



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002244
On appeal from: PA/55105/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 7 August 2023

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S H S

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Jackie Bond of Counsel, instructed by TNA Solicitors
For the Respondent: Ms Julie Isherwood, a Senior Home Office Presenting Officer

Heard at Field House on 27 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the claimant and his family members are granted anonymity. The claimant will be referred to as S H S.

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

DECISION AND REASON

Introduction

1. The Secretary of the State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 6 September 2021 to refuse him international protection pursuant to the Refugee Convention, humanitarian protection or leave to remain on human rights grounds. He is a citizen of Iraq and an ethnic Kurd.
2. The First-tier Tribunal allowed the appeal on Article 8 ECHR grounds only. The Judge dismissed the international protection elements of the appeal, which has not been challenged.
3. For the reasons set out in this decision, I have come to the conclusion that the decision of the First-tier Tribunal should be set aside and remade by dismissing the appeal.

Procedural matters

4. **Mode of hearing.** The hearing today took place face to face. I am satisfied that the hearing was completed fairly, with the cooperation of both representatives.
5. **Vulnerable party.** The claimant is a vulnerable person: he has specific learning disabilities, depression, anxiety and post-traumatic stress disorder symptoms. He is entitled to be treated appropriately, in accordance with the Joint Presidential Guidance No 2 of 2010: Child, Vulnerable Adult and Sensitive Guidance. I am satisfied that this was done in the First-tier Tribunal.
6. The claimant does not complain of any inadequate arrangements in the First-tier Tribunal. As the claimant was not present at the Upper Tribunal hearing, no adjustments were required or sought.

Background

7. The main basis of the claimant's international protection case related to a fear of serious harm at the hands of his cousins in Iraq, and also from ISIS-Daesh. He claimed to have no CSID and that removal would be a breach of the UK's international obligations under the Refugee Convention and the European Convention on Human Rights and Fundamental Freedoms.
8. The First-tier Judge dismissed that element of the appeal and I am not seized of any challenge to it. The challenge by the Secretary of State is to the Judge's decision under Article 8 ECHR.
9. On 4 February 2022, the claimant entered into an Islamic marriage contract with a woman who is also an Iraqi Kurd, and currently seeking leave to remain in the UK on protection grounds. I have not seen any evidence regarding the status of the protection application made by the

claimant's partner. Their relationship is recent: it began at the end of 2021 and the Islamic marriage was on 4 February 2022. They have a daughter, born in early December 2022, who is just under 8 months old and is also presumably an Iraqi citizen.

10. The First-tier Judge applied as his *Devaseelan* starting point, a 2016 decision by First-tier Judge Lloyd who heard the claimant unrepresented and promulgated her decision on 10 October 2016. Judge Lloyd found the claimant not to be a credible witness.
11. The First-tier Judge in the present appeal also found the claimant's core account to lack credibility, but allowed the appeal on limited Article 8 ECHR grounds, making what amounts to a direction or recommendation as to non-removal of the claimant until his partner's protection claim is finally determined:

"100. If it was not for the [claimant's] ongoing family life with [his partner] and their daughter, I would agree with what is said in paragraphs 83 and 84 of the RFRL as to the possible application of paragraph 353B of the immigration rules (and see *Khanum & Others* (paragraph 353B) [2013] UKUT 00311 (IAC), circulated on 5 July 2013). ...

101. But one matter which I consider to be clearly established is that the [claimant] and [his partner] currently form a close-knit family unit with their daughter who was born in Oldham on 6 December 2022 (copy birth certificate at page 19).

102. It also seems clear to me that if the [claimant] was removed to Iraq separately from [his partner] and their daughter, that would constitute a disproportionate breach of the family life rights of all three individuals (as per, for example, *Beoku-Betts* [2008] UKHL 39, 25 June 2008).

103. For so long as the family unit referred to holds together, my judgement is that the [Secretary of State] should undertake not to remove the appellant to Iraq whilst [his partner] has outstanding application/s /appeal/s as regards her own efforts to secure leave to remain in the UK. If there comes a point where [his partner] has unsuccessfully got to the end of her attempts to secure leave to remain, it might become appropriate to consider whether the three individuals concerned could be removed to Iraq as a family unit."

12. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

13. The Secretary of State's application for permission to appeal to the Upper Tribunal was granted on the basis that there was no, or no adequate, consideration within the First-tier Tribunal decision of the test in Part 5A of the 2002 Act and in particular, section 117B(4)(b) thereof.

Rule 24 Reply

14. On 26 July 2023, the day before the hearing, Ms Bond for the appellant submitted a Rule 24 Reply. It is out of time but I extend time and have treated it as the appellant's skeleton argument.
15. Ms Bond noted that the First-tier Judge went no further than to allow the claimant's appeal pending resolution of his partner's protection claim. She argued that the First-tier Judge's error in failing to address part 5A of the 2002 Act was immaterial, because the express application of the provisions of sections 117A-D of the 2002 Act to the facts could not have produced another outcome to the appeal. The Judge had not considered the Secretary of State's section 55 'best interests' duty in relation to the appellant's child.
16. Further, Ms Bond contended that the First-tier Judge's finding on Article 8 ECHR, was:

"...entirely consistent with him having understood the need to carry out a balancing act exercise of the public interest factors against A's right to respect for his family/private life and that ultimately, the finding that there were "exceptional circumstances" (as per the Supreme Court decision in *Rhuppiah v SSHD* [2018] UKSC 58) is a finding which was open to him to make on the facts as he found them to be: see paragraph 49 of *Rhuppiah*."
17. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

18. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal and in addition the Rule 24 Reply already mentioned. I gave an oral indication as to the outcome and I now give brief written reasons for dismissing the appeal.
19. The First-tier Judge's decision on the protection element of the claimant's appeal stands unchallenged. The Secretary of State's challenge is only to the decision to allow the appeal on Article 8 grounds, specifically by reason of the claimant's relationship with his partner and young daughter, and only pending the outcome of her application for protection.
20. Any Judge considering an Article 8 claim is required to have regard to the considerations listed in section 117B, as provided by section 117A(2)(a) of the 2002 Act. This Judge did not do so. I am not persuaded by Ms Bond's assertion that he nevertheless had these provisions in mind, or that there was anything exceptional about the family circumstances between the claimant, his partner, and their child. I have had regard to Ms Bond's submissions that consideration of the section 117B 'little weight' provisions would not have affected the outcome of the appeal. I do not agree: the section 117B(4)(b) 'little weight' presumption sets the bar much higher than in *Beoku-Betts*, on which the claimant relied.

21. The First-tier Judge's Article 8 ECHR reasoning is unsustainable. It is also not appropriate for him to have given a direction to the Secretary of State to give an undertaking not to remove the claimant while his partner's application for international protection remains pending.
22. There is no alternative but to set aside the Article 8 ECHR element of the First-tier Tribunal decision.
23. I therefore proceed to remake the decision, there being no challenge to the facts found by the First-tier Judge. Ms Bond has conceded that neither the claimant's partner, nor his very young daughter is yet a qualified person, and his partner does not yet have leave to remain in the UK, still less is she settled here.
24. So far as his partner is concerned, section 117B(4)(b) requires little weight to be given to private life between them. Section 117B(6) is not engaged, because their daughter is not a qualifying child. She is very young, and her best interests lie in remaining with her mother, or better still, both parents, wherever they are living. The Article 8 claim is not made out.
25. The appeal is dismissed on all grounds.

Notice of Decision

26. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the claimant's appeal.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber
Dated: 27 July 2023