on 25 May 1988. He is a Syrian national who entered the UK in 2005, as a child. He was recognised as a refugee in the UK in 2007. He has limited leave to remain in the UK until 2024. Every 2½ years the respondent grants the appellant's husband a travel document confirming limited leave to remain in the UK.

(c) The appellant arrived in the UK on 13 August 2021, as a visitor with leave a valid until 31 January 2022. On 12 October 2021, the appellant applied for leave to remain in the UK.

(d) On 20 February 2023, the appellant's daughter was born in the UK. She is a Syrian national. At the date the First-tier Tribunal's decision was promulgated, her application for refugee status (in line with the appellant's husband) was outstanding. Between that date the date of hearing before me, the appellant's Syrian daughter has been granted refugee status.

(e) The appellant is from the Kurdistan region of Iraq. Neither the appellant's husband nor the appellant's daughter can go to Syria because they are refugees (the appellant's husband's travel document prohibits travel to Syria).

(f) Syrian nationals are only granted 30 days entry visa to KRI.

(g) The appellant's husband is employed. He earns approximately £30,000 per annum. The appellant speaks English. The appellant could now make a successful application for entry clearance if she returns to KRI.

27. At the date of decision, the appellant's husband could not meet the financial requirements of the immigration rules, and, because the appellant was in the UK as a visitor, she could not meet the requirements of paragraph E-LTRP2.1 of the immigration rules.

28. The respondent considered paragraph EX.1 of the rules. The appellant has a genuine and subsisting relationship with her husband. It is accepted that the appellant's husband is in the UK with protection status.

29. On the facts as I find them to be there are insurmountable obstacles to family life continuing outside the UK. Family life within the meaning of article 8 exists between the appellant, her husband, and their daughter. The appellant's husband and daughter are Syrian nationals with refugee status and cannot return to Syria.

30. The only place the appellant can go to his Iraq. The appellant comes from the KRI. To join the appellant there, the appellant's husband and daughter need a visa. They can only be issued with a 30 day visit visa, and then they are expected to return to the UK.

31. The appellant could make a successful application for entry clearance from KRI, but she will have to wait for months for a decision, and wait alone while her husband and daughter remain in the UK.

32. In Agyarko [2017] UKSC 10, Lord Reed said that if an applicant, even if residing in the UK unlawfully, was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal and that point was illustrated by Chikwamba.

33. In Alam & Anor v SSHD [2023] EWCA civ 30 the Court held that tribunals must give great weight to an inability to satisfy the immigration rules. The finding that there are no insurmountable obstacles to family life abroad is a further powerful factor militating against the article 8 claims, as is the finding that relationships were formed when each appellant was in the United Kingdom unlawfully. The relevant tribunal in each case was obliged to take both those factors into account, entitled to decide that the public interest in immigration removal outweighed those appellants' weak article 8 claims, and to hold that removal would therefore be proportionate.

34. I find that there are insurmountable obstacles to family life abroad. I find that the appellant benefits from paragraph EX.1 because she would be separated from her husband and daughter. Her daughter is a six-month-old baby with refugee status. Separation would cause insurmountable obstacles for the appellant and her partner in continuing their family life together outside the UK, which could not be overcome or would entail very serious hardship for the appellant and her husband. Separation would cause the appellant's baby distress.

35. My findings distinguish this case from the case of Alam & another, and place this case within the guidance given by of Lord Reid in Agyarko.

36. I therefore find that the appellant benefits from paragraph EX.1. I find that there would be unjustifiably harsh consequences flowing from the respondent's decision.

37. I remind myself of Section 55 of the Borders, Citizenship and Immigration Act 2009. In Kaur (children's best interests / public interest interface) [2017] UKUT 14 (IAC) it was held that the "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.

38. In the unusual circumstances of this case, the appellant meets the immigration rules because of the operation of paragraph EX.1.

39. TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109 tells me that where a person satisfies the Rules, whether or not by reference to an article 8 informed requirement, then this will be positively determinative of that person's article 8 appeal, provided their case engages article 8(1).

40. I find that this appeal succeeds on article 8 ECHR (family life) grounds.

Decision

The decision of the First-tier Tribunal promulgated on 12/05/2023 is tainted by material errors of law and is set aside.

I substitute my own decision.

The appeal is allowed on article 8 ECHR grounds.

Signed Paul Doyle
Date 1 August 2023
Deputy Upper Tribunal Judge Doyle

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.