Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17876/2018

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 29th May 2019	**On 17th June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

KIZHAN OMER HAMA AMIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mrs O Obayelu of Goshen Solicitors
For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction and Background

1. The Appellant appeals against a decision of Judge Powell (the judge) of the First-tier Tribunal (the FtT) promulgated on 29th October 2018.

2. The Appellant is a female Iraqi citizen born 26th September 1990. She originates from the Iraqi Kurdistan Region (the IKR). She claims to have entered the UK on 17th December 2015 as a family member of an EEA national.

3. On 8th September 2017 the Appellant applied for leave to remain in the UK on the basis of her private and family life. She wished to remain in the UK so that she could continue to live with her husband Aziz Omer Mohamed (to whom I shall refer as the Sponsor) who is a naturalised British citizen who has lived in the UK since 16th February 2002.

4. The Sponsor originates from Iraq. He was naturalised as a British citizen in 2010. The Appellant and Sponsor married on 15th January 2008.

5. The Respondent refused the Appellant's application on 16th August 2018. The judge heard the appeal on 25th October 2018.

6. The judge found that there were no insurmountable obstacles to the Appellant and Sponsor continuing their family life in Iraq. The judge found that the Appellant had not proved that there would be very significant obstacles to her integration in Iraq, and therefore she did not satisfy paragraph 276ADE(1)(vi) of the Immigration rules. The judge took into account that the Appellant was pregnant, but found that no exceptional circumstances existed, and the Appellant's removal from the UK would not breach Article 8 of the 1950 Convention.

The Application for Permission to Appeal

7. The grounds were prepared by the Appellant's solicitors. It was argued that the judge erred in law for the following reasons.

8. The judge was wrong to treat section EX.1(b) as a rule and determinative of whether the requirement of E-LTRP of Appendix FM is met and failed to have regard to the principle in Sabir [2014] UKUT 00063 (IAC). The Appellant contended that EX.1 was not a freestanding element. I found this ground somewhat difficult to follow.

9. It was contended that the judge applied a literal approach to insurmountable obstacles and was in error in so doing. It was submitted that the judge had failed to interpret insurmountable obstacles in a sensible and practical way.

10. The judge had erred by failing to consider the Respondent's policy at a general level. It was submitted that there was no proportionate consideration of the family and private life in the UK. Reference was made to R (on the application of Chen) IJR [2015] UKUT 00189 (IAC) on the basis that there may be cases where there are no insurmountable obstacles to family life being enjoyed outside the UK, but where temporary separation to enable an individual to make an application for entry clearance may be disproportionate.

The Grant of Permission

11. Permission to appeal was granted by Deputy Upper Tribunal Judge Roberts in the following terms;

> "• It is arguable that the FtTJ has failed to set out adequate reasons for his finding that the Appellant (either alone or accompanied by her husband) would be able to access support from family members on return to Iraq. In support of his credibility finding the judge refers to AAH (CG) as authority but I find that this is the wrong approach to the evidence. AAH concerns returning failed asylum seekers. The Appellant is not in that category and her evidence is that she would not be welcome in either her family home or the home of her husband's brothers.
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> • Bearing in mind that the Appellant is pregnant with twins, and has a history of miscarriage, I cannot discount the possibility that a proper evaluation of the evidence above may be sufficient to tip the balance of the proportionality assessment in her favour."

12. Following the grant of permission to appeal the Respondent lodged a response pursuant to rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. In summary it was contended that the judge had directed himself appropriately and made findings open to make on the evidence. It was contended that the judge had given cogent reasons for concluding that the Appellant had failed to demonstrate that family support would not be available in Iraq.

13. Directions were issued that there should be an oral hearing before the Upper Tribunal to ascertain whether the FtT decision contained an error of law such that it must be set aside.

My Analysis and Conclusions

14. At the oral hearing Mrs Obayelu relied and expanded upon the grounds upon which permission to appeal had been granted. Documentary evidence had been produced to indicate that the Appellant had now given birth. It was accepted that this was not relevant to the error of law issue as I had to consider the circumstances that were before the judge, and at that time the Appellant was pregnant and had not given birth.

15. Mr Howells relied upon the rule 24 response, arguing that the judge had applied the correct test of insurmountable obstacles, and had also correctly considered paragraph 276ADE(1)(vi), and was again correct in then considering Article 8 outside the Immigration Rules.

16. Having carefully considered all that has been placed before me, I conclude that the judge has not materially erred in law for the following reasons.

17. The judge took into account all material factors. The judge adopted the correct approach when considering this appeal. It was accepted that Article 8 was engaged in that the Appellant and Sponsor had established family life, and the Appellant had also established private life.

18. The judge was aware that both the Appellant and Sponsor originate from Iraq. Both are of Kurdish ethnicity. The Sponsor is a naturalised British citizen and has his own business in the UK.

19. The judge took into account the Appellant's pregnancy.

20. The starting point of the judge was to consider EX.1(b) of Appendix FM. I do not accept that the judge was incorrect in taking this approach. The starting point in this case had to be whether the Appellant and Sponsor could demonstrate that there were insurmountable obstacles to family life continuing outside the UK. The judge applied the correct definition of insurmountable obstacles.

21. The judge noted that the couple had lived together in the Kurdistan area of Iraq between 2013-2015 without significant difficulties.

22. The judge was well aware that the couple do not want to return to Iraq but that is not the test. The judge found that medical facilities and services exist in Kurdistan which although are not of the same quality as similar services in the UK, would be available to the Appellant. The judge found that there was insufficient evidence to find that the couple would be without familial support if returned to Iraq and was entitled to reach that conclusion.

23. The judge took into account that the Sponsor could sell his business in the UK, and his property, and establish a business in Iraq. The judge was entitled to make those findings and reach those conclusions.

24. The judge is criticised for making reference to the country guidance decision of AAH, but makes the point in paragraph 39 that while that decision is directly relevant to protection cases, it also provides useful information as to risk in Iraq and Kurdistan. The judge is well aware that this is not a protection case.

25. The judge finds at paragraph 49 that the obstacle to family life between the Appellant and Sponsor continuing outside the UK is primarily his reluctance to give up the life he has established in the UK. He has established a good business and does not wish to uproot and relocate to Iraq. The judge found that this would involve a degree of hardship and inconvenience and would be disruptive and worrying.

26. Those are findings which the judge was entitled to make, and the judge was fully entitled to go on and find that the couple had not demonstrated that they would face very significant difficulties in continuing their family life abroad. The judge was entitled to find at paragraph 51, that a significant factor in his assessment was the fact that the Appellant and Sponsor lived together in Kurdistan between 2013 and 2015 and "did so without misadventure and with family support."

27. The judge dealt properly and adequately with EX.1(b) of Appendix FM and then went on to consider paragraph 276ADE(1)(vi). The judge adopted the correct legal approach at paragraph 61 and was entitled to conclude that there were no very significant obstacles to the Appellant's integration into Iraq. The judge noted at paragraph 62 that she had lived in Kurdistan

from birth until September 2015. There would be no language difficulties. There are family members in Kurdistan. The Appellant is married and the Sponsor was able to accompany her to Iraq if he chose to do so.

28. Having found that the Appellant could not satisfy paragraph 276ADE(1)(vi) the judge correctly went on to consider Article 8 outside the Immigration rules and adopted a balance sheet approach. The factors that weigh on the Respondent's side are set out at paragraph 72, and the factors on the Appellant's side at paragraph 73.

29. The judge took fully into account the Appellant's pregnancy. He considered the section 117B considerations. In my view the judge has adopted the correct legal approach, and was entitled to find that there were no exceptional circumstances which would cause unjustifiably harsh consequences if the Appellant was not granted leave to remain in the UK. The judge was entitled to conclude, and gave adequate reasons for his conclusion, that the public interest in maintaining effective immigration control should be accorded more weight, than the weight to be accorded to the wishes of the Appellant and Sponsor that the Appellant be allowed to reside in the UK.

30. The grounds upon which permission to appeal have been granted, amount to a disagreement with the conclusion reached by the judge, but they do not disclose a material error of law.

31. There has now been a change of circumstances in that the Appellant has given birth to a child. It is a matter for the Appellant and Sponsor as to whether they wish to make a fresh application to the Respondent based upon the birth of their child.

Notice of Decision

The decision of the FtT does not disclose a material error of law. The appeal is dismissed.

There has been no application for anonymity and I see no need to make an anonymity direction.

Signed Date 7th June 2019

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT
FEE AWARD

The appeal is dismissed. There is no fee award.

Signed Date 7th June 2019

Deputy Upper Tribunal Judge M A Hall